



TranState Working Papers

STATE CIVIL DISOBEDIENCE
MORALLY JUSTIFIED VIOLATIONS OF
INTERNATIONAL LAW CONSIDERED
AS CIVIL DISOBEDIENCE

Gerald Neubauer

No. 86

Universität Bremen • University of Bremen
Jacobs Universität Bremen • Jacobs University Bremen
Universität Oldenburg • University of Oldenburg

Staatlichkeit im Wandel • Transformations of the State
Sonderforschungsbereich 597 • Collaborative Research Center 597

Gerald Neubauer

***State Civil Disobedience
Morally Justified Violations of International Law
Considered As Civil Disobedience***

TranState Working Papers

No. 86

Sfb597 „Staatlichkeit im Wandel“ – „Transformations of the State“

Bremen, 2009

[ISSN 1861-1176]

Gerald Neubauer

State Civil Disobedience. Morally Justified Violations of International Law

Considered As Civil Disobedience

(TranState Working Papers, 86)

Bremen: Sfb 597 „Staatlichkeit im Wandel“, 2009

ISSN 1861-1176

Universität Bremen

Sonderforschungsbereich 597 / Collaborative Research Center 597

Staatlichkeit im Wandel / Transformations of the State

Postfach 33 04 40

D - 28334 Bremen

Tel.:+ 49 421 218-8720

Fax:+ 49 421 218-8721

Homepage: <http://www.staatlichkeit.uni-bremen.de>

ABSTRACT

International legalization promises to civilize world politics with global legal norms that bind states' behavior effectively. However, international legal norm can also institutionalize unjust forms of cooperation and the dominance of powerful states. In order to challenge unjust global rules the concept of civil disobedience has to be extended to international law violations by sovereign states. In the national realm civil disobedience has contributed extensively to the establishment of human rights. In order to use the concept for international politics, this paper develops criteria for state civil disobedience which are then applied to the Argentine foreign debt repudiation and Bolivia's violations of international investment law. Furthermore two hypotheses concerning causes and consequences of state civil disobedience are formulated.

CONTENTS

INTRODUCTION	1
1. INTERNATIONAL LEGALIZATION BETWEEN ANARCHY AND TYRANNY	2
2. FROM INDIVIDUAL TO STATE CIVIL DISOBEDIENCE	4
2.1. Illegality	7
2.2. Conscientiousness	8
2.3. Aiming at change in laws or policies	9
2.4. Non-Violence	10
2.5. Publicity	10
3. EMPIRICAL CASES	11
3.1. Argentina's debt repudiation.....	11
3.2. Bolivia's violations of bilateral investment treaties.....	16
4. CAUSES AND EFFECTS OF STATE CIVIL DISOBEDIENCE	22
5. CONCLUSION	24
REFERENCE.....	25
BIOGRAPHICAL NOTE	27

INTRODUCTION

In 2002 Argentina was hit by a severe financial and economic crisis and defaulted on its public debt of 141\$US billion. Argentina's excessive foreign debt burden originated from the military regime (1976-83) and since then increased steadily although Argentina implemented IMF structural adjustment programs. After massive hunger revolts had thrown the old government out of office, Argentina repudiated its international debt service openly. Arguing that basic social rights are prior-ranking to debt service, Argentina in 2003 realized a 70% debt cut. This largest ever sovereign debt cut violated international credit law clearly, as many court rulings confirmed later.

Bolivia violated international investment rules in several instances. In accordance with many NGOs, Bolivia argues that bilateral investment treaties and the World Bank's investor-to-state dispute settlement procedure ICSID¹ protect corporate profit making at the expense of social and ecological regulation. Due to massive demonstrations Bolivia in 2000 withdrew a private water service license, because the investor had raised water rates strongly in the city of Cochabamba. In 2005 Bolivia also ended the license of another transnational company in La Paz/El Alto for the same reasons. Both measures were challenged under different bilateral investment treaties, while Bolivia argued that the right to access to water is prior-ranking to investor rights.

These are two examples of weak countries openly violating international law, arguing that it is unjust and should be reformed to better reflect moral demands. The same happened in numerous other cases of states breaking international law on the grounds of fundamental rights arguments, as e.g. South Africa's and Brazil's production of generic medicines that violated TRIPS intellectual property law. Further examples include powerful OECD member states as well. Member states of the European Community rejected the import of hormone treated beef from the United States in order to protect their citizens' health, violating a WTO ruling. And the same will probably happen in the currently pending conflict between the EC and the United States concerning import of genetically modified plants.

This paper argues that these cases can best be understood in analogy to individual civil disobedience in national law systems. Civil disobedience theory has to be extended to the international realm in order to overcome the gap between international law and international justice. As in national societies, where civil disobedience contributed significantly to end colonialism (Mahatma Gandhi) or black people's discrimination (Martin Luther King), state civil disobedience can become a major tool to challenge unjust international rules.

¹ International Centre for the Settlement of Investment Disputes

In order to develop the concept of state civil disobedience, this paper's first chapter discusses the process of international legalization from a moral perspective. While the case for state civil disobedience is not bound to a particular historical period, the present extension of international law makes state civil disobedience more likely than ever. The second chapter presents national civil disobedience theory and derives criteria from this for the application on international law-breaking. Chapter three describes Argentina's debt repudiation (3.1) and Bolivia's violation of investment treaties (3.2.) as cases of state civil disobedience. Chapter four develops some preliminary conjectures on causes and effects of state civil disobedience. The questions here are: 1) under what circumstances do states apply civil disobedience, rather than abiding unjust international law or opting for legal reform paths, 2) can state civil disobedience bring about moral progress in international law?

1. INTERNATIONAL LEGALIZATION BETWEEN ANARCHY AND TYRANNY

The concept of state civil disobedience is today more than ever needed to limit international legalization processes in the sense that international law is bound to universal human rights. In the last decades researchers witnessed an impressive extension of international primary norms shaping states' behaviour and secondary norms guiding norm interpretation and enforcement. The number of international organizations and multilateral or bilateral treaties between states increased enormously, shaping states' behaviour in almost all issue areas with a more and more dense web of rules (Abbott/Snidal 2000; Romano 1999; Zangl 2006). The behaviour of modern states is today embedded in extensive rules covering such different issues as security, trade, investment, environmental protection, human rights, labour conditions etc. And even more significant, a growing number of international courts and quasi-judicial dispute settlement procedures adjudicate conflicts between states or states and private parties. Some of these instances like the WTO dispute settlement procedure can authorize economic sanctions to bring states into compliance with their rulings. Others, like the European Court on Human Rights, have the mandate to issue legally binding rulings, which are implemented by member states in a vast majority of cases. International law is today stronger than ever before in history, so that the traditional state sovereignty is deeply transformed. In the Westphalian world order – although this order was constituted by international law – state sovereignty was characterized by structural anarchy between sovereign states that were free to choose their internal order and external policy. This meant that neither genocide nor war of aggression was forbidden. By contrast, at the beginning of the 21st century, state sovereignty is embedded in international law provisions that regulate state's internal order as well as their external policies significantly.

The process of international legalization constitutes not only a deep transformation of state sovereignty. The transformation of the anarchical state system towards global rule of law is without doubt as well a major moral progress. My concept of moral progress is derived from cosmopolitan theory of international justice which argues that universal human rights constitute the basis for legitimacy of state sovereignty and the global legal system (Buchanan 2004: 1-13, Höffe 1999: 62-63, 308-310, Pogge 1989: 238-239). In that view, every change in the international legal system, that improves the realization of (political as well as social) human rights, is considered a moral progress.

Three aspects may demonstrate that an anarchical state system is morally unacceptable. Firstly, in an anarchical state system, powerful states can dominate and exploit weaker states as they wish. Aggressive wars as well as colonial exploitation demonstrate that without rules, inter-state relations are dominated by force and injustice. Secondly, in an anarchical state system individuals have no international protection against totalitarian governments, so that genocide, internal war crimes and other human rights abuses can not be prevented. And thirdly, external damages of state action on foreign citizens are not limited. As an example emissions of carbon dioxide emanating mainly from industrial countries cause the climate change which damages especially poor coastal and island states. Protectionist economic measures can as well cause external damages, like the US cotton export subventions that destroy local markets in many African countries. Binding international rules are indispensable, to contain unequal power relations between states, protect individuals from abusive state violence and limit external damages from state action on others. In other words, there will be no international justice without international rule of law.

