International Prosecution of Human Rights Crimes

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(Editors)

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Preface

In his separate opinion in the *Nuclear Weapons* case,[1] Judge Mohammed Bedjaoui, then the President of the International Court of Justice, called nuclear weapons "the absolute evil." There are a few other things which merit being called absolutely evil. They are the predicates of the International Criminal Court and of various domestic laws patterned on the Rome Statute: war crimes, crimes against humanity, genocide, and aggression. A conference organized by the Berlin-based Republikanischer Anwältinnen- und Anwälteverein (Republican Lawyers Association) and the New York-based Center for Constitutional Rights was held in Berlin in June 2005 under the title *Globalverfassung versus Realpolitik* (*Global Constitution versus Realpolitik*). It dealt with the tension between these universally accepted norms and the actual practice of governments in an age characterized by the ill-defined concept of the "war on terror."

This book is the outcome of that conference. It is intended for a wide variety of readers: academics, all kinds of jurists, as well as human rights activists, who sometimes know more about the applicable law than the legal experts. It owes its existence to a paradox: On the one hand, new structures for dealing with the most serious international crimes are being put into place. In addition to the International Criminal Court (ICC), there are the international tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY); the mixed national and international (hybrid) courts for Bosnia-Herzegovina, Cambodia, and Sierra Leone; and various domestic universal jurisdiction laws, such as those enacted by Belgium, Spain, and Germany. On the other hand, norms of substantive and procedural justice, which have been centuries in the making, are at risk of falling victim to "the war on terror" and the sacred cow of national security. Questions which appeared to have been definitely answered a few short years ago, are being debated anew: Is torture permitted under certain circumstances? What constitutes torture? Is preventive war a violation of the UN Charter? Are the Geneva Conventions inapplicable to certain combatants? How high up does command responsibility go? Are we back to the days of *inter armas silent leges*, with a new and very broad definition of "armas"?

Some of these questions, as well as others, are examined in the articles that follow. There are historical contributions, accounts of current practice under extraterritorial jurisdiction laws and principles, speculations about the future of universal

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[1] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Advisory Opinion of July 8, 1996, *ICJ Reports* 1996, p. 226.

jurisdiction, and discussions of the German Rumsfeld case as a prime example of justice defeated by realpolitik.

This is not a plea for one method of enforcing international human rights over others. Any experienced practitioner will choose among a plethora of tools and venues: international courts versus municipal courts; at the local level, state, or provincial courts versus national courts; criminal versus civil proceedings; old-fashioned tort actions versus new-fangled universal jurisdiction actions; complaints to domestic or international human rights bodies versus court cases—all of the above subject to the caveat "where applicable."

In addition to the choice of venue and procedure, lawyers and human rights activists, to the extent that they have freedom of choice, will have to prioritize among various plaintiffs. Some advocate a careful selection of plaintiffs calculated to advance the cause of extraterritorial or universal jurisdiction rather than setting it back. They argue that bringing prosecutions at or near the top of the pyramid of command responsibility is likely to lead to bad judicial precedents and retrogression in legislation, as in the case of the Belgian universal jurisdiction law; they would prefer a step-by-step approach beginning with establishing the accountability of foot soldiers and leading eventually to that of generals, to use a military analogy. As against this respectable view, one can propound the opposite: Prosecution of the foot soldier who applies the thumbscrew to a prisoner while letting the defense minister or commanding general who gives the green light for torture off the hook does nothing to counter a system-wide culture of illegality and paints an inaccurate picture of a few "rotten apples" in an otherwise law-abiding structure.

It is self-evident that in the world of realpolitik a case against a minister or president, particularly one still holding office, is more difficult to win than one against a corporal or sergeant. But this overlooks the benefits to be derived from the presentation of a carefully researched, detailed presentation of the case, which is likely to have ramifications in the court of public opinion—not in a narrow party-political sense, but in the crucially important sense of the triumph of justice over criminality. One should never bring a prosecution or lawsuit without being convinced of the rightness of one's cause, but not necessarily of the chances of victory in the real world.[2]

It is hoped that this book will contribute not only to the academic debate about law versus politics, but also to the elevation of law over politics.

New York, August 2006 Peter Weiss

[2] For a book-length exposition of this approach, see J. Lobel, *Success Without Victory* (2003).

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Part I

Fundamental Questions

Protection of Human Rights by Means of Criminal Law: On the Relationship between Criminal Law and Politics

Jörg Arnold[*]

This essay explores the theme "*Globalverfassung* versus *realpolitik*," where Globalverfassung is understood as the universal claim of human rights and realpolitik is criticized as a means that limits human rights or prevents their realization.[1]

Globalverfassung refers not only to the universality of human rights and their implementation, but it also bears on the concept of globalization. Universal jurisdiction is frequently mentioned as a positive, desirable effect of globalization. A detailed discussion of the issues surrounding international legal globalization is not possible here, especially because the treatment of these issues would require addressing the political, cultural, and economic context of globalization, a complex subject that—it appears—has not yet attracted the necessary attention from criminal law scholars and one that requires an interdisciplinary approach.[2] To begin with, one must question the real world application of universal jurisdiction and whether it endangers human rights themselves via a global criminal law policy.[3] When freedoms originally created as defense against the *state's* monopoly of force

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[*] I am grateful to Emily Silverman, Max Planck Institute for Foreign and International Criminal Law, for her valuable assistance. The German version of this essay was published in *Ad Legendum* No. 4/2005, pp. 183–187.

