DRAFT FOR PRESENTATION

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Reframing Human Rights III
Secular and Religious Sources of Human Rights
17-20 May, 2006
A workshop organized by the Irmgard Coninx Foundation, the Social Science Research Centre Berlin (WZB) and Humboldt University

The Individual in International Law

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I. Introduction

In this short presentation, I will try to argue for an understanding of international law as a legal order which places the individual at the centre of its endeavours. The starting point will be a historical sketch of the development of international law in the light of the principle of State sovereignty. Against this background, I will suggest a renewed understanding of international law based on the principle of complementarity, trying to apply a holistic view which brings together claims of universality, processes of constitutionalization and modes of argumentation in international law.

II. From 'sovereign equality' to 'complementarity'

1. The evolvement of sovereignty

The history of international law is inherently linked to the history of the principle of State sovereignty.[1] Wars for independence and statehood were struggles for the recognition of sovereignty. The main subjects of international law used to be and still are sovereign States. Sovereignty meant that States were free to act, i.e. free of any outside interference. Indeed, the classical understanding of sovereignty implied the right of States to resort to war for enforcement of their sovereign rights. It took two world wars to foster the awareness that an absolute conception of State sovereignty was to the detriment of all States and their people. Especially since the horrendous atrocities of the

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[1] See, for example, W.G. Grewe, *The Epochs of International Law* (Berlin/New York: de Gruyter, 2000), especially part 6 and 7.

Second World War, States have created mechanisms for co-operation to achieve and ensure international peace and security. *Wolfgang Friedmann* once described this development by stating that international law has move from co-ordination to co-operation.[2] The strongest and most important limitation of sovereignty was certainly the prohibition on the use of force with the exception of legitimate self-defence and enforcement measures of the Security Council enshrined in Art. 2 (4) and chapter VII of the UN Charter. In addition, this constraint of sovereignty was complemented by an increasing institutionalization for international co-operation. The protection of individuals – sometimes necessary against their own States – lies at the centre of this co-operation and comprises today the protection of the environment and individual criminal responsibility. The awareness of a shared responsibility for 'common concerns of mankind' lead to the creation of what is called today the 'international community'.[3]

2. The Protection of the Individual

Inherently linked to the concept of State sovereignty is the concept of citizenship. Traditionally, individual rights were the rights ascribed or 'granted' to the citizens of a State. However, such conception defined also criteria for 'inclusion' and 'exclusion' and, hence, created the potential for a sense of 'us' and 'them', of 'otherness' and 'difference', of 'nationalism' and 'patriotism'. This created feelings of competition and exclusion but also fears of displacement and loss, not only towards non-citizens 'outside' the State but also within the territory: women and the inhabitants of colonies gained the status and basic rights of citizens only after decades of painful struggles. Yet it would be mistaken to believe that the individual did not play any role in international law before the era of the United Nations. Already the codification of humanitarian law (*ius in bello*) sought to mitigate the effects of war on combatants and civilians, and the rules governing the treatment of aliens were meant to grant a minimum degree of

[2] See W. Friedmann, *The Changing Structure of International Law* (London: Stevens, 1964) 60-71; see also Chr. Tomuschat, 'How the Classical Concept of Sovereignty Has Evolved', in: M.D. Dilas/V. Deric (eds.), *The International and the National – Essays in Honour of Vojin Dimitrijevic* (Belgrad: Belgrad Centre of Human Rights, 2003) 21-34, *passim*; B. Fassbender, 'Sovereignty and Constitutionalism in International Law', in: N. Walker (ed.), *Sovereignty in Transition* (Oxford/Portland Oregon: Hart, 2003) 115-143.

[3] See, for example, H. Mosler, *The International Society as a Legal Community* (Alphen aan den Rijn: Sijthoff and Noordhoff, 1980); R.-J. Dupuy, *La communauté internationale entre la mythe et l'histoire* (Paris: Economica, 1986); B. Simma, 'From Bilateralism to Community Interest in International Law', 250 *RdC* (1994) 217, at 243-249; the most recent contribution of Chr. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 281 *RdC* (1999) 9, at 72-90 and *passim*; A.L. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (München: C.H. Beck, 2000).

protection to the citizens of foreign States. Yet the individual was usually associated with a State and not regarded as an autonomous subject of international law.