But, however, the transformation from anarchy towards rule of law does not tell the whole story about international legalization. Legalization optimists tend to oversee that international law does not by itself realize the above-mentioned objectives, but can as well incorporate injustice. The opposite of anarchy – the absence of all rules – is tyranny, a system of effective but extremely unjust rules. We have to acknowledge that parts of the evolving international legal system are conceived in wide parts of the world as tyrannical or at least extremely unjust (Ali et al. 2005; Pogge 2005: 15-20; Ziegler 2005). This holds true primarily for international economic law, which institutionalizes the dominance of northern countries and corporations at the expense of southern societies. An example of international law conceived as tyranny is the WTO's 1994 TRIPS agreement on intellectual property, which restricted production and forbid import of generic medicines. Developing countries, whose public health programs before TRIPS relied largely on cheap generic medicines, faced sharp price increases for essential medicines. AIDS activists, international NGOs and even the United Nations Development Program declared, that TRIPS protects pharmaceutical corporations' profits by tolera-

ting the avoidable death of thousands of poor ill people (UNDP 1999: 66-76). The IMF is another institution perceived as global tyrant. The IMF's activity in Argentina in the 1980th and 1990th was described as “substantive violations of economic, social and cultural human rights by structural adjustment programs” (Morgan-Foster 2003: 577). They point to the fact, that the IMF had met Argentina under pressure to accept all public debt resulting from the military period, although this debt was largely raised under corrupt and kleptocratic conditions.² And later IMF structural adjustment programs worsened the debt crises and placed foreign debt service above basic social rights of the Argentine population.

International legalization does not by itself promote moral progress. As the TRIPS and IMF examples indicate, international law can also institute unjust rules that violate basic rights of persons in (often poor) countries. From a moral point of view, it has to be assured that the promise of international legalization – to overcome the anarchical state system – does not lead to an international law system that enforces unjust rules that institutionalize the dominance of some states at the expense of others. In cases where unjust rules are already incorporated in international law, state civil disobedience can serve as a remedy.

2. FROM INDIVIDUAL TO STATE CIVIL DISOBEDIENCE

In national law systems, civil disobedience committed by individuals, had paramount importance for the realization of fundamental human rights. It has to be reminded that our national law systems originally did not recognize any human rights norms, but protected, above others, feudal, bourgeois, male or white people's privileges. It was only by struggles of social movements as the enlightenment, labour movement, women's movement and the civil rights movement that human rights became incorporated into national law systems. In all these struggles civil disobedience was used – besides legal reform and violent resistance – as a major instrument to challenge unjust law and to replace it by more equitable norms. As an example, workers established illegal trade unions and used forbidden strike action to protest against exploitative labour conditions. Coloured people in the United States went into restaurants and busses, which were reserved by law for whites, to protest against their legal discrimination. And Greenpeace activists climbed illegally on industrial chimneys to protest for the enactment of envi-

² In 2000 Argentina's High Court declared in a ruling, that large parts of the public debt raised under the military regime is unconstitutional. The court counted 477 single criminal acts in connection with public debt raised from 1976-83 and it stated a partial responsibility of the IMF and other multilateral lender, who had knowledge about the criminal character of the debt (OLMOS, Alejandro s/ Denuncia, Nr. 14467).

ronmental law. Almost all social movements fighting against injustice used civil disobedience to challenge contested laws.

Political theory of the democratic nation state acknowledges civil disobedience as an illegal but legitimate way to defend basic rights and to overcome the tension between law and justice (Arendt 1972; Habermas 1983; Bedau 1961, 1991; Dworkin 1977: 206-222; Rawls 1979: 399-430). Civil disobedience can be described as a measure of last resort to challenge the violation of basic rights. Defenders of civil disobedience argue that it is better to violate rules of minor importance (as the defence to climb on foreign property) than to accept major injustice (as environmental pollution). While legal reform is normally preferable to illegal reform, civil disobedience proposes alternative options when legal reform channels are blocked. However, civil disobedience avoids the legitimacy problems of violent resistance, which violates basic rights to defend other basic rights. While civil disobedience generally violates only rules of minor importance, violent resistance poses a threat to one of the most fundamental norms of modern law, the sanctity of human life.

Civil disobedience has a position at the margins of rule-following behaviour. Citizens committing civil disobedience support the idea of rule of law and they thrive to make the law more just by breaking it. Law violations are justified by higher-ranking moral and/or legal norms (e.g. human dignity, human rights, constitutional principles) that are allegedly violated by specific legal norms or policies. This feature constitutes the main difference between mere law breaking and civil disobedience. Mere law breaking, e.g. by criminals, has selfish, particular objectives and it constitutes a threat to the rule of law. If a huge number of citizens would break the law in all cases, when they could have personal advantages from that, society would quickly degenerate towards anarchy. By contrast, civil disobedient law breaking has universal moral objectives and it stabilizes the rule of law as it applies the highest moral and legal principles of a society and thereby brings morality and law in accordance. A huge number of citizens that violates unjust law in order to replace it by more just law, does in no way pose a threat to the rule of law. They do rather strengthen the rule of law, since the new law will be based on a greater social acceptance and thereby ameliorate citizens commitment to the law system in general.

However, although civil disobedience is widely accepted in national law systems, the concept is normally not applied to international relations. While at the national level we can distinguish between legitimate and illegitimate law-breaking by individual citizens, there is no normative theory that legitimizes states to violate unjust international law. There are some exceptions, but they are either limited to military interventions or not very elaborated.

Concerning military interventions Buchanan (2001, 2004) used the term *illegal acts of legal reform* to describe incidents like the NATO intervention in Kosovo 1999 or British navy's illegal seizure of foreign vessels to end the 19th century's transatlantic slave trade. Buchanan is right to reject the term civil disobedience for these cases, because they concern hegemonic powers, that don't have to frighten any sanctions for their illegal acts.³ Compared to individual civil disobedience in a state with a functioning monopoly of force, international law violations by hegemonic powers pose a far greater threat to the rule of law. This holds true especially in the security field, in which international law is particularly weak and can easily be damaged by great powers. Buchanan's examples are rather comparable to morally justified violations of domestic law by e.g. a president who enjoys immunity. It might be legitimate for immune presidents to violate domestic law, e.g. in a state of emergency, but this is clearly different from ordinary citizens civil disobedience. However, states that violate international law are not always hegemons or except from legal sanctions. And there are also areas of international law, like international economic law, that are not as weak as security law. A constellation of strong international law and weak norm violating states would be much closer to civil disobedience, but Buchanan's approach doesn't consider such cases.

Besides military cases, some authors explicitly use the term civil disobedience for law violations by states, but generally only in short terms. Nancy Kokaz used the term international civil disobedience to describe Brazil's and India's policies concerning the production of generic medicines and the TRIPS agreement on intellectual property (Kokaz 2005: 72). Political philosopher Otfried Höffe proposed the concept of world federal disobedience (*weltföderaler Ungehorsam*), which he defines as “disobedience of one state or a group of states against the world republic” (Höffe 1999: 342, translation by author). His approach is based on the argument that states are bearers of certain state rights, or “human rights of states”, which protect the citizenry as a collective (Höffe 1999: 324). Since the state has the task to protect human rights, it must also have certain state rights that enable him to fulfil his task. Höffe thereby demonstrates that the concept of civil disobedience can be transferred to the international level and that it is necessary for a normative theory of international order. But his approach concerns only the imagined ideal of a federal world republic and it doesn't develop specific criteria to identify cases. Due to this it has only limited value for today's real world conflicts. More specific is Goodin's approach (2005). Concerning international customary law, Goodin argues that this class of law can *only* be reformed by illegal norm-violation,

³ The violent character of military interventions is another argument against the use of the term civil disobedience. Since civil disobedience necessarily demands non-violent means of action, military action should be excluded.

except minor interpretational shifts. As there is no international procedure to change customary law by collective decision, reform-willing states can only breach customary law. Gooding therefore proposes to use criteria derived from national civil disobedience to distinguish mere law breakers from “would-be-law-makers”. The essence of his approach is a generalizability-test that assesses if a law-violating state accepts that the rules it proposes are applied to other states as well. A mere law breaker fails the generalizability-test, since he wants to be exempt from law provisions, while would-be-law-makers concede that others may as well benefit from new rules.