[1] Otto von Bismarck justifies realpolitik thus: "We are not presiding over a judgeship, but making German policy." (See http://de.wikipedia.org/wiki/Realpolitik).

[2] But see O. Höffe, *Gibt es ein interkulturelles Strafrecht? Ein philosophischer Versuch* (1999). See also H. Däubler-Gmelin and I. Mohr (eds.), *Recht schafft Zukunft, Perspektiven der Rechtspolitik in einer globalisierten Welt* (2003); H. Brunkhorst and M. Kettner (eds.), *Globalisierung und Demokratie* (2000); R. Voigt (ed.), *Globalisierung des Rechts* (1999–2000); O. Höffe, *Wirtschaftsbürger, Staatsbürger, Weltbürger. Politische Ethik im Zeitalter der Globalisierung* (2004); H. D. Assmann and R. Sethe (eds.), *Recht und Ethos im Zeitalter der Globalisierung* (2004); Adolf-Arndt-Kreis (ed.), *Sicherheit durch Recht in Zeiten der Globalisierung* (2003); A. L. Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (2001).

[3] See J. Arnold, in R. Gröschner (ed.), *Die Bedeutung P. J. A. Feuerbachs (1775-1833) für die Gegenwart, ARSP-Beiheft No. 87* (2003), p. 107 at p. 122.

are translated into a catalog of opportunities for a *global* monopoly of force, often the resulting interventions violate the democratic and human rights values that they seek to protect.[4]

First of all, however, the practice of human rights protections by means of national criminal law deserves attention, though with specific reference to its international bases. Four postulates may provide impetus for an examination.

I. Factors Influencing Protection of Human Rights through Criminal Law

The first postulate is as follows: In addition to its dependence on politics, protection of human rights by means of criminal law is influenced by a multitude of other factors. Criminal law and human rights are connected to different legal cultures and different social, economic, political, cultural, and historical interests and conditions.[5] This becomes particularly apparent in national processes of democratic transformation—that is, when serious violations of human rights by former political systems are addressed by means of criminal law. In countries where the political will to prosecute was particularly strong, as in Germany after 1989 with regard to human rights violations committed in East Germany, the judicial system undertook comprehensive criminal investigations and punishment of state-sponsored crime.[6]

The post-1989 political changes in Eastern and Central European countries such as Poland and Hungary similarly demonstrated these processes, though to a lesser extent.[7] In contrast, the prevailing Russian political mentality is one of closing the book, expressed in legal practice through a complete absence of criminal prosecution.[8] Freedom from prosecution (*impunidad*) can also be observed in Latin American countries such as Argentina, Brazil, Chile, and Uruguay following the end of the military dictatorships in the 1970s and 1980s.[9] In South Africa in 1989–90, lack of criminal prosecution was connected with a peaceful system change and was even considered a prerequisite for such change. It is just now becoming apparent, however, years after the transition, that refraining from prosecu-

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4 See J. Hirsch, *Freitag* No. 4/2001.

5 See H. J. Sandkühler, *Warum brauchen Menschen Menschenrechte? Address on UNESCO Philosophy Day*, University of Bremen, December 2004, http://www.unesco-phil.uni-bremen.de/texte/unesco-tag_2004_Menschenrechte.pdf.

6 See K. Marxen and G. Werle, *Die strafrechtliche Aufarbeitung von DDR-Unrecht. Eine Bilanz* (1999); A. Eser and J. Arnold (eds.), *Strafrecht in Reaktion auf Systemunrecht, Vol. 2, Landesbericht Deutschland* (2000); J. Arnold, *Freitag* No. 17/2001; No. 18/2001.

7 See A. Eser and J. Arnold (eds.), *Strafrecht in Reaktion auf Systemunrecht, Vol. 5, Landesberichte Polen und Ungarn* (2002).

8 See A. Eser and J. Arnold (eds.), *Strafrecht in Reaktion auf Systemunrecht, Vol. 7, Landesberichte Russland, Weißrußland, Georgien, Estland, Litauen* (2003).

9 See A. Eser and J. Arnold (eds.), *Strafrecht in Reaktion auf Systemunrecht, Vol. 3, Landesbericht Argentinien* (2002).

tion asked a great deal—sometimes too much—of many victims of serious human rights violations. In Spain, for example, this is only now leading to the development of a "culture of memory,"[10] but one in which criminal law plays no role.

Uniform concepts are apparent in a discussion of the political goals of the criminal-law response to the past, however loosely composed they may be. While for one country, the goal of non-prosecution is reconciliation (for example, South Africa, 1990), for another, prosecution is a means to achieve reconciliation (for example, Germany after 1989). If for one country stabilizing the system is the goal of criminal-law responses to the past (Germany after 1989), for another, it is the act of refraining from punishment that creates conditions conducive to a peaceful transition.