The weakness of the link between sovereignty, citizenship and rights was apparent, again, after the horrible experience of the Second World War. A State is not always and automatically a guardian of its citizens. The protection of human rights became, therefore, a central concern of all States. Hence, the more State sovereignty evolved the more the individual became a subject of international law.[4]

However, if human rights are not (only) citizen rights and are not 'granted' by the State, the question arises where these rights originate from. This question is as much relevant for international law as it is for national law. Natural law tried to give an answer by pointing at a transcendental source of norms and at the 'natural state of being human'. It was concerned with the merit of the law. Legal positivism instead regarded law as an autonomous system and believed that it alone could provide all necessary answers to legal problems.[5]

At this point, I do not want to go into the discussion on secular or religious sources of human rights or on natural law and legal positivism in great detail. This seems odd at a conference dedicated to exactly these questions. However, I would argue that the quest for the very sources of human rights is misleading, disturbing and, eventually, counter-productive. Misleading because the concept of human rights is inherently linked to questions that go far beyond the law and cannot be answered with a legal vocabulary alone. Human rights relate to questions of autonomy and identity, therefore are also linked to faith, philosophy, sociology and political science. It is disturbing because it tracks the focus away from more pressing issues of enforcement and substantiation of established human rights. Counter-productive because it opens the floor for the questioning of the relevance and existence of human rights all together. What I want to suggest instead is a shift from the concept of State sovereignty to a concept of Individual sovereignty. The respect and recognition of the sovereignty of an individual which is only limited by the sovereignty of other individuals is the fundamental maxim of any community.

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[4] See also A. Orakhelashvili, 'The Position of the Individual in International Law', 31 *California Western International Law Journal* (2001) 241-276.

[5] For a recent enquiry, see St. Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism', 12 *EJIL* (2001) 269-307; for a historical overview, see H. Lauterpacht, *International Law and Human Rights* (Hamden : Shoe String, 1968).

Although the premises of legal positivism such as legal security, predictability, consistency and coherence are important features of any legal system based on the rule of law, every lawyer knows that law and especially international law is not complete, unequivocal and static. It is dynamic and fulfils a social function.

The contemporary international legal order – just like every legal order – is based upon on a *system of values* which is accepted by the majority of states. This system of values finds its explicit expression in international treaties like the UN Charter, the Universal Declaration of Human Rights, both human rights covenants, regional human rights treaties, also in the Friendly Relations Resolution of the General Assembly[6] but also in numerous treaties for the peaceful settlement of disputes. However, international law is not the source of these values but has incorporated these values for their more effective assurance.[7]

Although it might not be necessary today to rely directly on natural law because of the increased codification and refinement of the international legal system, the *principles of humanity and justice* remain as a framework against which the entire legal system can be scrutinized. Accordingly, the International Court of Justice, for example, has repeatedly referred to 'elementary considerations of humanity' ('considérations élémentaires d'humanité')[8] or the famous Martens' Clause which speaks of 'principles of humanity' and 'dictates of public conscience'.[9] Similarly, the criminal tribunal at Nuremberg, the International Criminal Tribunal for the former Yugoslavia[10], the European Court of Human Rights[11] and, for example in Germany, the trials against the

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[6] *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, annex to resolution 2625 (XXV), 24 October 1970, UNYB (1970) 788.

[7] See A. Verdross, 'Die naturrechtliche Basis der Rechtsgeltung', in N. Hoerster (ed.), *Recht und Moral* (Ditzingen: Reclam, 1987) 42, at 44.

[8] See, for example, *Corfu Channel (U.K. / Albania)*, Judgment of 9 April 1949, ICJ Reports (1949) 4, at 22; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996-I) 226, at 257; most recently *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, para. 154-160, available at <www.icjcij.org/icjwww/idocket/imwp/imwp_advisory_opinion/imwp_advisory_opinion_20040709.pdf> (visited 1 May 2006).

