

Social Dimensions of International Law

Joint Symposium Munich 2012 of Ludwig-Maximilians-Universität München, Ritsumeikan University Kyoto
and Seoul National University

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1. Auflage 2016. Taschenbuch. 106 S. Paperback
ISBN 978 3 8316 4324 0
Format (B x L): 14,5 x 20,5 cm

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Herbert Utz Verlag · München

Europäisches und Internationales Recht

herausgegeben von

Prof. Dr. Georg Nolte und Prof. Dr. Rudolf Streinz

Humboldt-Universität zu Berlin und Ludwig-Maximilians-Universität München

begründet von

Prof. Dr. Bruno Simma

unter dem Titel Europarecht–Völkerrecht

Band 84



Bibliografische Information der Deutschen Nationalbibliothek: Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

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ISBN 978-3-8316-4324-0

Printed in EU

Herbert Utz Verlag GmbH, München

089-277791-00 · www.utzverlag.de

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Social Dimensions of International Law

Rudolf STREINZ

I. Introduction

I am very glad that we can have our joint symposium together with our Japanese and Korean colleagues from Ritsumeikan University of Kyoto and Seoul National University (SNU) in cooperation with the Munich Max-Planck-Institute (MPI) of Social Law and Social Policy. This cooperation is based on manifold reasons: Firstly, we would not have such spatial and organisational capacities at the Ludwig-Maximilians-University. Secondly, our faculty of law is interested in strong connections and fruitful cooperation with the Munich Max Planck Institutes. The branch of public international law is connected especially with the MPI of Social Law and Social Policy because of the director of this MPI, my dear colleague Ulrich Becker. As an honorary professor he is not only a Member of our Faculty but also eagerly engaged in giving lectures and seminars within our general programme. He is not only an expert in social law but in European law, too, which is not least proven by his contributions to the third edition of Jürgen Schwarze's commentary on European law that has been published recently. Thirdly, this Max Planck Institute deals with international law as one of its main subjects. Unfortunately we were not successful in getting a chair of public international law at the MPI because the elected colleague, Ms Angelika Nußberger, did not accept her call and stayed at Cologne University for personal reasons. Now Ms Nußberger started her position as judge at the Strasbourg European Court of Human Rights. Nevertheless, there are a lot of international activities of the MPI, especially in cooperation with South-East Asia.

Firstly, I want to give a general overview on social aspects of international law, specifically with a view to economic matters and the consequences of globalization. Then I will present the special aspects of our symposium in this context. In my conclusion I want to demonstrate that the social dimension of international law is a special field of international law that needs and deserves more attention and research.

II. General overview: Social Aspects in International Law

Social aspects are an essential part of international human rights regimes. They are laid down in a lot of international treaties. To some extent they can be found in the other sources of international law that are mentioned in Article 38 of the

Statute of the Hague International Court of Justice of 26 June 1945¹: customary international law and general principles of international law.

1. Universal international law

a) Law of Treaties

aa) General Treaties on Human Rights

(1) The United Nations Charter (UN Charter)

First of all, the Charter of the United Nations of 26 June 1945² proclaims as its purposes “to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion” (Art. 1 No. 3 UN Charter). With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the United Nations shall promote higher standards of living, full employment, conditions of economic and social progress and development, solutions of international economic, social, health, and related problems, and international cultural and educational co-operation and universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion (Art. 55 UN Charter). All members of the UN pledge themselves to take joint and separate actions in co-operation with the UN for the achievement of these purposes (Art. 56 UN Charter).

(2) The Universal Declaration of Human Rights as a starting point for social rights

There is, however, no precise definition of these obligations in the UN Charter. Concrete rights were defined by the Universal Declaration of Human Rights (UDHR) of 10 December 1948³. Social aspects can be found in many provisions of this Declaration. For example, the prohibition of slavery and servitude (Art. 4 UDHR), the right to marry and to found a family (Art. 16 UDHR), the right to own property (Art. 17 UDHR) and the right to freedom of association (Art. 20 UDHR) include general social aspects. A special and very important aspect

¹ 15 United Nations Conference on International Organization (UNCIO) 355. See Malcolm D. Evans, *Blackstone's International Law Documents*, 10th edn 2011, p. 30. In force since 24 October 1945. 192 States parties.

² 892 United Nations Treaty Series (UNTS) 119. See Evans (note 1 above), p. 9.