Despite the fact that criminal law responses to serious human rights violations depend on political will, studies conducted by the Max Planck Institute on the role of criminal law in dealing with the past after a political system change also indicate the significance of numerous other factors. Political will, for its part, correlates with a number of different variables: the concrete historical, religious, and transnational conditions of each individual system change. Parameters that play a role include the replacement of the political elite and the country's economic capacity—that is, its resources. The latter also crucially influences the implementation of policies for dealing with the past (*Vergangenheitspolitik*) in the areas of rehabilitation, compensation, and restitution.

Socio-cultural and socio-psychological factors are also influential in the relationship between perpetrators and victims. For example, one speaks typically of a Russian culture of forgiveness, but in Germany after 1989 a variety of victims' organizations, in addition to demanding greater compensation for injustices suffered, called vigorously for punishment of the perpetrators. Conciliation and reconciliation were rarely mentioned. Here, the significance of differing religious views should not be underestimated, such as evidenced, for example, by the willingness to seek reconciliation in South Africa.

II. Differing Concepts of Human Rights

Not surprisingly, states' views on punishment, retribution, and reconciliation vary just as fundamentally as do their understandings of human rights. This is the subject of the second postulate, which looks at these fundamental differences without detailing the concrete effects of differing human rights concepts on criminal law in each case.

During the Cold War, characterized by intense rivalry between the two great power blocs, state socialism's understanding of human rights—where individuality and freedom were accepted only within narrow state, political, and collective bounds—collided with the concept of human rights in constitutional democratic

[10] See reports on conference on "Culture of Memory" in *Frankfurter Rundschau*, May 31, 2005; *Die Welt*, May 26, 2005; *die tageszeitung*, May 31, 2005.

societies, which called for the human being's freedom from the state as well as for freedoms guaranteed by the state. Indeed, the understanding of human rights under state socialism had become so ingrained in the Soviet Union over the course of seventy years, and in the other Eastern and Central European countries over the course of forty years, that democratic concepts still find limited traction there. Such concepts prove difficult because economic, social, and cultural rights, which were the starting point for the understanding of human rights in state socialism (while political rights and freedoms were largely negated), are found at the bottom of the human rights spectrum in societies undergoing transformation.

Yet, an understanding of human rights that defines political rights only within the narrow confines of the state and the collective and makes civic duties absolute is not purely the invention of now defunct European state socialism. Such views prevail, for example, in China, where they cannot be ascribed directly to a wrongly understood, dogmatic, and inhumane Marxism, such as was practiced in the socialist countries of Europe. Crucial to the understanding of human rights in China, instead, are the philosophical and religious teachings of Confucianism, which see the human being from the outset not primarily as an individual but as a social being, though various old school, state-socialist influences cannot be ignored.[11]

In contrast, in Africa a human rights concept based on two archetypical arguments prevails. First, the concept adopts pre-colonial traditions "in order to weaken the cultural alienation of colonial rule and protect Africa's autochthonous cultural identity. Second, it views the continent as persisting in a state of underdevelopment and dependence."[12] Human rights in this form thus apply not to all people, but only to members of a particular culture. This African concept of human rights is interpreted as something beyond individualist and collectivist ideas.[13] Islam offers yet another interpretation of human rights.[14] "Classic" Islamic law, or Sharia, which is still applied to some extent today, and modern human rights contradict one another in part because the former stems from the first century of Islamic history. Based on the Koran, Sharia law functions not only as a standard for the faithful, but as a source of legislation. Cruel punishments are justified by God's right of punishment (*Strafanspruch*).[15]

Whereas during the Cold War era, two different human rights concepts dominated the discourse, the post-Cold War era fostered recognition of differences among the understanding of human rights in Western democracies—at first gradually, then ever more clearly. In reality, they had long existed. The Swiss human rights activist and writer Gret Haller has described these differences, especially as they exist between Europe and the United States.[16]

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[11] See also H.-P. Schneider, in N. Paech et al. (eds.), *Völkerrecht statt Machtpolitik* (2004), pp. 339 et seq.

[12] U. Tonndorf, *Menschenrechte in Afrika* (1997), p. 100.

[13] Id., p. 122.

[14] See H. Bielefeldt, *Europäische Grundrechte-Zeitschrift* 1990, pp. 489 et seq.

[15] See H. Bielefeldt, *Philosophie der Menschenrechte* (1998), p. 132; H. Bielefeldt, *supra* note 14, p. 492.

[16] G. Haller, *Die Grenzen der Solidarität* (2004); G. Haller, *Deregulierung der Menschenrechte*, http://www.linksnet.de/drucksicht.php?id=579.

