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Global legalisation and the missing link to constitutionalisation

Paper prepared for the 6th Pan-European Conference on International Relations, Making Sense of a Pluralist World, Panel 4-6 'Law vs. Politics: A Focus on Norms', University of Turin, Italy, 12-15 September 2007

Abstract

The article elaborates an idea of global constitutionalism that goes beyond segregated processes of international law generation and transnational legalisation. It starts with a phenomenological analysis of the notions and status quo of universal law – illustrating that the generic process of an ‘ethos of international’ law is a dialectic process driven by attempts to establish counter-legacies that are directed towards an amelioration of global legacies. In normative terms these processes reveal that an underlying notion of a universal code is necessarily a regulative ideal hinting at the structural defects of the existing global system of law generation and enforcement. Against this background, we argue that fragmented, exclusive and rights-distorting jurisgeneration has to be re-integrated into a constitutional scheme of legalisation that relies on a universal principle of mutual recognition and cooperation. On the one hand, the idea of global constitutionalisation is a systematic articulation of a procedural ideal directed at establishing an inclusive system of jurisgeneration and jurisdiction guaranteeing responsiveness towards different ‘agents of justice’. On the other hand, it involves an organisational ideal of a horizontal system of checks and balances directed at establishing an institutional system of mutual self-restraint and equal respect. A ‘constitutional’ meta-scheme of cooperation and reciprocity – so the hope – would replace the partiality and arbitrariness of transnational legalisation by guaranteeing the minimum of reflexive universal law and decent global legal order.

I. Introduction

“The task for international lawyers is not to learn new managerial vocabularies but to use the language of international law to articulate the politics of critical universalism” (Koskeniemi 2007)

We seem to be confronted with a twofold situation, we can observe neo-liberal driven capitalist economic globalisation, statist as well as transnational violence and injustice on the one hand, and a growth in trans- and international norm-generation and regulation on the other hand. In the light of current debates on governance beyond the nation state, legalisation and juridification seem to be the ultimate and irreversible trends of domesticating international anarchy and factual hegemonies of sovereign nation states. However, legalisation as well as juridification of international and transnational relations are in phenomenological, and as we will argue, in systematic and normative terms rather ambiguous, the binding and implementing force of principles, rules and normative standards is contested; the status of norms and the subjects of the law are indistinct; processes and practices of jurisgeneration are highly inconsistent; legacies are fragmented according to standards and fields of jurisdictions. Such diverse normative spheres like *lex humana*, *lex mercatoria*, *lex electronica* etc. are not evolving simultaneously and within an overarching “order”. Two phenomena are particularly striking insofar as they reveal inconsistencies in systematic and normative terms. On the one hand, it

seems that we are confronted with simultaneous processes of legalisation and de-legalisation. The upgrading of law, esp. fundamental norms, and the rise of discretionary power of interpreting these norms can be described as dialectic. More precisely: references to (global or universal) fundamental norms seem to be consented at a very general and abstract level, at the same time they are substantiated and applied in hegemonic and idiosyncratic terms. On the other hand, juridification qua judicialisation, by tribunal-driven conflict-resolution, is highly fragmented at the institutional level and rule-bound in a negative sense. That is to say, contesting and competing jurisprudence can only rely on partial agreement and not on procedural remedies. Trans- and international rule-making, rule-implementation and rule-application produce *partial* legacies which potentially induce “counter-legacies” (public scandalisation, opposing jurisprudence at different levels, and recourse to alternative bodies of conflict-resolution). So, in systematic terms, legalisation has to be specified in order to explain its normative potentials and to identify counter-productive and pathological side-effects.

At the same time, modern developments of international justice as well as injustice are embedded in a longstanding debate between legal and moral cosmopolitanism and their sceptical counterparts, sovereignty and state centred views. The ‘family’ of contemporary cosmopolitans draw upon ideas of world citizenship and inclusion, of more or less Kantian principles of universal rights relying on the assumption of moral dignity and equality of all human beings as individuals and legal subjects, regardless of their ethical self-interpretation, culture or nationality. At the diagnostic level they share the intuition that globalisation goes beyond mere functional interdependencies and coordinative schemes established and maintained by self-contained nation-states, and that globalisation is about cooperative problem-solving concerned with general humanity and acknowledging individuals as agents of justice. In programmatic terms they envision a global order able to establish universally justified and applicable principles and norms. These perceptions run counter to statist views of the international order insofar as they deny the strict notion of nation-states as the ultimate source of legal and moral authority, and the strict notion of nation-states’ integrity that is guaranteed by the principles of non-intervention and national self-determination and sovereignty. Statists, be it in the shape of republican or nationalist approaches, are not just concerned with the protection of ethical and cultural plurality, but share the conviction that the state or the nation provides the best context in which rights and obligations, political self-determination, reciprocity, trust and solidarity is conserved. Shared values, loyalties, common concern and identity are conditions of political authority that cannot be reproduced in a global order without borders, directed at general humanity (Rorty 1998).