³ United Nations General Assembly (UN GA) Resolution 217 A (III). See Evans (note 1 above), p. 42.

within this topic is the right of everyone, as a member of society, to social security. We know that this is not a matter of course, even in highly developed countries. Social rights are essential for the fruition of conventional, so-called “classic” political rights like the right to life, liberty and the security of person (Art. 3 UDHR) or the right to freedom of opinion and expression (Art. 19 UDHR). Therefore everyone, as a member of society, has the right to social security and is entitled to realization of the economic, social and cultural rights indispensable for his dignity and for the free development of his personality (Art. 22 UDHR). Typical social rights are the rights of workers. The Universal Declaration postulates the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment and the right to equal pay for equal work. As regards the latter right, it has proven very difficult to secure its equal enjoyment between men and women up until today. The Universal Declaration also touches on the issue of very low salaries. It includes the right to just and favourable remuneration for everyone who works ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection, and the right to form and to join trade unions for the protection of individual interests (Art. 23 UDHR). It provides the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay (Art. 24 UDHR). Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age and other lack of livelihood in circumstances beyond his control (Art. 25 para 1 UDHR). Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection (Art. 25 para 2 UDHR). The Declaration recognizes the essential importance of education. Everyone has the right to education, which shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit (Art. 26 para 1 UDHR), not on the basis of money. There are some essential aims of education named: It shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups (Art. 26 para 2 UDHR). The Declaration includes cultural rights, too: Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits (Art. 27 para 1 UDHR). Furthermore, the Declaration mentions intellectual property law: “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the

author” (Art. 27 para 2 UDHR). Everyone is entitled to a social and international order in which his rights and freedoms set forth in the Declaration on Human Rights can be fully realized (Art. 28 UDHR). Vice versa, everyone has duties to the community in which the free and full development of his personality is possible (Art. 29 para 1 UDHR).

Albeit a resolution of the General Assembly of the United Nations and therefore only a recommendation, the Universal Declaration of Human Rights nevertheless is of legal importance. It was the starting point for the development of customary international law and for special international treaties as well as for the development of constitutional law. For example, the Fundamental Rights part of the Basic Law for the Federal Republic of Germany of 23 May 1949 was based, *inter alia*, on the Universal Declaration of Human Rights⁴.

(3) *The International Covenant on Economic, Social and Cultural Rights*

Human Rights as they have been laid down in the Universal Declaration were supposed to be transformed in legally binding documents. This was realized on 16 December 1966 in the International Covenant on Civil and Political Rights (ICCPR)⁵ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶. While the former includes the “classic” freedoms the latter adds the social dimension of Human Rights. It has been ratified by 170 states. It includes the rights which were announced in the Universal Declaration of Human Rights of 1948. In contrast to it the Covenant is legally binding and its provisions are more detailed. Article 7 ICESCR provides the right to work under just and favourable conditions which ensures, “as a minimum standard”, fair wages, equal remuneration for equal work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, and guaranteeing a decent living for the workers and their families, safe and healthy working conditions, equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence, rest leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays. The right to form trade unions and to join them of one’s own choice must be ensured, too (Art. 8 ICESCR).

⁴ See Thilo Rensman, *Wertordnung und Verfassung*, 2007, p. 25-34, concerning the social dimension of human dignity *ibid.* p. 40-41.

⁵ 999 UNTS 171. See Evans (note 1 above), p. 110. In force since 23 March 1976. 167 States parties.

⁶ 993 UNTS 3. See Evans (note 1 above), p. 97. In force since 3 January 1976. 160 States parties.

Furthermore one can find again: the rights of everyone to social security (Art. 10 ICESCR), to an adequate standard of living (Art. 11 ICESCR) and “to the enjoyment of the highest attainable standard of physical and mental health”, which has to some extent to be put in more concrete terms by the State Parties, e.g. by the provision for the reduction of the stillbirth-rate and of infant mortality or the creation of conditions which would assure to all medical service and medical attention in the event of sickness (Art. 12 ICESCR). The right of everyone to education is set out in equal detail as in the Universal Declaration. Primary education shall be compulsory and available free to all, secondary education accessible to all in particular by the progressive introduction of free education, and higher education in particular “by the progressive introduction of free education” (Art. 13 ICESCR). According to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights of 10 December 2008⁷, which so far has not entered into force, a Committee can accept communications which are submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by the State Party (Art. 2 Optional Protocol), and the Committee can examine these communications and give views to the State Party concerned. This is a parallel to the (First) Optional Protocol to the International Covenant on Civil and Political Rights⁸ which has been in force since 1966 counting 111 Member States until today.

bb) Special Treaties on Human Rights

On the universal level there are a lot of special treaties on human rights. As far as their social dimension is concerned, e.g. according to the International Convention on the elimination of All Forms of Racial Discrimination of 21 December 1965⁹, States Parties must undertake to prohibit and to eliminate racial discrimination in all forms and to guarantee the right to everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment, e.g. of “economic, social and cultural rights”, in particular the rights to work with equal pay etc., to form and join trade unions, to public health, to education and to equal participation in cultural activities (Art. 5). Similar provisions exist in the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979¹⁰.