This literature report demonstrates that there is already some agreement, that law-violations by states can under certain conditions be comparable to civil disobedience. However, further definitional and conceptual work is necessary to apply the concept to specific empirical cases. Civil disobedience is generally defined as a “public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies” (Brownlee 2007, alike: Rawls 1979: 401, Bedau 1961). In the following I will apply these classical criteria of individual civil disobedience to state civil disobedience. There are other, more permissive definitions that are less strict concerning violence, publicity and reformism, in order to address situations in more authoritarian states (Raz 1979, Greenawalt 1987). However, since the global legal system is more fragile than national legal systems, it seemed appropriate to me, to apply a rather strict approach. Since state violations of international law pose a bigger threat to the whole legal system than individual law violations, a rather strict approach is needed to prevent damaging the global legal system.

2.1. Illegality

To describe a specific action as civil disobedience, it has firstly to be determined that the action is a breach of law. Contrary to international politics, it is rather easy to detect a breach of law on the national level. Here, civil disobedience such as climbing on a chimney normally triggers police arrest and criminal conviction and this demonstrates the illegality of the action. However, the picture is complicated since police and courts sometimes disagree on what is a breach of law. A drastic example is the destruction of a British hawk jet due to be exported to Indonesia by four women in 1996.⁴ The activists, who caused a damage of 1.5 million pounds with household hammers, were arrested by the police as they obviously destroyed foreign property. At court they argued that their action was essentially legal, since they prevented the airplanes from being used for atrocities in Indonesian-occupied East-Timor. A Liverpool court in 1997 acquitted the women, using a law which states that “a person may use reasonable force in the preven-

⁴ East Timor protesters win peace prize, Agence France-Press, 23.4.1997

tion of crime”. As this case demonstrates, civil disobedience actions can turn out to be legal, at least in retrospective. In fact, it is even one of the main objectives of civil disobedience, that the law (or its application) will be changed in a way that the action is considered legal in the end. In court, many civil disobedience activists apply legal arguments such as the supremacy of human rights or the above-mentioned provision in English criminal law, to build a bridge for judges to acknowledge their moral motivations. However, we would still call such actions like the hawk jet destruction civil disobedience, since the women were arrested and brought to court after destroying the air planes. To meet the illegality criterion it therefore suffices that an action is declared to be *supposedly illegal* by executive officials (like the police or public prosecutors) at the time of committing, even if it turns out to be legal in the end.

On the international level it is much more difficult to detect the supposed illegality of specific state action, since the law is often rather unclear. One possibility to detect illegal state action would be to consider only cases in which a breach of international law has been determined by an international tribunal. But this would exclude supposedly illegal state actions that later turn out to be legal or undecided, because complainants withdraw their case. Furthermore, in many issue areas there are no international tribunals or existing courts are appealed only rarely. To detect supposedly illegal state act it would be best to have recourse to a world prosecutor or world police that persecute law violating states. But international law hasn't got any executive officials who regularly decide on the supposed legality or illegality of state actions. Due to the absence of a world executive, the only way to detect a supposed violation of international law is to determine, if the concerned state at the time of committing a certain action faced a serious probability to be subject of legal consequences. If a state risks legal sanctions, we may say that it commits a supposedly illegal action, even if there is no conviction by an international tribunal in the end.

2.2. Conscientiousness

Secondly, to be qualified as civil disobedience, supposed breaches of law have to be committed conscientiously. Civil disobedient activists have to demonstrate that they don't breach the law merely for selfish, personal reasons but because they want to prevent serious, moral injustice. Concerning state civil disobedience, the same criteria can be applied: the responsible state representatives that commit an international breach of law have to justify their action with universal moral arguments instead of presenting particular, national reasons.

Two clarifications are needed to impede misunderstandings of this point. The concept of conscience is often understood as a completely unselfish internal motivation that leads the action. This understanding feeds doubts as to whether state representatives can

ever exhibit such an unselfish internal moral motivation, since states as well as politicians pursue strategic objectives. From my point of view, complete unselfishness as well as internal motivation are misleading criteria, that fit neither to individual, nor to state civil disobedience. To consider the conscientiousness of civil disobedience it should rather be investigated, if universal moral arguments are presented to justify the action.

Firstly, the conscience criterion does not exclude that a civil disobedient activist may as well have – besides his moral arguments – personal advantages from reformed policies. A Greenpeace activist that climbs illegally on a chimney to prevent environmental pollution may serve as an example. His moral argument is that environmental pollution damages citizen's health and has therefore to be stopped. Besides this, the activist might be share-holder of a company that sells filter technology and would therefore have a financial advantage of stricter environmental legislation. But this advantage does not reduce the value of his universal arguments concerning citizen's health.

A second, interrelated clarification concerns the question, if a moral motivation or a moral justification is needed. A moral motivation requires that an activist is internally motivated by his cause, whereas the moral justification requires only that he uses moral arguments in his public statements. I argue that the motivational aspects should be neglected and that only public justification has to be considered. It is simply not relevant to know if the Greenpeace climbs on the chimney because he likes adventures or because he really wants to save his fellow citizen's health. The only decisive aspect is, that the reasons he presents to justify his action are not personal but of a universal, moral character. Furthermore, we simply have no possibility to check internal motivations of actors, because we never know if they lie, when they talk about their motivations. In public discourse as well as in empirical research we can therefore only meaningfully talk about public justifications.

2.3. Aiming at change in laws or policies

This third criterion is essential for civil disobedience, because it demonstrates the activist's commitment to the rule of law in general. The objective to provoke a change in laws or policies underlines that civil disobedient activists don't seek primarily personal advantages, but that they want to have new rules that are applied to all. As an example the activists that occupied reserved-for-whites buss seats during the Montgomery Bus Boycott, didn't only want to be exempt personally from racial segregation. Instead they fought for a solution for all black people, the abolishment of racial segregation by law. This political character of law violations marks the difference between personal disobedience and civil disobedience.

The same applies to state civil disobedience. Only law violating states that strive for a general change of international law and policies that affects other states as well can be qualified as civil disobedient states. This change can have a variety of forms, at least the four following: Firstly, a disobedient state can try to convince contracting parties of an international treaty to alter the treaty itself or its application by formulating additional interpretative rules. Secondly, a state can try to establish new customary law by breaking old customary law and convincing other states and lawyer of his proposed new norms. Thirdly, a state can try to convince international courts or comparable dispute settlement bodies to establish new case law, that differs from the hitherto law interpretation. And fourthly, states could leave criticized international institutions and/or create new ones that better reflect their moral claims.

2.4. Non-Violence

Out of all illegal acts, only those can be considered as civil disobedience, which are committed in a non-violent manner. Non-violence is indispensable for the civility of any law violation.

However, transferring the non-violence criterion to state civil disobedience confronts us with the problem, that all state action is characterized by the monopoly of force, which is a defining element of statehood. In the end, the enforcement of all general laws in a state depends on latent or actual police violence. One could argue that the fact that states regularly use force impedes them from being able to commit civil disobedience. My argument is that the monopoly of force is generally accepted to be legitimately in the hands of the state. It is, even more, one of the main prerequisites for peaceful coexistence and the realization of human rights. For sure, the monopoly of force has to be constrained by the rule of law, so that force is only used on the basis of general laws. But if this condition is fulfilled, there is no doubt, that the use of force by the state has a civilian character. The non-violence criterion has therefore to be reformulated as a legitimate force criterion. International law violations by states can only be called civil disobedience when the state doesn't use any extra-legal violence.⁵

2.5. Publicity

The fifth civil disobedience criterion requires that law violations have to be committed in public. Activists may not hide themselves from the police or the media and they have to present their arguments to the wider public. The publicity criterion is essential for the civil character of any law violation. Who breaches the law publicly, acknowledges the

⁵ This argumentation concerns only the internal use of (police) violence, while the external use of (military) violence is left out.

necessity to justify his act before the public. This means that one tries to convince the society with arguments, instead of blackmailing it with violence or free-riding in secrecy. And who is willing to be arrested and put to court for his matter, thereby demonstrates his acceptance of the rule of law in general.