According to Haller, one conceptual difference consists in the fact that Europe has pursued a clear, internationally defined concept of human rights since World War II, in which each country is supervised by the community of nations in carrying out its duty to guarantee rights. In contrast, the United States has a more national concept of human rights. This leads to the United States' largely rejecting international legal obligations in the area of human rights and, in particular, refusing to submit to international supervisory mechanisms. Haller sees a second conceptual difference in the fact that, for the United States, international human rights are not primarily a legal matter, but rather a matter of political strength. For the United States, international treaties are of less significance than the combination of the rights anchored in the US Constitution and the country's understanding of constitutionality, democracy, and (American) nationhood. Therefore, the understanding of human rights in the United States is mainly determined by the religious and moral elements upon which the nation was founded. In Haller's view, both conceptual differences can be ascribed to the fact that in Europe the state itself guarantees human rights to the individual, while for the individual in the United States, human rights consist exclusively in the guarantee of freedom from the state.[17]

III. Erosion of Human Rights Protections

The fundamental transatlantic differences over human rights stem from the United States' historical view of itself, reaching far into the past, which strongly rejects the separation of law and morality that has taken place in Europe. But while those in power in the United States are unwilling to give up their understanding of human rights in favor of European-style rule-of-law principles, the state in many European countries is today no longer the guarantor of freedom and social rights, and has thus imperiled its own understanding of human rights. Discussions of criminal law development clearly demonstrate this.

In this context, the third postulate is as follows: Over the past several decades, the classic, liberal, rule-of-law concept of criminal law has transformed into a tool for regulating globalization, risk, and information societies. This type of criminal law parades legislatively in the guise of security law, intervention law, and, most recently, in the development of a special criminal law solely applicable to the "enemy" (*Feindstrafrecht*). It goes hand in hand with a dismantling of human rights—first gradually, but now with increasing rapidity—which frequently occurs in the name of human rights.

At first, proponents of this transformation of criminal law attempted to legitimate their goals by referring to the dangers posed by organized crime, which recognizes no national borders. Today the struggle against terrorism is the Trojan horse used to legitimate the departure from the idea of liberal criminal law based on the rule of law. German Constitutional Court judges Jaeger and Hohmann-

[17] G. Haller, *supra* note 16, pp. 10 et seq.

Dennhardt expressed this in another way in their dissent to a decision of the Court's First Panel on the admissibility of state wiretapping of private homes (*Großen Lauschangriff*). In their view, the issue today is no longer just one of preventing the beginnings of the dismantling of constitutional positions on basic rights, but of preventing a bitter end in which the concept of the human being created by such a development no longer resembles that of a liberal democracy governed by rule of law.[18]

Security has yet again trumped freedom as evidenced by recent challenges to formerly unshakeable legal guarantees such as human dignity. According to a new commentary on Article 1 of the Basic Law by the Bonn constitutional law scholar Matthias Herdegen in the respected Maunz-Dürig textbook, human dignity may be subject to balancing tests.[19] For example, questioning the absolute prohibition of torture is no longer taboo in German criminal law scholarship,[20] and the killing of bystanders is justifiable under the air security law.[21] Bonn constitutional theorist Günther Jakobs even goes a step further. Jakobs distinguishes between criminal law for citizens and criminal law for enemies. If we wish criminal law for citizens to retain its rule-of-law characteristics, says Jakobs, we must give another name to what we must do in order to combat terrorists if we wish to survive—that is, enemy criminal law and restrained war.[22] According to Jakobs,

> He who deviates on principle offers no guarantee of personal behavior; thus he cannot be treated as a citizen, but must be combated as an enemy. This combat occurs based on a legitimate right of citizens, namely, their right to security.[23]

Although Chief Federal Prosecutor Kai Nehm verbally rejected enemy criminal law, in the same breath he sharply criticized German courts for distancing themselves from the findings of intelligence agencies and from unreachable witnesses in terrorist trials. Nehm declared that, if the judicial system refuses to act, the political branch will "jump into the breach" and "create a diffuse crime of conspiracy." He said there was no desire for "enemy criminal law," but also none for "friend criminal law," in which Islamists are "protected only because Guantánamo—rightly—weighs heavily upon us."[24]

The conceptual distinction between citizen criminal law and enemy criminal law fails to express the political ideas behind these views. Hans-Jörg Albrecht, director of the Max Planck Institute, in an address to the Republican Lawyers Association, suggested the new legislation intervenes in civil society in such a way that

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[18] *Neue Juristische Wochenschrift* 2004, pp. 1020, 1022.

[19] See *Frankfurter Allgemeine Zeitung*, April 29, 2005, pp. 1 et seq.

[20] See K. Lackner and K. Kühl, *StGB, Kommentar*, 25th ed. (2004), § 32, margin note 17a; V. Erb, in *Münchner Kommentar zum Strafgesetzbuch, Vol. 1* (2003), § 32, margin notes 174 et seq.; V. Erb, *Die Zeit* No. 51/2004, p. 15; V. Erb, *Jura* 2005, p. 24.

[21] See K. Lackner and K. Kühl, *supra* note 20; Erb, *supra* note 20.

[22] G. Jakobs, in *Wen schützt das Strafrecht? Materialheft zum 29. Strafverteidigertag in Aachen* (2005), p. 15; G. Jakobs, *Höchstrichterliche Rechtsprechung Strafrecht* 2004, pp. 88 et seq.

[23] G. Jakobs 2005, *supra* note 22, p. 16.