⁷ A/RES/63/117. See Evans (note 1 above), p. 104.

⁸ 999 UNTS 171. See Evans (note 1 above), p. 122. 113 States parties.

⁹ 666 UNTS 195. See Evans (note 1 above), p. 89. In force since 4 January 1969. 174 States parties.

¹⁰ 1249 UNTS 13. In force since 3 September 1981. 188 States parties.

b) Customary international law

The fundamental principles of human rights form part of customary international law, although there is not necessarily an agreement on their precise scope. Therefore only a few rights are unanimously and agreeing in substance accepted to be customary law and even a peremptory norm of international law (*ius cogens*), e.g. the prohibition of slavery or slave trade, the prohibition of genocide, racial discrimination or the rule banning torture¹¹. Concerning the law of international investment disputes, the fair and equitable treatment standard may be acknowledged to be customary international law¹².

c) General principles of international law

This category of international law is the most difficult and most controversial of the categories specified in Article 38 para. 1 of the Statute of the International Court of Justice. Where general principles of law are not derived from internal law but have originated in international legal relations, there is no sharp difference to customary international law¹³. Therefore the fair and equitable treatment standard may also be recognized as a general principle of international law. General principles of law may also be a source of human rights granting a minimum of social standards¹⁴.

d) Multilateral non-binding instruments

As mentioned above in the context of the Universal Declaration of Human Rights of 1948, even non-binding instruments are relevant in a legal sense, by setting standards and in some cases by providing starting points for the development of legally binding instruments. Another example is the influence of

¹¹ See Ian Brownlie, *Principles of Public International Law*, 7th edn 2008, p. 562 et sequ.; Malcolm N. Shaw, *International Law*, 6th ed. 2008, p. 124, 275, 807 with further references; Christian Tomuschat, *Human Rights. Between Idealism and Realism*, 3rd edn 2014, p. 45; Antonio Cassese, *International law*, 2nd edn, 2005, p. 393 et sequ. But even if the prohibition of torture is accepted as a norm of customary international law and even *ius cogens*, and even if in theory the term “torture” is clear, there are in practice different points of view even in western states, especially the USA, on the question of whether certain measures must be categorized as “torture” or not. Concerning fundamental divergences in the “western” point of view of some human rights see Tomuschat, p. 58 et sequ.

¹² See Anthony Aust, *Handbook of International Law*, 2010, p. 348.

¹³ Karin Oellers-Frahm, in: Bruno Simma (ed), *The Charter of the United Nations. A Commentary*, 3rd edn 2012, Art. 92 para. 102.

¹⁴ See Felix Ekardt/Anna Hyla, *Human Rights, the Right to Food, and WTO. Global Constitutionalisation and the Example of Bioenergy*, 1 (10 et sequ.).

the Helsinki Final Act of 1975¹⁵. So e.g. the Declaration of the International Labour Organisation on Fundamental Principles and Rights at Work of 18 June 1998¹⁶ is relevant to some extent because the ILO Members generally have an obligation to respect “in good faith and in accordance with the Constitution, the principles concerning the fundamental rights” which are the subject of ILO Conventions, even in the absence of ratification¹⁷.

e) The so-called three “generations” of Human Rights

According to the theory of Karel Vasak, there are three generations of human rights¹⁸. The first generation¹⁹ deals essentially with liberty and participation in political life. It serves negatively to protect the individual from excesses of the State (*status negativus*) granting the right to life, freedom of religion, freedom of speech, freedom of assembly and association. But these rights are also necessary for a fair political discourse, which is a compelling corollary of voting rights (*status activus*). The second generation²⁰ guarantees fundamental economic, social and cultural rights with equal conditions and treatment. Such rights are the right to just and favourable working conditions, the rights to food²¹, housing, healthcare, social security²² and the right to education²³ (*status positivus*). Without these economic, social and cultural rights the enjoyment of the rights of

¹⁵ The Final Act of the Conference on Security and Cooperation in Europe of 1 August 1975, ILM 14 (1975), p. 1292. See Ian Brownlie/Guy S. Goodwin-Gill, *Brownlie's Documents on Human Rights*, 6th ed 2010, p. 910 (No. 106). Concerning the significance of the Helsinki Final Act see Brownlie (note 11 above), p. 560.