This criterion can be applied directly to international affairs. All kinds of secret state acts, that violate international law, can surely not be qualified as civil disobedience. However, most relevant cases can not be hidden from the public due to their essentially public character. The enactment of laws that violate an international treaty or executive orders concerning e.g. debt repudiation cannot be hidden from the public. The publicity criterion is therefore only of minor importance for the assessment of international law violations.

3. EMPIRICAL CASES

In the following I describe two empirical cases of developing countries that violated international economic law in order to protect their citizen's basic human rights. In both issue areas – international credit law and international investment law – there are a number of other states that considered or actually committed comparable law violations. However, the selected cases are outstanding examples since Argentina and Bolivia are both positioned at the cutting edge in the global struggle for a more just economic order.

3.1. Argentina's debt repudiation

Argentina's debt crisis had its origins in the military rule from 1976-82. During this time Argentina's foreign public debt raised from 7.9 billion to 35.7 billion \$US. As an Argentine high court ruling later confirmed, large parts of this debt had a criminal character, because it served the enrichment of corrupt elites that indebted public enterprises to finance massive capital-exports into private hands (Olmos 2006). This demonstrates a first justice deficit in international credit law: There is almost no legal provision to declare sovereign debt invalid, even if the debt was clearly raised for criminal purposes. The Argentine military regime's debt, South Africa's apartheid debt, Iraq's debt under Saddam Hussein – there are many examples of criminal sovereign debt, that countries may not refuse to pay back. Only in cases of state succession are states allowed to reject former sovereign debt according to the odious debt doctrine (Khalfan et al. 2003; Olmos Gaona 2005).⁶ This doctrine stipulates that states may refuse the payment of former

⁶ The main historic example concerning odious debt is the refusal by the United States to pay Cuban foreign debt, after they had won the island in a war with Spain in 1898. The American argument, which was later re-

sovereign debt, when this debt has been raised against the interests and without approval of the population and creditors were aware of these circumstances. However, although many NGOs and lawyers claim that this doctrine should also apply to regime changes like the transformation from military to civil government in Argentina, debt repudiation is still illegal in this case.

The first democratic government after military dictatorship under President Raúl Alfonsín (1983-89) pledged to scrutinize the legitimacy of all debt contracts raised by the military regime. This means, that Alfonsín considered illegal debt repudiation as a policy option. However, the IMF – which had collaborated with the military regime because this approved its neoliberal policy recommendations – pressured Argentina to acknowledge all former debt contracts. The IMF threatened to cut Argentina from lending, if the country would not pay investors out. Eventually Alfonsín bowed to the pressure and acknowledged the debt (Interview Olmos).

A second chance to repudiate the military regime's debt came in 2000, when a lengthy criminal process against the military regime's minister of economy was won by journalist Alejandro Olmos. The Argentine High Court had found at least 477 criminal offences related to sovereign debt contracts of the period 1976-82.⁷ The court ruling declared as well a partial guilt on part of the IMF, other multilateral lenders and banks, because they had cooperated with the military regime, although they were aware of these criminal activities. The court recommended the Argentine Congress to consider the case. However, since there had been several bond exchanges since the military regime, so that most Argentine state bonds from that time had changed form and owner, it would have been difficult to repudiate this debt. Although some deputies pleaded for an investigation, the Argentine Congress ignored the court ruling (Cafiero 2004, Interview Cafiero).

In December 2001 Argentina experienced a dramatic economic crisis which triggered mass protests, rising unemployment and the collapse of the peso. Poverty in Argentina rose drastically during the crisis and parts of the population even suffered hunger. During the 1990s Argentina had been a loudly praised example of free market reforms according to IMF policy recommendations. The economic crisis marked the beginning of Argentina's move away from neoliberal economic policy and the refusal to pay its sovereign debt instead of financing social programs.

Argentina's situation in December 2001 points to a further injustice in international: the absence of a fair and transparent state insolvency procedure or comparable rules that

flected in the formulation of the odious debt doctrine was that the Cuban debt was raised in order to suppress the population and without their approval.

⁷ OLMOS, Alejandro s/ Denuncia, Nr. 14467

allow developing states to reduce unsustainable debt amounts. States are not only forbidden to refuse odious debt – as was shown above – they also have to pay their debt even at the cost of hunger and poverty in their country (Barry/Tomitova 2006). Due to these rules states are legally bound to debt service even if this implies the violation of basic human rights as the right to food of their population. Sure, sometimes creditor countries decide to abate developing countries' debt – but these debt cuts depend on creditor's good-will, while debtors have no legal means to refuse debt payments. Argentina's decision to repudiate large parts of its sovereign debt therefore constituted a violation of international credit law.

During the midst of economic turmoil and violent protests, transitional president Rodríguez Saá declared on 24th of December 2001 a unilateral moratorium on the repayment of large parts of its public debt which amounted to 144 billion US-dollars (Damill et al. 2005). This decision was directly caused by the massive demonstrations in whole Argentina, where the population demanded tough measures against the economic crisis. To be precise, Argentina refused the repayment of its public debt held by Argentine and foreign private creditors, while it continued repayment of multilateral creditors (IMF, World Bank...). The moratorium was justified as a measure of emergency, since the very functioning of the Argentine society was at stake during the economic crisis.

The moratorium from December 2001 only meant that Argentina postponed its debt service while it still acknowledged the debt in general. Since this could not lead a way out of the crisis, the government under President Néstor Kirchner turned in 2003 to open debt repudiation (Christian Aid 2007: 24-26). Kirchner had pledged at his inaugural speech in May 2003 that Argentina would not “return to paying debt at the cost of hunger and exclusion of Argentines”.⁸ This statement was supported by many international NGOs as the Jubilee Network and local protests against the IMF (which wanted to compel Argentina at that time to high budgeted surpluses so that it could fulfil its debt service). Argentina's economy was recovering meanwhile, due to the devaluation of the peso and the debt moratorium. In order to assure this recovery Kirchner presented in January 2005 a proposal to cut private creditors bonds by 70%. The proposal invited creditors to exchange their old bonds until the 25th of February 2005 with new, discounted bonds.⁹ The proposal concerned bonds worth 103 billion US-dollars, which were held by about 500.000 private and institutional investors in a diversity of countries. While creditors were outraged by this biggest sovereign debt cut in history, the Argentine Congress passed in February 2005 a law that forbid renegotiation of the proposal. Furthermore, the law stipulated that Argentina would refuse all payments to

⁸ President Néstor Kirchner, Inaugural address, Argentina, 25 May 2003.

⁹ Argentina Starting Drive To Emerge From Default, New York Times, 12.1.2005

creditors that didn't accept the bond exchange.¹⁰ In the end, 76% of all creditors accepted the bond exchange, so that the debt cut was largely successful. One of the chief-negotiators concluded even that international sovereign debt regime would be transformed by this event: "This is a watershed event, with great impact on the international financial system. The Argentine restructuring shows that in case of default, sovereigns have much more power than before, maybe even the upper hand. The rules of the game have changed."¹¹

However, although the majority had accepted the bond exchange, a number of foreign creditors filed complaints against Argentina in national courts of the United States, Germany, Italy and other countries. Many of these complaints, which were in parts already lanced during the moratorium, were successful and demonstrated that the Argentine debt moratorium violated international law. As an example, the German Constitutional Court decided in July 2007 that there is no provision in international law that would allow Argentina to refuse debt payments.¹² Argentina had pledged to have been in a situation of state emergency, what the court refused.¹³ Argentina is therefore obliged to pay the full amount to German holders of old Argentine state bonds. However, although many creditors won their cases in court, they have problems to enforce their rights. Some creditors tried unsuccessfully to confiscate Argentina's embassies and presidential jet, but these belongings are protected by diplomatic immunity. But at least in one case a court in Maryland, USA decided to freeze belongings of the Argentine Military in the United States.¹⁴ However, although this flood of legal proceedings in different countries clearly demonstrated the illegality of Argentina's debt cut, also the new Government under President Christina Fernandez Kirchner continues the refusal to pay out the remaining creditors.