[24] *Frankfurter Allgemeine Zeitung*, May 21, 2005, p. 4.

it "views its free spaces, and thus the substance of civil society, as potential dangers and places them under general suspicion. Immigration and asylum, religious organizations and political movements, ethnic minorities, foreign citizens and transnational communities, workplaces and fields of activity relevant to security and, finally, entire religions or countries become links for surveillance and in some cases for social and economic exclusion."[25]

Although the judicial branch clearly limits the idea of enemy criminal law—as seen, in the Hanseatic Court of Appeal's in Hamburg and the Federal Supreme Court's acquittal of Abdelghani Mzoudi of Morocco on charges of participation in the terrorist attacks of September 11, 2001—the following assessment can be made of the aforementioned developments in constitutional law: It is not only in authoritarian or totalitarian societies and not only in transitional societies that criminal law finds itself in the stranglehold of politics and power. Criminal law in democratically constituted Europe is increasingly subject to erosion. The factors that influence criminal law in transitional societies are not determinative. Criminal law in the constitutional democratic state is being robbed of its liberal character. Thus, in regard to democracy, we can now only speak of "defective" democracy, to borrow a term from democracy researchers.[26] The end of liberal democracy has already been affirmed, and is on its way to "gentle totalitarianism."[27]

IV. Consequences

The reality described in postulates I to III demands appropriate response. One solution could lie in international law, specifically international criminal law. The newly created International Criminal Court as well as the ad hoc tribunals for the prosecution of serious human rights violations in Yugoslavia and Rwanda serves this purpose. There are, in addition, so-called hybrid courts, which combine national judicial authority with international courts, such as those to investigate and punish serious human rights violations in Sierra Leone, East Timor, and most recently Cambodia. Furthermore, many national legal systems, prodded by the Rome Statute, have adopted provisions for criminal law protection of human rights. The German Code of International Crimes is a model in this area.[28]

These developments can be viewed with optimism. Despite the varying concepts of human rights and the differences in regional implementation, the universality of fundamental political rights is given consensual expression through supranational or internationally-oriented criminal law provisions for the prosecution of crimes under international law. Human rights are spottily and dissentingly practiced. Therefore, legal principles must gain force, serving as the lowest common

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[25] H.-J. Albrecht, *Informationsbrief des RAV* No. 91/2003, pp. 6–9.

[26] A. Croissant, *Von der Transition zur defekten Demokratie* (2002), pp. 31 et seq.

[27] J. Hirsch, *Das Ende der liberalen Demokratie*, http://www.links-netz.de/K_texte/K_-hirsch_postdemokratie.html.

[28] A. Eser and H. Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen, Vol. 1: Deutschland* (2003).

denominator in the creation of crimes under international law. Human rights in national criminal law can expect a positive outcome from such implementation.

Basic human existence[29] and human dignity are central to internationalization of human rights protection through criminal law. Human dignity is the normative reference point for intercultural and interreligious understanding.[30]

Starting with the United Nations Charter and the Universal Declaration of Human Rights, the principle of "human dignity as the elementary basis of the human rights system"[31] entered regional human rights documents, such as the American Convention on Human Rights, the African Charter of Human Rights, and the Universal Islamic Declaration of Human Rights. Because the Statute of the International Criminal Court followed the Geneva Conventions, which first protected human dignity via international criminal law, it also could adopt as a mission the protection of human dignity and state as positive law that every serious violation of international law is based on a violation of human dignity.[32]

Of course, significant international disagreements stemming from different concepts of human rights as well as from various other sources impede the protection of human dignity. The United States can once again serve as an example. The US administration's refusal to accede to the International Criminal Court occurs not least because of its particular understanding of state sovereignty and human dignity as an expression of national interest, which represents a "value in itself."

In regard to power politics and realpolitik, this means that open avowals of the universality of human rights and efforts to implement them globally are as ubiquitous as the *worldwide* practice of serious human rights violations. Ironically, the same policies that originally helped make it possible for human rights to become part of positive law later prevented the assertion of human rights via international criminal law (while often employing two different standards, as in the refusal to investigate NATO war crimes during the war in Yugoslavia)[33] and dismantled human rights on the national level, while creating enemy criminal law.[34]

Not surprisingly, protection of human rights by means of criminal law is extremely limited. Such awareness prevents many errors, misunderstandings, and illusions about the possibility of implementing human rights globally, at least by means of national or international criminal law. It would also be a misunderstanding to recognize the "balancing test"—now considered permissible—involving the absolute prohibition on the use of force, on the one side, and so-called humanitarian military interventions, on the other. Its recognition legitimizes such international punitive interventions and unconscionably erodes human dignity.

Stating this here signifies neither resignation nor a rejection of the "battle for justice." Protection of human rights by means of criminal law is indispensable, de-

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[29] See H.-P. Schneider, *supra* note 11, p. 344.

[30] H. Bielefeldt, *supra* note 14, p. 491.

[31] R. J. Schweizer and F. Sprecher, in K. Seelmann (ed.), *Menschenwürde als Rechtsbegriff, ARSP-Beiheft No. 101* (2004), pp. 127 et seq., 133.

[32] R. J. Schweizer and F. Sprecher, *supra* note 31, pp. 138 et seq., 157 et seq.

[33] G. Hankel, *Mittelweg 36* No. 3/2003, pp. 77 et seq., 87.