[9] See only A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', 11 *EJIL* (2000) 187; Th. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', 94 *AJIL* (2000) 79.

[10] ICTY Appeals Chamber, *Prosecuter v. Dusko Tadic*, Judgment of 2 October 1995, ILM 32 (1996) para. 129

[11] See, for example, *Streletz, Kessler and Krenz v. Germany*, ECtHR Judgment of 22 March 2001, para. 83;

Mauerschützen, they all relied on comparable notions in their legal reasoning when the letter of the law could not provide an answer or would produce manifest injustice.

As elements of an objective international legal order these fundamental principles influence the entire legal system which they permeate. In this sense, the relationship between law, justice and morality can indeed be regarded as a "necessary" one.[12] Moving the individual to the centre of international law instead of States means to move from politics or morality to humanity and community.

3. Complementarity and the Limits of State Authority

Yet it would be too early and mistaken to regard the concept of sovereignty as outdated. Art. 2 (1) of the UN Charter sets forth that the Organization "is based on the principle of sovereign equality of all its Members". The State formed the defining link between a political community, sovereignty, constitution, rights, citizenship and freedom.[13] Even in times of globalization the State is regarded as the guardian of rights, the structure of the State is still equated with the structure of freedom. Hence, contemporary international law has to balance the evolved concept of sovereignty with the increased importance of the individual. To conceptualize this relationship, I would suggest to use the *principle of complementarity.*

The principle of complementarity can be found in explicit terms in the Statute of the recently established International Criminal Court where it regulates the relationship between the jurisdiction of the ICC and of domestic courts.[14] Art. 17 provides that a case is inadmissible before the ICC when it "is being investigated or prosecuted by a State which has [traditional] jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".

This regulation is symbolic of the relationship between States and the 'international community' with regard to the protection of the individual. It means that the obligation to protect the individual lies primarily with the sovereign State but if a State is unable or unwilling to fulfil its obligation, the international community may be called upon to do what is required. After all, sovereignty cannot mean that a State has the right to mass murder its own people. Sovereignty of the State is not absolute but limited, it is not a

[12] H. L. A. Hart, The Concept of Law, 2nd ed. (Oxford: Oxford University Press, 1994) 155 *et seq.*

[13] R. Axtmann, *Liberal Democracy into the Twenty-First Century* (Manchaster/New York: Manchester University Press, 1996) 130.

[14] Second last paragraph of the preamble, Art. 1 (1) and 17 of the Rome Statute of the ICC.

Selbstzweck but a right in the interest of the people. This conception of international law has certain implications which I will exemplify with regard to processes of supra-national constitutionalization and the use of universalizing arguments.

III. Constitutionalization

The idea of constitution is fundamental to the protection of human rights. At the same time, constitutions are the very symbol of sovereignty. Constitutionalism has freed individuals from great harm, provided an emancipatory vocabulary and institutional machinery for people across the globe. It raised the standards by which governments judge one another, and by which they are judged, both by their own people and by their peers on the inter-national plane. Constitutions are (or were) inherently linked to the modern State.

A constitution may be defined as the higher (or the highest) law in a public community with an ordering and integrative function.[15] The purpose of which is structuring the powers of government and coordinating the relationship between the public and private, the guarantee and protection of fundamental rights and values, and the reflection and creation of a collective identity and destination.[16] A constitution, therefore, unifies a legal, social and ideal dimension of a society.[17]

Almost all constitutions of the modern liberal and democratic *Rechtsstaat*, however, are a consequence of the horrors and chaos of revolution and war.[18] What we witness today on a supranational level is, on the other hand, a consolidation and sophistication of legal orders. Although both the European Community and the international human rights system can also be regarded as an answer to war, a 'constitution' of these legal orders was not created by a big bang or after a *Stunde Null*. Ample studies have been provided applying constitutionalist vocabulary and thinking to supra-national legal systems

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[15] G. Jellinek, *Allgemeine Staatslehre* (Darmstadt: Wissenschaftliche Buchgesellschaft, 5th reprint of the 3rd ed. 1959) 519; B. Fassbender, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 529, at 532 *et seq.*