We do not want to enter these debates, in which various systematic and normative arguments were put forth and back again to justify the worth of national or international and universal law (for an overview about the debates see Cheah and Robbins 1998, Pogge 1992, Lu 2000, Vertovec and Cohen 2002, Brock and Brighouse 2005, and Appiah 2006). Instead, we will start with some phenomenological reflections (chapter II.) about the notion of universal law that might be instructive in several aspects: On the one hand, we will get a clearer picture of the idea of ‘global legacy’ that is factually existing and developing; on the other hand, we will get an impression about the generic process of an ‘ethos of universal law’ that is affecting the coordinates of ‘sovereignty’ (chapter II.1.). In this respect, we can show that the development of universal law and global legacy is a dialectic process, mainly driven by attempts to establish counter-legacies that are directed towards an amelioration of the global legacy. A phenomenological illustration will reveal different dimensions of generating and reproducing as well as of practically implementing and contesting the idea of universal right and universal law, at the level of historical experience and self-reflection, at the level of the legal professional community working out a *corpus juris*, and at the level of institutional engineering and social embedding. In normative terms, an analysis of these dialectic processes reveals that the

idea of the ‘necessity’ of universal law is a kind of universal code for agents of justice (chapter II.2.). By reconstructing the critical challenges to global legacies, we can identify certain structural defects of the existing global system of law-generation and ‘universal’ enforcement, esp. relating to constitutional, i.e. organisational and procedural, principles of the inclusion of agents of justice (chapter III.1.). We will then argue that the concept of legalisation beyond the nation-state can be acceptable in normative terms only if a broader notion of proceduralisation is included. Ideas of legalisation frequently neglect the potential self-blocking and arbitrary structures of normative regimes that are not embedded in a second-order system of mediation. We will content that it is necessary to establish a meta-scheme of legalisation, a scheme that is better captured as Constitutionalisation (III.2). Constitutionalisation as such is essential to enable conciliation between conflicting normative principles, norms and rules, in order to ensure results that are acceptable to all those concerned and affected, and in order to prevent hegemonic self-interpretation in negligence of conflicting normative demands. In this sense, global constitutionalism is a systematic articulation of the idea of inclusive (and democratic-procedural) legalisation guaranteeing jurisgenerative and jurisprudential practices of mutual self-restraint. We will elaborate the idea that global constitutionalisation has to establish a system of mutually self-restrained norm-generation and –application, i.e. a procedural system of horizontal checks and balances. A transnational-procedural system of checks and balances is a necessary minimum of a ‘decent’ universal law and just (global) order.

II. A Phenomenology of Global Legacy

II.1. An Ethos of international law?

We can start from a very broad and general observation: Global processes have challenged territorial premises of sovereignty and particularistic presumptions about rights based in a strong sense on national belonging. Most human rights lawyers point out that the post-World War II emergence of international human rights law represents one of the most profound challenges to the notion that state sovereignty is irreducible and impermeable (see Koh 2000). Apart from that, the emergence of cosmopolitan norms has been accompanied by debates about refugee, immigrant and asylum status (see Benhabib 2007). Accordingly, transformations of citizenship-concepts¹ lead to a decoupling of rights and identity – not least by invoking human rights conventions and demanding the recognition of rights for particular vulnerable, discriminated or minority groups (see Soysal 1994, Delanty 2000). These decouplings of rights and national belonging challenged the claim that nation-states are the ultimate source of normative authority.

Looking at the central ‘universal’ legal code, the *Universal Declaration of Human Rights* (UDHR), we are by now at a point that, starting from the drafting debates in the mid 1940s up to present developments, there are – broadly speaking – two accepted types of human rights norms identified in international treaties and conventions, i.e. civic-political and socio-economic rights. Civic-political rights include norms regarding physical and civil security on the one hand – like prohibition of torture, slavery, inhumane punishment, arbitrary arrest, guarantees of legal personhood and equality before the law – and (although they are at the level of concrete application much more contested) norms regarding civil and political empowerment on the other hand – like freedom of thought, assembly, voluntary association, guarantees of political participation. Socio-economic rights include norms regarding the provision of goods meeting basic personal and social needs (nutrition, shelter, health care, education) as well as norms regarding goods meeting basic economic needs (work, fair wages, decent living stand-