¹⁰ Argentina pushes law to boost debt swap approval, Reuters News, 3.2.2005; 'No new offer' on Argentina's defaulted debt proposal, Financial Times, 7.2.2005

¹¹ Argentina Announces Deal on Its Debt Default, New York Times, 4.3.2005

¹² Bundesverfassungsgericht - Pressestelle -, Pressemitteilung Nr. 75/2007 vom 5.Juli 2007, Zum Beschluss vom 8. Mai 2007 – 2 BvM 1-5/03; 2 BvM 1/06; 2 BvM2/06

¹³ There is currently some confusion in international economic law with regard to the applicability of the concept of state emergency (Schill 2007). While the German Constitutional Court as well as several ICSID Panel have refused the validity of state emergency as a justification for Argentine economic policies, a new ICSID decision (LG&E v. Argentine Republic) has justified certain economic policies due to state emergency. However, LG&E v. Argentine Republic has no direct relevance for the sovereign debt issue.

¹⁴ US Judge Freezes \$3M Argentina Military Assets – Reports, Dow Jones International News, 6.2.2004; Argentina govt says won't alter debt restructuring offer despite asset seizure, AFX International Focus, 6.2.2004

Argentina's debt refusal was justified with the obligation of the state towards its citizens. But besides this, Argentina also pleaded for reforms of the international financial system. As an example, President Kirchner demanded in September 2003 at the United National General Assembly that the IMF be reformed in way that it serves the fight against poverty.¹⁵ This reform proposal targeted IMF structural adjustment programs and policy recommendations that place debt service above citizen's social rights. However, the Argentine reform proposals were rather vague and they didn't reflect civil society demands for a neutral state insolvency procedure and the application of the odious debt doctrine. Although they approved Argentina's debt repudiation NGOs in Argentina and abroad were rather deceived of this reluctance concerning reform proposals (Interview Gambina).

Another activity of Argentina to alter the international financial regime was its effort to construct an alternative for the IMF. In December 2005 Argentina paid all its outstanding IMF debt – 9.8 billion US-Dollars – back, in order to liberate itself from IMF interference into its economic policy.¹⁶ Argentina thereby followed Brazil that had some days before also paid back all its IMF debt of 15.5 billion US-Dollars. Parallel to this turning away from the IMF Argentina also took part at the foundation of an alternative to IMF and World Bank lending, the Bank of the South. The *Banco del Sur* is a common project of several Latin American states that try to develop an alternative to neoliberal multilateral lenders. The Bank of the South has been created on 9th of October 2007 by Argentina, Brazil, Bolivia, Ecuador, Paraguay, Uruguay and Venezuela.¹⁷ Contrary to World Bank and IMF where voting rights are bound to financial deposits, every member state of the Bank of the South has the same voting rights. The purpose of the Bank of the South is to give loans to developing states with respect to basic human and social rights and without neoliberal structural adjustment programs. Although the Bank's starting capital of 7 billion US-Dollars is rather modest, the project is thought to make Argentina and other countries in the long run independent from World Bank and IMF loans.

To conclude this case description we can ask if the Argentine debt repudiation fulfils the criteria of state civil disobedience. The debt moratorium from 2001 and even more the debt cut 2005 were definitely illegal, as many court rulings in several countries confirmed. The Argentine Presidents Saá and Kirchner justified the refusal also with universal moral reasons that stipulated the primacy of basic social rights over debt service (“no repayment at the cost of hunger”). And Argentina combined this conscience-based

¹⁵ Reuters News, 25.9.2003

¹⁶ Freikauf vom IWF, telepolis, 20.12.2005

¹⁷ Kampfansage an IWF und Weltbank, Deutsche Welle, 3.11.2007

policy with demands and concrete steps for an alternative international financial system. Finally, the Argentine debt repudiation was publicly announced and it didn't resort to any extra-legal use of violence. The Argentine debt repudiation can therefore be classified as state civil disobedience.

3.2. Bolivia's violations of bilateral investment treaties

The second case of state civil disobedience involves the conflict between citizen's right to affordable access to drinking water and foreign investor's rights to have their investment protected. During the 1990s World Bank and IMF had – as part of their Washington Consensus policy – put pressure on Bolivia that it should privatize its public water enterprises and end all subsidies to water supply. In September 1997 Bolivia and the World Bank “agreed” that Bolivia would privatize its public water enterprises in exchange to a World Bank loan of 138 Million Dollars. This form of “agreement” between poor and overindebted developing countries and multilateral lenders dominated by northern countries, is criticized by many southern countries and NGOs as blackmail. Due to its unsustainable amount of public debt (which is, as in the Argentina case, also a product of the unfair sovereign debt regime), Bolivia did not have the financial autonomy to reject the World Bank conditionality. It therefore agreed to a damaging structural adjustment program that opened the water market for foreign investors but worsened citizen's access to affordable drinking water. This form of blackmailing a developing country was experienced by many Bolivians as deeply unjust.

In response to IMF/world bank pressure, Bolivia licensed private foreign enterprises to provide the water supply in the cities of Cochabamba and La Paz/El Alto. In Cochabamba, an affiliate of the US-American multinational Bechtel, Aguas del Tunari, was licensed in September 1999. In La Paz/El Alto the company Aguas del Illimani, an affiliate of the French multinational Suez received the license in July 1997. The International Finance Corporation, an arm the World Bank Group, was also minority shareholder of Aguas del Illimani. The contracts with the multinationals were very unfavourable to the local population (Crespo 2007; Solón/Rodríguez 2007). In Cochabamba the contract stipulated that Aguas del Tunari had to refinance all infrastructural investments with its water revenues in order to avoid public subsidies. Furthermore, the company received the right to realize an annual profit of 15-17% on its investment and water rates were bound to the US-Dollar, so that the exchange rate risk was shifted to consumers. These excessively investor-friendly provisions, which were comparable in La Paz/El Alto, led within short time to sharp water rate increases in both cities. In Cochabamba, water rates were raised drastically in December 1999 – although Bechtel admits only increases

of 35%, there is evidence of some citizens who suffered increases of up to 300%.¹⁸ In La Paz/El Alto, increases were not that drastic, but here as well prices rose sharply.

The water rate increases triggered massive public protests first in Cochabamba, then in La Paz/El Alto. From January to April 2000 the city of Cochabamba saw a full-fledged popular rebellion, also known as *Guerra del Agua*. It involved huge demonstrations as well as street battles with the police that killed a 17 year old boy (Olivera 2004). Although the government declared the state of siege, it was not able to calm down the protests. The water war in Cochabamba became famous worldwide, and it was supported by solidarity committees in Bolivia and around the world. And since the protesters in the end achieved to terminate Aguas del Tunari's license, the *Guerra del Agua* became one of the first victories and symbols of the transnational movement against neoliberal globalization (Assies 2003). The protest movement in Cochabamba formulated its positions in human rights language and demanded international legal reform to protect the right to water:

“2. Water is a fundamental human right and a public trust to be guarded by all levels of government; therefore, it should not be commodified, privatized, or traded for commercial purposes. These rights must be enshrined at all levels of government. In particular, an international treaty must ensure these principles are incontrovertible.” (The Cochabamba Declaration, December 8, 2000; documented in: Olivera 2004)

On 10th of April 2000, the Bolivian government gave in and agreed to terminate the concession for Aguas del Tunari without paying a compensation to the company. This success in Cochabamba triggered protests in La Paz/El Alto, which lasted from 2000-2005. These protests were influenced strongly by the Cochabamba experience, although they were less massive. However, in January 2005, the Bolivian government also terminated the contract with Aguas del Illimani.

The termination of the two contracts is the point where Bolivian state civil disobedience began, because this move violated international investment law. International customary law protects foreign direct investment and obligates states to pay compensation in case that they expropriate possessions of foreign nationals. According to the so-called *Hull formula* the compensation has to be “prompt, adequate and effective” and it also has to include expected future gains.

However, since these customary law provisions are hard to enforce, many countries signed bilateral investment treaties (BITs) to protect foreign investment further. Approximately 2500 BITs have been signed mainly between developed countries on the one

¹⁸ The Democracy Centre in Cochabamba has put extensive evidence on it's website that refutes the companies assurances (www.democracctr.org).

side and underdeveloped countries on the other side. These are criticized because they grant excessive rights to investors which are not balanced with complementary responsibilities, thereby reflecting the unequal negotiation power of the contracting countries (Anderson/Grusky 2007: 3-5). BITs often include restrictions on so called “indirect expropriation” through e.g. environmental or social legislation that reduce the value of an investment. Furthermore, they often include bans on capital controls and limits on performance requirements (that oblige foreign investors to e.g. use a certain percentage of local products). And the national treatment and most favoured nation treatment clauses make it difficult for developing countries to pursue national development strategies.