[16] See, for example, J.H.H. Weiler, 'Fischer: The Dark Side', in: Chr. Joerges/Y. Mény/J.H.H. Weiler (eds.), *What Kind of Constitution for What Kind of Polity?* (Florence/Cambridge, MA: Robert Schuman Centre for Advanced Studies/Havard Law School, 2000) 235-247, at 242; J. Buchanan, 'Why Do Constitutions Matter', in: N. Berggren/N. Karlson/J. Nergelius (eds.) *Why Constitutions Matter* (New Brunswick/London: Transaction, 2000) 1-16, *passim*; this list is by no means exhaustive, one could add: security, freedom, transparency, unambiguousness of the law, adequate law-making procedures, peaceful settlement of disputes.

[17] Ph. Allott, *Eunomia: New Order for a New World* (Oxford: OUP, 1990) 135-36.

[18] See only H. Arendt, *Über die Revolution* (München: Piper, 3rd ed. 1994), *passim*, arguing for a "Gründung der Freiheit".

focusing on questions of whether and how constitutional structures can be applied in new contexts.[19]

What then is the specific value of the constitutional terminology? I will repeat the answer which I gave before: the specific value is the care of the law for the individual. This argument is not limited to the protection of the integrity of the person through human rights. It goes beyond, as it places the individual at the centre of any constitutional effort. The State is nothing more than a structural unit created for the benefit of a people which in turn is a group of individuals. To place the individual at the centre of constitutional thinking also helps solving difficulties connected to the translation of notions like sovereignty, identity, demos, *pouvoir constituant*, etc to an international context. This constitutional vocabulary has been attributed to the State as the subject and main concern of constitutional scholarship for decades. Placing the individual at the centre of constitutionalization and regarding the different layers of governance and protection as complementary makes it easier and more plausible to reconceptualize the above notions as principles in the interest of individuals. Individuals can be *verfasst* alone, in a group, as a minority, a people, a State or a community of States which then is nothing else than a community of individuals. Therefore, also sovereignty as a right of a State is nothing else than a right in the interest of the individuals which form the people of that State. At the core of any constitution has to be the *Gemeinwohl* or public goods.[20] In this regards, notions like *ius cogens* and obligations *erga omnes* on the international level receive a clearer purpose and meaning as fundamental rules of the international legal order.

The undertaking of constitutionalization as well as the employment of constitutionalist vocabulary makes only sense if the efforts are – in last resort – about the individual as the subject of law. Maybe these are the actual fears of authors like *Weiler* and *Grimm* who view the European constitutionalization in the present form as insufficient or even dangerous. The same is probably true for national constitutional courts when they claim the ultimate competence for the protection of fundamental rights. Also the supporters of the concept of an 'international community' must place the individual at the centre of

[19] For a recent insightful study, see R.St.J. MacDonald, 'The International Community as a Legal Community', in: *id.*/D.M.Johnston, *Towards World Constitutionalism* (Leiden/Boston: Martinus Nijhoff, 2005) 853; B. Ackerman, 'The Rise of World Constitutionalism', 83 *Virginia Law Review* (1997) 771.

[20] See, for example, B. Fassbender, 'Zwischen Staatsräson und Gemeinschaftsbindung – Zur Gemeinwohlorientierung des Völkerrechts der Gegenwart', in H. Münkler/K. Fischer (eds.), *Gemeinwohl und Gemeinsinn im Recht* (Berlin: Akademie Verlag, 2002) 231.

their constitutional efforts. Now it is also understandable why constitutionalism has to be deliberative and open for all to participate. Only in this way can the notion of legitimacy and *pouvoir constituant* maintain their crucial importance in a post-national context.[21]

IV. Politics and Argumentation in International Law

State sovereignty has evolved; the individual has become a central subject of international law; a complementary structure of the international legal system has been established – some scholars of international law and relations would simply ask: "So what?"