¹⁶ See Brownlie/Goodwin-Gill (note 15 above), p. 627 (No. 76). Annex revised 15 June 2010.

¹⁷ See Angelika Nußberger, *Evaluating the ILO's Approach to Standard-Setting and Monitoring in the Field of Social Security*, in: Eibe Riedel (ed), *Social Security as a Human Right. Drafting a General Comment on Article 9 ICESCR – Some Challenges*, 2007, p. 103 (103 et sequ.).

¹⁸ Karel Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights*, UNESCO Courier November 1977. Critical on this terminology Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law*, 2009, p. 11 (No. 1.15).

¹⁹ See e.g. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, *The American University Law Review* 32 (1982), p. 1 (17 et sequ., 32).

²⁰ See e.g. Sohn (note 19 above), p. 32 et sequ.

²¹ See Kerstin Mechlem, *Food, Right to, International Protection*, in: Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol. IV, 2012, p. 143-151.

²² See Angelika Nußberger, *Social Security, Right to, International Protection*, in: Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol. IX, 2012, p. 241-250.

²³ See Douglas Hodgson, *Education, Right to, International Protection*, in: Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law*, vol. III, 2012, p. 339-348.

the first generation would not be effective²⁴. They entail to some extent the limitation of first generation rights like the right to property, but must not be used to the effect that those rights which are fundamental for the human rights system are disregarded or even abolished. Therefore a balance between the first and the second generation rights must be found. The third generation²⁵ goes beyond the rights of the individual²⁶ and grants group and collective rights like the right to self-determination of the peoples, the right to economic and social development, the right to natural resources, to participation in cultural heritage, but also rights whose development is in the interest of mankind as a whole like the right to a healthy environment and to sustainability and the right to peace, and collective rights of groups within a country like the right to intergenerational equity.

f) Economic aspects of social principles of international law

aa) Inclusion of social principles in bilateral investment treaties (BITs) and multilateral investment treaties

International investment agreements, bilateral investment treaties (BITs) and multilateral investment treaties like the Energy Charter Treaty²⁷ have a social dimension as well. In order to attract foreign investment the legal protection of investment is necessary. Granting stability of the legal conditions of the investment, the host State at the same time limits its own scope to exercise national policy. It is a challenge, especially for developing countries, to strike a balance between attracting foreign investments and retaining policy autonomy²⁸. Especially the social dimensions of human rights of the second generation and the third generation must be protected.

²⁴ See Jeremy Waldron, *Liberal Rights: Collective Papers*, 1993, p. 7 concerning the critics of the second generation rights which may jeopardize the first generation rights: "If one is really concerned to secure civil or political liberty for a person, that commitment should be accompanied by a further concern about the conditions of the person's life that make it possible for him to enjoy and exercise that liberty." See also Ekhart/Hyla (note 14 above), p. 7: "The human rights liberties should unambiguously be interpreted to include the basic physical preconditions of freedom – which implies a right to food. For without such a mere subsistence and without health and life there is no freedom."

²⁵ See e.g. Sohn (note 19 above), p.48 et sequ.

²⁶ Therefore some authors think they cannot be human rights, see Ssenyonjo (note 18 above), p. 11 (No. 1.14) with further references.

²⁷ Official Journal of the European Communities 1994 L 380/24.

²⁸ UNCTAD, World Investment Report 2003, p. 89 et sequ.