Many BITs include also a clause that transfers jurisdiction in investment disputes to the International Centre for Settlement of Investment Disputes (ICSID), which is part of the World Bank group. ICSID was founded on basis of an international convention, namely the International Convention for the Settlement of Investment Disputes between States and Nationals of Other States. Under ICSID foreign investors can file complaints against host countries that are decided by dispute settlement panels with three members on the ground of BITs. The ICSID procedure is criticized as well for many reasons. Firstly, there are fundamental conflicts of interest: As in the Bolivia water disputes, the World Bank was itself involved in the privatization of water concessions, which became the topic of the dispute. And in the conflict concerning La Paz/El Alto, the World Bank was itself a conflicting party, since its International Finance Corporation was one of the share-holders of Aguas del Illimani. This is highly problematic, because – due to the procedural rules that guide arbitral panels – the World Bank President has the final competence to nominate the third arbitrator, when those nominated by complainant and defendant don’t find a consensus. The ICSID procedure is therefore no neutral dispute resolution procedure, since the World Bank is dominated by northern countries and in some cases even judge and complainant in the same conflict. NGOs demand for that reason the creation of an appeals procedure that is independent of the World Bank. Another line of criticism concerns the fact, that only states can be judged to pay compensation to investors in case they violated BITs. However, when a corporation evades taxes or damages the environment in the host country, there is no compensation scheduled.

To sum up, the international investment regime is in the eyes of many NGOs and developing countries deeply unjust, since it grants excessive rights to foreign investors without providing complementary responsibilities for them. The ICSID procedure is the place where unbalanced BITs are enforced and it thereby became the main target of Bolivia’s opposition.

After leaving the city of Cochabamba without being compensated, Aguas del Tunari filed a lawsuit at ICSID where it complaint that Bolivia had violated the bilateral in-

vestment treaty with the Netherlands. The parent company, Bechtel, had before founded a letter box company in the Netherlands which served formally as owner of Aguas del Tunari. This move made it possible to use the Bolivian-Dutch BIT for the lawsuit. Aguas del Tunari claimed a compensation of 25 million US-Dollars, although it had invested far less money up to that time. The complaint triggered a world wide solidarity campaign with Bolivia. Pablo Solón, one of the movement's spokespersons, calculated that Bechtel's worldwide turnover of 14 billion US-Dollars was as big as Bolivia's gross national product and that Bolivia could pay 3000 rural doctors with 25 million Dollars.¹⁹ A world wide NGO coalition tried in August 2002 to file an amicus curiae brief to the ICSID panel, where they argued that Bolivia's measures were necessary to assure the right to affordable water supply.²⁰ The panel should hold public hearings in Bolivia in order to recognize the citizen's perspective. However, this request was declined in January 2003. Meanwhile the complaint had turned into a public relations disaster for Bechtel that was plagued with lots of protest activities at its branches in Europe and America. Although everybody expected Bechtel to win the compensation at ICSID, it eventually decided to drop the case. In July 2005 Bechtel therefore sold Aguas del Tunari to Bolivia at the symbolic price of 2 Bolivianos (=less than one US-Dollar). Bolivia as new owner immediately withdrew the ICSID complaint.²¹

Also concerning the termination of the contract of Aguas del Illimani in La Paz/El Alto, the company threatened to file a ICSID complaint. In this case, the French parent company Suez argued that Bolivia had violated the Bolivian-French investment treaty. However, now Bolivia paid a compensation of 5.5 million US-Dollars and thereby avoided a formal complaint (Crespo, 2007: 141).

The successful mobilisations against water privatisations in Bolivia triggered a variety of activities by the Bolivian state (and other actors) to reform international economic law, so that the human right to water is better protected. The ICSID proceedings in the Cochabamba case had alerted a huge number of international NGOs that became aware of the possibly devastating effects investor-to-state dispute settlement can have. But also in other countries like Argentina, Ecuador and Mexico governments and civil society witnessed ICSID cases that caused widespread indignation (Anderson/Grusky 2007: 10-20). The ICSID secretariat reacted to this criticism in October 2004 with a

¹⁹ <http://www.voltairenet.org/article120357.html#article120357>, 5.9.2002

²⁰ Petition of La Coordinadora para la Defensa del Agua y Vida, et al. to the Arbitral Tribunal, ICSID Case No. ARB/02/3, August 29, 2002.

²¹ Rojas: Nuevo Gobierno debe disolver Aguas del Tunari, Los Tiempos.com, 10.1.2006

discussion paper that formulated several reform proposals for the procedure.²² In December 2006 the ICSID administrative council decided some minor reforms. The decision facilitated e.g. public hearings of concerned citizens that may now be held if no disputing party files a veto. However, the most important reform demands, to create an independent appeals mechanism and to consider human rights and social/ecologic law in dispute settlement were not realized.²³

In December 2005 Evo Morales, who had participated personally at the Cochabamba protests, was elected President of Bolivia and started bold activities to alter the international investment regime. Morales presidency was an effect of the social protests against neoliberalism in Bolivia which had begun with the Cochabamba water dispute in 2000. Morales appointed one of the main spokes persons of the movement against water privatization, Pablo Solón, as special ambassador for commerce and integration. In April 2007, the government announced together with Venezuela and Nicaragua that the countries would quit the ICSID convention. On the fifth summit of the Bolivarian Alternative for the Americas (ALBA), they decided a resolution that condemns attempts by multinational companies to subvert social and environmental policies in developing countries with ICSID-complaints.²⁴ However, while Venezuela and Nicaragua are at present still members of ICSID, Bolivia formally quit the convention on 2nd May 2007. This move was supported by 863 NGOs from 59 countries that demanded in a letter to World Bank president Zoellick the creation of an independent review panel for ICSID decisions, that accounts as well for social, economic and human rights.²⁵

But Bolivia did not only leave the criticized institution, it also started to construct alternatives. Most importantly, Bolivia is currently renegotiating all its 24 bilateral investment treaties. The Bolivian government's objective in these negotiations is to change the aim of these treaties. Instead of promoting investment without further distinction, the new "development promotion treaties" shall attract only those investments which support the host country's development (Interview Thomas Kruse). For this purpose, rights and responsibilities between host country and investor shall be rebalanced. Human rights as well as social and environmental regulation shall have at least equal standing with foreign investor's rights. And as the ICSID dispute settlement procedure is

²² ICSID Secretariat 2004: Possible Improvements of the Framework for ICSID Arbitration, Discussion Paper, October 22, 2004, www.worldbank.org/icsid

²³ Bretton Woods Project: „Watered-down“ changes to arbitration, update 50, <http://brettonwoodsproject.org/art.shtml?x=547592>, 30.7.2007

²⁴ www.cadtm.org/imprimer.php3?id_article=2618, 31.7.2007, www.art-us.org/node/239, 27.6.2007

²⁵ „RE: Refusal to respect Bolivia's withdrawal from investment dispute court“, January, 15, 2008, <http://www.ipsdc.org/reports/080115-boliviapetition-en.pdf>

criticized as unbalanced, the new treaties don't include the clause that constitutes ICSID jurisdiction in investment disputes.

A further activity to reform international law and policies is Bolivia's engagement as a founding member of the *Banco del Sur*, which shall in future serve as an alternative to World Bank loans and structural adjustment programs. To sum up, we can conclude that Bolivia is seriously trying to reform the international investment regime by withdrawing from ICSID, renegotiating bilateral investment treaties and creating together with other states the Bank of the South.

Was Bolivia's cancellation of water concessions a case of state civil disobedience? Firstly, the cancellation of water concessions in Cochabamba and La Paz/El Alto was supposedly *illegal* under bilateral investment treaties. The ICSID proceeding in the Cochabamba case was very likely to be won by the complaining multinational Bechtel, since Bolivia refused to pay compensation to Bechtel. Only due to massive public pressure, Bechtel eventually gave in and sold his affiliate Aguas del Tunari to Bolivia, so that the proceeding ended without a ruling. Also in the La Paz/El Alto case, the cancellation of the contract with Aguas del Illimani was supposedly illegal. However, in this case Bolivia eventually accepted to pay 5.5 million US-dollars compensation to Suez, which then renounced from complaining at ICSID.