Two years ago, *David Kennedy* of Havard Law School published a puzzling book entitled "The Dark Sides of Virtue" in which he delivered a challenging and provoking critique of humanitarianism.[22] He argued for an enlarged awareness of human rights advocates in their role as activists and policy makers. In addition, it has been argued that in international law it is possible to achieve any result by different types of argumentation.[23] Constitutional and human rights vocabulary with its (Western) universalizing notions of fundamental rights would allow the masquerading of particular interests as general.[24]

It is already a famous contention that human rights are based on a western, liberal, post-enlightenment, rationalist, secular, modern, capitalist conception of rights. The 'dark side' of this is that alternative conceptions of community, rights, public, economy and self-determination are covered by a universalising constitutionalist framework.[25] As the dominant way of thinking, constitutionalization and human rights might (unintentionally) block our thinking of other forms to secure, to constitute and to organize. The one-size-fits-all emancipatory practice of human rights might primarily answer instead of asking questions. For example, the new Eastern European States and also most developing countries have little alternatives for their own constitutional orientation. This involves the imposition of an agenda of liberal market economy and a

[21] See, foremost, J. Habermas, *Der gespaltene Westen* (Frankfurt am Main: Suhrkamp, 2004).
[22] *Ibid.*, at 19 *et seq.*
[23] M. Koskenniemi, *From Apology to Utopia* (Helsinki: Lakimiesliiton Kustannus, 1989) *passim*.
[24] M. Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' 16 *EJIL* (2005) 113, *passim*; see also N. Walker, 'Making a World of Difference? Habermas, Cosmopolitanism and the Constitutionalization of International Law', *EUI Working Papers*, Law No. 2005/17, 12.
[25] D. Kennedy, *The Dark Sides of Virtue* (Princeton and Oxford: Princeton University Press, 2004).

specific conception of rights, and limits the socio-economic choices and the possibility to find an autonomous identity.

So after all, sovereignty might still be the ruling principle in international relations. Human rights might be idealist, ambivalent, re-active conceptions in the real world of power and politics.

Is this true? These critical and provoking arguments seem to have a puzzling point. Reality seems to prove all too often that sovereignty and the will of States are still the determining factors in international relations. The Security Council, for example, was repeatedly blocked by opposing wills of its permanent members, and the efficiency of any measure taken depends after all on the compliance and support by States.[26]

V. By way of conclusion: 'In the beginning was the word'

These arguments underestimate in my view the social regulative power of law. Human rights gain their power when they reach the heads of those who are victims of human rights violations and suppression. Human rights advocacy has to aim at changing the way of thinking. Only when individuals see themselves as right bearers, they start to invoke these rights and think about alternatives.[27]

This would also be my answer against the contention that human rights vocabulary is universalizing, that it can be misused for political or other objectives, and that argumentation might oscillate between apology and utopia. First, speaking and thinking in terms of rights give the holders of these rights an argument which they did not have before and create the need for argumentation in the first place. Secondly, universality does not only imply a one-size-fits-all emancipatory concept which imposes a certain (Western liberal) understanding of human rights on other cultures. What it implies in the first place is the possibility to argue: "If you claim this right for yourself, you cannot deny this right to me". There are no different classes of individuals which different entitlements to human rights. Thirdly, any vocabulary, also the one of human rights, might be open to misuse. Yet it is exactly the rationale of the concept of 'international

[26] See Chr. Tomuschat (*supra* note 2), at 31.

[27] However, the language of 'rights' has to be used carefully. A right to development, a right to peace and security, for example, go often beyond the actual capacity of governments and States. Here it might be advisable to use the language of 'duty' instead which emphasises the 'duty to co-operate for the promotion of development' or a 'duty to maintain the peace'. In addition, individuals are not only bearers of rights but also subjects of duties, see Chr. Tomuschat, 'Grundpflichten des Individuums nach Völkerrecht', 21 *Archiv des Völkerrechts* (1983) 289-315.

community' based on the principle of complementarity to safeguard that argumentation and following political action are not arbitrary or unilateral. Though it seems impossible to prevent unilateral action and false argumentation, the idea of complementarity together with the increasing international emphasis on democratic governance generates a system of accountability and responsibility from within and outside the sovereign State. In conclusion, the evolvement of the international legal order has done both it limited the concept of absolute sovereignty and fostered the role and importance of States as the primary entities in a system of complementarity for the protection of the individual at the centre of law.