For a long time international investment law and human rights law were perceived as two unconnected branches of international law²⁹. But the two have a lot in common³⁰. For the treatment of investors the standard of fair and equitable treatment (FET) includes the principles of non-discrimination, due diligence, procedural fairness and proportionality which are also basic principles of human rights. On the other hand, the competing obligations of host States to respect the human rights of all individuals living on their territory, e.g. health protection or consumer protection or the protection of the environment or to guarantee the human right to water for everybody, may collide with other obligations they have accepted vis-à-vis foreign investors³¹. Therefore, when concluding BITs, host States must take into consideration their human rights obligations, and judges and arbitrators must seek a balance between the conflicting rights³².

bb) Inclusion of social principles by free trade agreements

There is an economic as well as a social rationale for the inclusion of provisions to improve labour standards and working conditions in trade agreements. Such provisions have proliferated. Most of them include promotional elements. Dispute settlements and economic sanctions, however, are rare³³.

cc) Inclusion of social principles in WTO-law

Although the law of the World Trade Organization (WTO) and international human rights law have a different focus, the WTO recognises that the process of trade liberalization should also take into account non-trade issues. These issues include the protection of human rights, such as the freedom from hunger, the right to adequate food and the continuous improvement of living conditions (see

²⁹ See Pierre-Marie Dupuy/Jorge E. Vinuales, *Human Rights and Investment Disputes: Integration in Progress*, in: Marc Bungenberg/Jörn Griebel/Stephan Hobe/August Reinisch (eds.), *International Investment Law*, 2015, p. 1739-1767 (1739).

³⁰ See *ibid.*, p. 1745-1759.

³¹ See *ibid.*, p. 1751 et sequ. with further references.

³² Concerning the incorporation of human rights law in investment disputes see *ibid.*, p. 1759-1766. See also Ryan Suda, *The Effect of Bilateral Investment Treaties on Human Rights Enforcement and Realization*, in: Olivier De Schutter (ed.), *Transnational Corporations and Human Rights*, 2006, p. 73-160; Olivier De Schutter/Johan Swinnen/Jan Wouters (eds.), *Foreign Direct Investment and Human Development. The Law and Economics of International Investment Agreements*, 2013. See also Leyla Davarnejad, *Strengthening the Social Dimension of International Investment Agreements by Integrating Codes of Conduct for Multinational Enterprises*, OECD Global Forum on International Investment, 2008 (www.oecd.org/investment/gfi-7).

³³ See International Labour Organization (ILO), *International Institute for Labour Studies, Social Dimensions of Free Trade Agreements*, 2013, p. 5.

Art. 11 ICESCR).³⁴ Especially a fair balance between the interests protected by international intellectual property law, e.g. concerning pharmaceutical products, and international human rights law, e.g. the right to health also for the people of poor countries, must be found. In general, Art. XX GATT lists specific public policy reasons like public morals, the protection of human, animal or plant life or health, additionally e.g. the protection of children and other legitimate interests, that justify the deviation from GATT principles³⁵.

dd) In general: Inclusion of social principles by Corporate Social Responsibility (CSR)

At least having in mind the effects on the public reputation of companies, social principles are included in the concept of Corporate Social Responsibility³⁶. This aspect is taken more and more seriously³⁷.

2. Regional international law

a) The need of regional instruments to protect human rights

Having in mind the Charter of the United Nations, the Universal Declaration on Human Rights as a starting point for treaties like the Conventions of 1966 and customary international law, human rights are universally acknowledged to be a matter of international law. But there are questions concerning the real universality of human rights because of the cultural differences between the many nations of the world³⁸ and their different political systems³⁹. Such

³⁴ See Fons Coomans, *Application of the International Covenant on Economic, Social and Cultural Rights in the Framework of International Organisations*, Max Planck UNYB 11 (2007), p.359-390 (372-375).

³⁵ See Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence*, IDLO Voices of Development Jurist Paper Series, Vol. 2 No. 2, 2005, p. 10-17.

³⁶ See Angelica Bonfanti, *Applying Corporate Social Responsibility to Foreign Investments: Failures and Prospects*, in: Tullio Treves/Francesco Seatzu/Seline Trevisanut (eds.), *Foreign Investment, International Law and Common Concerns*, 2014, p. 230-246. See also Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA), *International aspects of corporate social responsibility (CSR) – Practical advice for companies*, 2006.

³⁷ See Boris Kasolowsky/Thomas Volland, Die „Ruggie Revolution“ – Menschenrechte im unternehmerischen Handeln, *Anwaltsblatt* 2014, p. 388-392.

³⁸ See Tomuschat (note 11 above), p. 47 et sequ. Concerning different points of view concerning the ICCPR see *ibid.*, p. 56.

³⁹ This was evident as long as the differences between the Western group of states and the so called Eastern bloc states under the hegemony of the Soviet Union existed, see e.g. Rudolf Streinz, *Meinungs- und Informationsfreiheit zwischen Ost und West. Möglichkeiten und Grenzen intersystemarer völkerrechtlicher Garantien in einem systemkonstituierenden*

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herausgegeben von

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