[34] See, e.g., J. Hirsch, *Freitag* No. 4/2001; N. Paech, *Freitag* No. 22/2001.

spite its limitations. How the "battle for justice" might look is impressively illustrated by the attempt undertaken in Germany to begin an investigation of US Secretary of Defense Donald Rumsfeld as well as other military and civilian leaders for torture perpetrated at the Abu Ghraib prison.[35] This attempt has failed for now, and its failure may have been "preprogrammed" by the relationship between law and politics. Germany's Chief Federal Prosecutor made the realpolitik decision that non-intervention in US affairs prevails over human rights. Yet "battles for justice" such as the aforementioned suit have an enormous effect on political discourse and may, by way of the criminal law, help call attention to the subject of human rights. Here, in particular, is a symbolic effect that should not be underestimated.

A similar symbolic effect was evident already in a 2003 suit brought against the German government for its support of the illegal Iraq war, namely, participating in AWACS reconnaissance flights, deploying tanks in Kuwait, and granting overflight rights. The Federal Prosecutor refused to investigate members of government suspected of planning an aggressive war under Section 80 of the German criminal code. Nevertheless, only through the discussion of the suit and the Federal Prosecutor's decision to reject it did it become clear that the relevant provision of the German criminal code is in reality a haven of unaccountability for those conducting and abetting aggressive war. This criminal law failure is diametrically opposed to the German Basic Law, which in Article 26 requires the punishment of any conduct disruptive to peace, and therefore illustrates the compelling need to work to bring national criminal law into conformity with the requirements of the Basic Law.[36]

This leads to the final postulate: The subject "Globalverfassung versus realpolitik" posits an idea of law (*Rechtsidee*) with an ideal. The "idea of law," based on universal human rights and inviolable human dignity, is linked with the ideal of human beings free from fear and want. This ideal, as stated in the International Covenant on Civil and Political Rights of December 19, 1966, can only be achieved under conditions "whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."[37] However, as Immanuel Kant pointed out, "Out of timber so crooked as that from which man is made nothing entirely straight can be carved."[38]

The freedoms and rights of the "crooked timber" of humanity cannot exist without a policy that enshrines human rights in positive law and that also creates the normative instruments necessary to guarantee these rights. Achieving such a

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[35] See Republikanischer Anwältinnen- und Anwälteverein and Holtfort-Stiftung (eds.), *Strafanzeige ./. Rumsfeld u. a.* (2005). See also the contributions of W. Kaleck and F. Jessberger in this volume.

[36] See J. Arnold, in K. Ambos and J. Arnold (eds.), *Der Irak-Krieg und das Völkerrecht* (2004), pp. 182 et seq. See also the decision of the Federal Administrative Court of June 21, 2005, according to which the Federal Republic of Germany is not obligated to support the illegal war against Iraq, http://bverwg.de/files/385bac46c40e252408e800418c-5b19c4/3060/2wd12-u-04.pdf.

[37] Quoted in H. J. Sandkühler, *supra* note 5, p. 3.

[38] Quoted in H. Bielefeldt, *supra* note 15, p. 79.

humane policy is primarily possible only through an active political debate—including the application of legal means—that recognizes the various concepts of human rights and their political, historical, religious, and cultural contexts. This requires active legal resistance to realpolitik. Such legal resistance is intrinsic to an international human rights movement that aims both for an open, unprejudiced dialogue on human rights and for concrete change in economic and social conditions as the basis for the progressive implementation of human rights.[39]

[39] See J. Hirsch, *Freitag* No. 4/2001; see also the contribution of P. Stolle and T. Singelnstein in this volume.

Global Constitutional Struggles: Human Rights between colère publique and colère politique

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I. Introduction

"The problem of international constitutionalism," as Philip Allott writes, "is the central challenge faced by international philosophers in the 21st century. It involves a fundamental re-conceiving of international society."[1] Not only philosophers, but lawyers as well, have reflected upon this central challenge: the United Nations Charter, the constitution of the WTO, the European Union's Constitution, a global political constitution not centered in the UN, global civil constitutions are all such non-state concepts of constitutionalism that draw global society's attention.[2] Clearly, we are dealing with "constitutional pluralism,"[3] in which the "self-fulfilling prophecy"[4] of the globalized semantics of constitution must be taken seriously. As long as its social substratum believes in its validity, a constitution provides society with a social surplus value.[5] This surplus value arises from the fact that the structural coupling of politics and law is achieved through an autological operation, which facilitates the mutual stimulation between politics and law in an era of globalization.[6]

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1 P. Allott, *International Law Forum du droit international* 2001, p. 12 at p. 16.

2 For references to different transnational constitutional concepts, see A. Fischer-Lescano, *Globalverfassung. Die Geltungsbegründung der Menschenrechte* (2005), pp. 195 et seq.

3 B. de Sousa Santos, *Towards a New Legal Common Sense: Law, Globalization, and Emancipation*, 2nd ed. (2002); see also A. Fischer-Lescano and G. Teubner, *Michigan Journal of International Law* 2004, p. 999.

4 N. Walker, *Modern Law Review* 2002, p. 317 at p. 333.

5 G. Teubner, in D. Nelken and J. Pribán (eds.), *Law's New Boundaries: Consequences of Legal Autopoiesis* (2001), p. 21.