Secondly, concerning the *conscientiousness* of Bolivia's breaches of law, the result is mixed. In both cases the governments of Hugo Banzer (2000 – Cochabamba contract) and Carlos Mesa (2005 – La Paz/El Alto contract) cancelled the contracts only due to massive pressure from below, and not by their own motivation. But at least we can say that the movements in Cochabamba and La Paz/El Alto justified their protest in terms of universal human rights claims. And the Bolivian government reacted with its decision to cancel the contract to these civil society claims. The conscientiousness of Bolivia's breaches of law is therefore only indirect: While the governments themselves did not act conscientiously, the movements that in the end caused the termination of the contracts did so. However, in 2005 the government of Evo Morales assumed power, which is now defending the protester's cause directly.

Thirdly, we have to assess if Bolivia's law violations were *aiming at the improvement of international law and policies*. Also here the result is mixed, for the same reasons as concerning the second criterion. While the protest movements in Cochabamba and La Paz/El Alto were clearly targeting international reforms, the Bolivian governments of Banzer and Mesa were suppressing these civil society claims. However, when Evo Morales assumed power, his government adopted the movement's demands for international law reform and even appointed one of its spokespersons as special ambassador for commerce. The decisions to withdraw from the ICSID convention, to renego-

tiate all BITs and to found the Bank of South are clearly efforts that Bolivia is now transforming the initial breach of law into concrete reform projects.

Fourthly and fifthly, the criteria of *non-violence* and *publicity* are met. When Bolivia terminated the contracts with Aguas del Tunari and Aguas del Illimani it only applied its legitimate monopoly of force and didn't use any extra-legal violence. And the termination of the contract was not hidden in secret but announced publicly. In sum, we can therefore conclude, that Bolivia's violations of investment treaties was a case of state civil disobedience.

4. CAUSES AND EFFECTS OF STATE CIVIL DISOBEDIENCE

Why do states violate international law by means of state civil disobedience? And is this a successful way to bring about moral progress in international law and policies? In the following I give some preliminary answers to these causal questions, without pretending a deductive approach. Research on state civil disobedience is rather of an explorative nature, since we have little knowledge in this field. Therefore, an inductive approach, which condenses possible explanations out of the empirical material, seems to be more appropriate.

Concerning the explanation of state civil disobedience, we can observe a similar pattern in both cases of this study. The governments of Argentina and Bolivia were both under heavy pressure of transnational social movements. These movements combined local protests directed at national governments as well as transnational activities criticizing the unjust international regime directly. In the Argentine case massive protests in the country demanded priority for basic social rights and disrespect to debt service and IMF structural adjustment. These protests were supported by NGOs in the whole world (e.g. the Jubilee Network), which since long call for a fair state insolvency procedure and the odious debt doctrine. And in the Bolivia case there were strong local protest movements in the cities of Cochabamba and La Paz/El Alto that criticized water price increases. These movements were supported by international NGOs that criticize World Bank privatisation policy, exaggerated investor rights and claim the human right to have access to water. In both cases there is a clear causal link observable: neither Argentina's debt repudiation nor Bolivia's cancellation of water licences would have occurred without the combined pressure from local protesters backed by strong international NGOs.

An essential element seems to be the combination of local and international activism. The local population in a state, that implements specific international rules, experiences most directly the injustice of these rules. This local activism of ordinary people is triggered by a sentiment of injustice, but it often hasn't got any idea of the international dimensions of the case:

“The number of people in Bolivia who have come to an intellectual or ideological opposition to ICSID dispute settlement is very limited. [...] On the other hand, the average person in Cochabamba just got that Bechtel was coming here and ripping them off [...]. And when Bechtel sued Bolivia for 25 million dollars, people thought: no way, that’s unfair.” (Interview Jim Shultz, Democracy Centre Cochabamba, 14.12.2007)

However, local activism in Bolivia (as well as in Argentina) was supported by specialized national and international NGOs, that translated the local claims (“stop water prices increases”) into the language of the discourse on international justice (“no exaggerated investor rights that violate the human right to water access”). There is a division of labour observable, in which local activism exerts pressure on the national government, while specialized national and international NGOs justify the cause on the global level and formulate reform propositions for international law from these local conflicts.

The cases of Argentina and Bolivia demonstrate that state civil disobedience is essentially caused by transnational civil society mobilisation. Both states, that violated international law, were reacting to a moral impetus originating from ordinary citizens that defended themselves against unjust international law. State civil disobedience could in such cases also be called “civil society based disobedience”.²⁶ Civil society has for that reason as well a partial obligation to present valid moral reasons for law violations it has pressured for. However, although civil society can bear parts of the moral responsibility, it is only the state that has the legal responsibility for any international law violation, so that the concept of state civil disobedience is still adequate.

Even more important than the question, why state civil disobedience occurs, is an investigation of the effects of this reform path. Is it possible to bring about moral progress in international law and policies that are criticised as deeply unjust?

To begin with, we have to acknowledge that progress in international law and policies is probably in almost all cases caused by a large bundle of causes and evolves over long time periods. It would be surprising to observe that since long time established international law is changed quickly because of the opposition of one country. We should therefore not have exaggerated expectations in this respect. But we know on the other hand that civil disobedience in national societies often functions as a catalyst that dramatizes conflicts and thereby triggers lots of further, mostly legal activities that in sum bring about change.

One of the most evident consequences of the Argentine and Bolivian state civil disobedience is the foundation of the Bank of the South together with other states. Surely the Bank was not founded only due to Argentina’s debt repudiation and Bolivia’s

²⁶ I owe this expression to Dieter Senghaas’ comments.

breach of investment rules. But both were important watershed events that caused Argentina's and Bolivia's turning away from IMF/World Bank economic policies and triggered the search for alternative models. Understood in this way we can conclude that state civil disobedience in these examples contributed to the creation of a new international organization that hopefully will better reflect moral demands.

While the Bank of the South is the only tangible effect of the Argentine debt repudiation, the Bolivian water dispute triggered some more effects. The ICSID dispute settlement procedure is currently in a legitimacy crisis (Franck 2005), which was caused by contentious proceedings and deepened by Bolivia's withdrawal from the procedure. The amendment of ICSID's procedural rules for dispute settlement was a first reaction that reflects civil society criticism. And secondly we observe Bolivia's efforts to renegotiate its bilateral investment treaties.

Comparing Argentina and Bolivia it seems that Argentina is far less successful to alter the sovereign credit regime than Bolivia with respect to the investment regime. A plausible explanation to this finding could be the different degree of institutionalization of the two regimes. The international investment regime features clear contractual primary norms (bilateral investment treaties) and secondary norms (ICSID dispute settlement procedure). Contrary to that there are no international treaties concerning sovereign credits, which are regulated mainly by customary law provisions (primary norms). And there is furthermore no dispute settlement procedure (secondary norms) to cope with sovereign defaults. The higher degree of institutionalization of the investment regime simply creates more opportunities to alter the regime by renegotiation of investment treaties or amendment of procedural rules for dispute settlement. It is by contrast far more difficult to alter the sovereign debt regime where there are no treaties or dispute settlement procedures to be altered directly.

5. CONCLUSION

This paper argued that the concept of individual civil disobedience which is widely accepted in political philosophy has to be applied to violations of international law by state actors. While the progress of international law promises to create more international justice, some international law provisions institutionalize fundamentally unjust rules. In order to prevent international institutions from developing towards a global Leviathan, we need a basic right for states to disobey unjust international rules. Criteria derived from individual disobedience can be applied with some minor adjustments to state civil disobedience.

Although the idea of state civil disobedience is already accepted by some authors, the concept has until now not yet been applied in detail to specific empirical cases. My paper fills this gap with an extensive analysis of Argentina's debt repudiation and Bo-

livia's breaches of bilateral investment treaties. Both cases confirm the importance of a theory of state civil disobedience. Although both states broke international law it would be completely misleading to describe these cases as mere law breaking, which is morally unacceptable. To the contrary, both countries have to be praised and supported for their courage to challenge unjust economic rules on the basis of human rights arguments. However, the cases also demonstrated that the impetus to breach the law originates rather from civil society protest than from the government. In Argentina as well as in Bolivia massive protests demanding basic social rights in the end compelled the governments to breach the law. In fact the only way for a grass roots movement to challenge unjust international rules is to pressure the government to challenge these rules. That *civil* society protest is at the beginning of state *civil* disobedience demonstrates that the concept fits to reality.