6 For the paradoxes of this coupling, J. Derrida, *New Political Science* 1986, p. 7.

II. The Sovereignty Paradox

Globalization is a challenge that rouses the legal system to emancipate itself from a fixation on the institution of the state. This is why Jacques Derrida has suggested a dual emancipatory strategy: a systemic emancipation of global law, by redefining both its proximity to and its distance from transnational politics, as a means to facilitate the classical emancipatory ideal. According to Derrida,

> Politicization, for example, is interminable even if it cannot and should not ever be total. To keep this from being a truism or a triviality, we must recognize in it the following consequence: each advance in politicization obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited. This was true for example in the Declaration of the Rights of Man, in the abolition of slavery, in all the emancipatory battles that remain and will have to remain in progress, everywhere in the world, for men and for women. Nothing seems to me less outdated than the classical emancipatory ideal.[7]

But how can this be achieved? The Enlightenment philosopher Immanuel Kant tried to solve the difficult relationship between politics and law using the concept of a social contract. But this philosophical model contained a fundamental tautology: the creation of a legally binding social contract assumes the legal validity of contracts.[8] It seems that there is no solution to this fundamental paradox, which consists in the fact that law defines law and that the legal foundation cannot be externalized in a convincing way, either in national legal systems or in international public law. Whereas both Kelsen's "basic norm" and H.L.A. Hart's ultimate rule of recognition oscillate between facts and norms, natural law is only law for those who believe in natural law. The plurality of possible observer positions leads to the conclusion that there is no legal theoretical consensus regarding the foundations of those legal systems.

Also, the fundamental paradox of the political system cannot be eliminated. As in the concept of "natural rights" described by Jeremy Taylor (1613–1667) – "The right of nature is a perfect and universal liberty to do whatsoever can secure or please me" – "equal sovereignty" as a "natural state's right" is a paradox. Consequently, Georges Scelle, Gustav Radbruch, and Hans Kelsen stressed the ambiguities of a world of sovereigns, as exposed, for example, in the Kantian draft of a perpetual peace. Under the conditions of Kant's proposal, states would not be bound by international legal obligations, and not even *pacta sunt servanda* could have any legally binding effect. Yet, Kant failed to explain how it would be possible for free and sovereign nation-states to enter into a situation dominated by legal procedures. His concept of a "perpetual peace" therefore oscillates strangely between absolute sovereignty (later developed by Hegel) and a legal status that is neither *status civilis* nor *status naturalis*. It is not only international public law that must live with these fundamental paradoxes. National subsystems, too, deal with

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[7] J. Derrida, in D. Cornell et al. (eds.), *Deconstruction and the Possibility of Justice* (1992), p. 3 at p. 28.

[8] N. Luhmann, *Law as a Social System* (2004), pp. 464 et seq.

autological operations, connect operation with operation, and make invisible the "mystical foundations" (Jacques Derrida) of their authority.

III. Global Constitutional Law

Neither legal theory nor philosophy, but rather the practice of law itself has detected the ultimate paralysis of these paradoxes. Since the US Declaration of Independence and the French revolution, it has been *en vogue* to render invisible the paradoxes of the political and legal systems in nation-states' constitutions. For this reason, Niklas Luhmann has explained on several occasions that a constitution—as a special form of structural coupling between political and legal systems—is an evolutionary achievement. It interrupts the fundamental circularity of the political system's paradox of limited sovereignty and the fundamental paradox of law, which consists in the fact that law defines law. On the inside of this coupling, the mutual irritation of politics and law is facilitated, and constitutionally legalized; on the outside, such mutual stimulation is, if possible, excluded, and in all cases made illegal. Thus politics and the administration of justice are supposed to interact "only constitutionally". On condition that other possibilities are excluded, their mutual influence can be increased enormously.

But even ceremonial effects and claims to transcendental powers in *constitutional moments* cannot conceal the element of force when the unorganized crowd metamorphoses into the organized *demos*. There is no universally accepted theoretical explanation for this creation of a "collective singular" and for the distinction between *pouvoir constituant* and *pouvoir constitués*, "a classical piece of jurido-doctrinal work";[9] none of the theoretical conceptions can encapsulate its paradoxes. And whichever assumptions of homogeneity of an ethnic, linguistic, or cultural nature were formulated for the political demos (meaning the crowd that "reflects itself as a political entity and enters as such into history"[10]), the *constitutional* moment is a *mystical* moment, in which the function and force of the structural coupling of two autopoietic systems is rendered invisible. By structurally coupling politics and law, the constitution opens a new symbolic horizon.

Depending on the reflection theory and the position of each observer, a constitution can have various meanings, legal foundations and regulations. We find the same observations in the public law discourse of the twentieth century as in the *international public law approach*: "textualization of the basic norm" (*Kelsen/Verdross*),[11] "constitution of a community" (*Mosler/Tomuschat*),[12] and "highest prin-

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[9] E.-W. Böckenförde, *Staat, Verfassung, Demokratie* (1991), p. 101.

[10] Id., p. 95.

[11] A. Verdross, *Die Verfassung der Völkergemeinschaft* (1926); H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, 2nd ed. (1928); H. Kelsen, *Heidelberg Journal of International Law* 1958, p. 234.

[12] H. Mosler, *International Society as a Legal Community* (1980); C. Tomuschat, *Recueil des Cours* 1999, p. 1; C. Tomuschat, in UN (ed.), *International Law on the Eve of the Twenty-first Century* (1997), p. 37.

ciple of a political law" (*New Haven approach*)[13]—antinomies everywhere. The basic norm oscillates between facts and norms. The communitarianism of the "international community" is a tautology;[14] its basis of *core values* may be only *Utopia,*[15] and the excluded lurks in each *persistent objection*.[16] The *New Heaven* of the *New Haven school* lies in the netherworld of values that must be achieved by a process in which law is nothing more than an excuse for illegal politics.[17] Nevertheless, the constitution is an "evolutionary achievement"[18] that—if the autological operation is successful—can interrupt the fundamental circularity of the political system and the legal system.

So, legal practice, not legal theory, answers this key question of global law: how is it possible that, on the one hand, international public law is constituted by states and, on the other hand, states are constituted by international public law? The self-transformation of law and law creation and the limitation of sovereigns are not facilitated by an ultimate philosophical basic norm, but by national, supranational, organizational, and global law that possesses the quality, or its functional equivalent, of constitutional law.

Since the decision in *Marbury v. Madison*, the legal system has found its ultimate reflection paralysis in constitutional law:

> The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable […] If, then, the court are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.[19]

This statement was the autopoietic manifesto of a function system and the paradigm for all subsequent concepts of constitutional law. Even nation-states that lack a constitutional text to which courts could refer have constitutional law at their disposal. For example, in Great Britain there is no constitutional document,

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[13] M. McDougal and F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961); M. McDougal, H. Lasswell and L.-C. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (1980); see A.-M. Slaughter and W. Burke-White, *Harvard International Law Journal* 2003, p. 1; those constitutional conceptions are euphemist semantics for legally unbound political power politics. For an elaboration of this criticism, see A. Fischer-Lescano, in M. Bothe et al. (eds.), *Redefining Sovereignty* (2005), p. 335.

[14] For a pointed critique of community conceptions, G. Arangio-Ruiz, *European Journal of International Law* 1997, p. 1.

[15] See M. Koskenniemi, *From Apology to Utopia. The Structure of International Argument* (1989), p. 6.

[16] For the doctrine of persistent objection, see D. Charney, *British Yearbook of International Law 1985* (1986), p. 1.

[17] M. Koskenniemi, *supra* note 15, p. 6.

[18] N. Luhmann, *Rechtshistorisches Journal* 1990, p. 176.

[19] *Marbury v. Madison*, 1 Cranch (5 U.S.), 2 L.Ed. 60 (1803), 137.

but there is a constitution. So the thesis seems justified: a constitution is not a text, but a form of structural coupling. A constitution emerges from the processes of law and politics, in the hypercircles of their operation.

In global law, we can observe the generalization of legal rules and the emergence of secondary rules, e.g., the law of lawmaking and networking global legal remedies. The constitutional character of these rules arises from their very nature in legally constituting and limiting collective political bodies. In this sense, we will find a political global constitution if we find norms that regulate the relationship between politics and law in global society. Traditionally, these norms (leaving aside the organizational differentiations in the political system) are classified as (1) constitutional rules of jurisdiction, or "global remedies rules," (2) formal constitutional law, and (3) constitutional norms regarding the legal formation of norms.

1. Global Remedies Rules

At the center of global law, we find a heterachical organization of courts. We observe judicial networks and communicative interferences. Hierarchical and segmented centralizations of global remedies can be localized in supra-national organs such as the ECJ, ICTY, ICTR, ICC, truth commissions established by the UN, regional human rights courts, the WTO appellate body, the ICJ, and special treaty bodies.

Aside from their function in the special institutional context, all of these contribute to the generalization of expectation in the field of global human rights. All of them have their legal basis in international public law treaties, whether between states and states, or between states and international organizations, or in decisions by international organizations. But the trials of Augusto Pinochet and the Argentine military dictators, for example, demonstrate[20] what George Scelle called a *dédoublement fonctionnel* of these courts;[21] decentralized national courts, too, play a particularly important role in the generalization of expectations on a global level. Their jurisdiction is founded upon global remedies rules of civil and criminal law, whereas the most controversial principle is that of universal jurisdiction.[22]

2. Ius Cogens

These global remedies make legally binding decisions. They apply the binary code legal/illegal. Also, only these centers of the legal system can make binding decisions on the international community's core values, collisions between human and

[20] For details, see A. Fischer-Lescano, *supra* note 2, pp. 129 et seq.

[21] G. Scelle, *Précis de droit des gens*, *Vol. 1 and 2* (1932 and 1934).

[22] B. Stephens, *German Yearbook of International Law 1997* (1998), p. 117; J. D. van der Vyver, *South African Yearbook of International Law* (1999), p. 107; for further references and an explanation of the center/periphery divide, A. Fischer-Lescano and G. Teubner, *supra* note 3, pp. 999 et seq.