To consider international breaches of law as civil disobedience can help us to advance international law in moral respects. Civil disobedience has in national societies served as an early warning system for moral deficits and as a factory for reform alternatives. State civil disobedience can fulfil the same task for international politics and is for this reason indispensable. In order to become a tool for the moral progress of international law, the concept of state civil disobedience has to be applied by political scientists, politicians and activists in public discourse. As the concept of civil disobedience cannot be introduced by international institutions or treaties into international relations (the law cannot allow its own violation), the only way is to introduce the concept by public discourse "from below". As my case studies demonstrate, there are a number of law violations that fit civil disobedience criteria, but they are not (yet) labelled as civil disobedience in public discourse. The use of civil disobedience terminology could probably shift the discourse on this kind of law violations, so that the progressive potential of civil disobedience can be lifted for international relations.

REFERENCE

- Abbott, Kenneth/Snidal, Duncan 2000: Hard and Soft Law in International Governance, in: *International Organization* 54: 3, 421-456.
- Ali, Tariq/Amin, Samir/Walden, Bello/u.a. 2005: Alternativen zur Tyrannei der neoliberalen Globalisierung. Manifest von Porto Alegre vom 29. Januar 2005, in: *Blätter für deutsche und internationale Politik* 3: 2005, 382-384.
- Anderson, Sarah/Grusky, Sara 2007: *Challenging Corporate Investor Rule, How the World Bank's Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What to Do About it*, Washington, D.C.
- Arendt, Hannah 1972: Civil Disobedience, in: Arendt, Hannah (Hrsg.): *Crises of the Republic*, New York, 50-102.

- Barry, Christian/Tomitova, Lydia 2006: Fairness in Sovereign Debt, in: *Social Research* 73: 2.
- Bedau, Hugo Adam 1961: On Civil Disobedience, in: *The Journal of Philosophy* 58: 21, 653-661.
- Bedau, Hugo Adam 1991: *Civil Disobedience in Focus*, London.
- Brownlee, Kimberly 2007: Civil Disobedience, in: *Stanford Encyclopedia of Philosophy*
<http://plato.stanford.edu/entries/civil-disobedience/>, First published Thu 4 Jan, 2007.
- Buchanan, Allen 2001: From Nuremberg to Kosovo: The Morality of Illegal International Legal Reform, in: *Ethics* 111: 4 (Jul., 2001), 673-705.
- Buchanan, Allen 2004: *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law*, New York.
- Cafiero, Mario 2004: Proposal for a Balanced Long-Term Solution to Argentina's Public Debt Problem, Buenos Aires, http://www.jubileeresearch.org/news/argentina290904_1.htm.
- Christian Aid 2007: Enough is enough: The debt repudiation option, <http://www.christian-aid.org.uk/>.
- Crespo, Carlos 2007: Agua, soberanía nacional y resistencia social. Los convenios bilaterales sobre promoción y protección a la inversiones: los casos de Holanda y Francia, in: Crespo, Carlos/Spronk, Susan (Hrsg.): *Después de las guerras del agua*, La Paz, 109-146.
- Damill, Mario/Frenkel, Roberto/Rapetti, Martin 2005: La deuda argentina: Historia, default y reestructuración, in: *Desarrollo Económico* 45: 178 (julio-septiembre 2005), 187-233.
- Dworkin, Ronald 1977: *Taking Rights Seriously*, Cambridge, Massachusetts.
- Franck, Susan D. 2005: The legitimacy crisis in investment treaty arbitration: Privatizing public international law through inconsistent decisions, in: *Fordham Law Review* 73, 1521-1625.
- Goodin, Robert E. 2005: Toward an International Rule of Law: Distinguishing International Law-Breakers From Would-Be Law-Makers, in: *Journal of Ethics* 9, 225-246.
- Greenawalt, Kent 1987: *Conflicts of Law and Morality*, Oxford: Clarendon Press.
- Habermas, Jürgen 1983: Ziviler Ungehorsam - Testfall für den demokratischen Rechtsstaat. Wider den autoritären Legalismus in der Bundesrepublik, in: Glotz, Peter (Hrsg.): *Ziviler Ungehorsam im Rechtsstaat*, Frankfurt/Main, 29-53.
- Höffe, Otfried 1999: *Demokratie im Zeitalter der Globalisierung*, München.
- Khalfan, Ashfaq/King, Jeff/Thomas, Bryan 2003: *Advancing the Odious Debt Doctrine*, Montreal.
- Kokaz, Nancy 2005: Theorizing International Fairness, in: *Metaphilosophy* 36: 1/2, January 2005, 68-92.
- Morgan-Foster, Jason 2003: The Relationship of IMF Structural Adjustment Programs to Economic, Social, and Cultural Rights: The Argentine Case Revisited, in: *Michigan Journal of International Law* 24, 577-646.
- Olivera, Oscar 2004: *Cochabamba! Water War in Bolivia*, Cambridge, Massachusetts.
- Olmos Gaona, Alejandro 2005: *La deuda odiosa. El valor de una doctrina jurídica como instrumento de solución política*, Buenos Aires.
- Olmos, Alejandro 2006: *Todo lo que usted quiso saber sobre la deuda externa y siempre se lo ocultaron. Quienes y como la contrataron*, Buenos Aires.
- Pogge, Thomas 1989: *Realizing Rawls*, Ithaca and London: Cornell University Press.

- Pogge, Thomas 2005: *World Poverty and Human Rights*, Cambridge.
- Rawls, John 1979: *Eine Theorie der Gerechtigkeit*, Frankfurt a.M.
- Raz, Joseph 1979: *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press.
- Romano, Cesare P. R. 1999: The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, in: *NYU Journal of International Law and Politics* 31, 709-51.
- Schill, Stephan 2007: Auf zu Kalypso? Staatsnotstand und Internationales Investitionsschutzrecht – Anmerkung zur ICSID-Entscheidung LG&E Energy Corp. vs. Argentina, in: *SchiedsVZ*, 4, 178-186.
- Solón, Pablo/Rodríguez, Denisse 2007: *El agua en los países Andinos y los Acuerdos de Libre Comercio*, La Paz.
- UNDP 1999: *Human Development Report 1999*, New York.
- Zangl, Bernhard 2006: *Die Internationalisierung der Rechtsstaatlichkeit. Streitbeilegung in GATT und WTO*, Frankfurt/Main.
- Zangl, Bernhard/Zürn, Michael 2004: Make Law, Not War: Internationale Verrechtlichung als Baustein für Global Governance, in: Zangl, Bernhard/Zürn, Michael (Hrsg.): *Verrechtlichung - Baustein für Global Governance?*, Bonn.
- Ziegler, Jean 2005: *Das Imperium der Schande: der Kampf gegen Armut und Unterdrückung*, München.

Interviews:

- Mario Cafiero, Former Deputy of the Argentine Congress, Foreign Debt Activist, Buenos Aires/Argentina, 6.12.2007.
- Thomas Kruse, Assistant to the Special Ambassador for Commerce and Integration, La Paz/Bolivia, 21.12.2007.
- Julio Gambina, Spokesperson of Attac Argentina, Buenos Aires/Argentina, 27.11.2007.
- Alejandro Olmos Gaona, Instituto Universitario Isedet, Expert concerning Argentinas Foreign Debt, Buenos Aires/Argentina, 22.11.2007.
- Jim Shultz, Director of the Democracy Centre, Cochabamba/Bolivia, 18.12.2007.

BIOGRAPHICAL NOTE

Gerald Neubauer is research fellow at the Collaborative Research Center “Transformations of the State”, University of Bremen.

Telephone: +49 421 218 8703

Fax: +49 421 218-8721

E-Mail: gerald.neubauer@sfb597.uni-bremen.de

Address: University of Bremen, Collaborative Research Center „Transformations of the State“, Linzer Strasse 9a, D 28359 Bremen