¹ See about the notion of flexible citizenship Ong 1999, about citizenship of residency Benhabib 2004, about transformations in general Sassen 2006.

ard, social security). The decisive point is that both groups of rights imply potential claims of individual persons against their respective states. Apart from these ‘first-generation rights’ there is another class of human rights – however less settled and more contested – acknowledged in international agreements, i.e. collective rights of peoples or groups held against their respective states, either in form of collective rights of self-determination of people regarding their political status and economic, social and cultural development or in form of protective rights for ethnic and religious minorities to the enjoyment of their cultures.

In a first step we will shed some light at the generic process of modern international law relying so highly on the notion of universal rights in order to reconstruct the structural embedding of this idea in what might be called ‘global legacy’. The nascent international *corpus juris* was established in the 1920s, and its specific force goes to a high extend back to an emerging international legal professionalised community. In the 1920s, there has first of all been a transformation of international politics by the spread of interstate mediation and conciliation which required disputing states to resort to independent “third parties” – in fact, there has been an unprecedented dissemination of the practice of mediation, and the success of conciliation relied on quasi-jurisdictional techniques and accordingly on similarly trained mediators². So, “the rise of a supranational legal authority is the outcome of two distinct but interdependent social processes. First is the attempt of [a] heterogeneous group of international lawyers ... to collectively build and maintain an international law ... Second, the particular value acquired by this symbolic capital of [international law] in the context of interwar international politics in which an entire market of interstate mediation and conciliation emerges, favours the recourse to ‘third parties’ imbued with a reputation of impartiality and independence from power politics” (Sacriste and Vauchez 2007: 85, see also Koskenniemi 2001). If we look at this emerging legal proficiency we can, on the one hand, stress the international lawyers multiple positioning (scholars, judges, legal advisers of national diplomacies, private practitioners) representing a various and hybrid set of interests relating to cosmopolitan as well as to national affiliations. On the other hand, the public-administrative milieu of Geneva, where the headquarters of international associations such as the *Red Cross* and the *Inter-Parliamentary Union* were located, and after its foundation the *International Labor Organisation* and the *League of Nations*, opened a variety of venues more open to universalist and cosmopolitan causes of international law.³ In this cosmopolitan milieu – the talk of an ‘Esprit de Genève’ is indicative in this sense – a wide variety of international expertise and consultancy emerged that was united by the endeavour to search for an autonomous source of legitimacy that would free them from brute national interests esp. of the great powers (an endeavour that is after all not so very much different from today’s search for a cosmopolitan order able to domesticate hegemonic denials of international law and imperial practices). One result was the creation of a number of academic institutes specialised in training people for international careers; the most successful during the inter-war period was in Geneva and at The Hague which, after the *Permanent Court of International Justice*’s headquarters were established there in 1923, was soon called the “temple of international law” (see Eyfinger 1988). Altogether, the 1920s reveal “an early process of differentiation and specialisation of [international law] practice, which is developing as international politics gets more and more structured” (Sacriste and Vauchez 2007: 92). At the same time, a common sense or core of what ‘lawyering’ in international affairs is about, has been founded – including the conviction that there must be an international rule of law, that there is a need for judiciary modes of settling conflicts and for reli-

² *Mixed Arbitration Tribunals* were established (whose presidents were mostly chosen among international lawyers) for solving conflicts of application of post-WWI Peace Treaties. Likewise, the 1924 *Geneva Protocol*, the 1928 *Pan-American Convention on Conciliation and Arbitration*, or the 1929 *Briand-Kellogg Agreement* on the ‘outlawry of war’ based the settlement of international peace on the intervention of ‘third parties’.

³ Between 1919 and 1925 there was a rise of employees and civil servants from about a hundred in all of these international organisations to more than a thousand in the permanent Secretariat of the *League of Nations*, see Sacriste and Vauchez 2007.

ance on legal ‘peace techniques’, and that there is a necessity of permanent jurisdiction with universal and compulsory competence (unlike conciliation and arbitration). In this setting, the *International Law Institutes* advanced ideas of a ‘legal conscience of the civilised world’, of an ‘esprit d’internationalité’ quite empathetically.⁴ However, the call for ‘peace through law’ was not so much utopian in a strong sense but rather a pragmatic plea for a step-by-step evolution of universal law and esp. for compulsory and universal competence of the Permanent *Court of International Justice* applying the law in the ‘general international interest’, i.e. in the interest of all states and independently of each of them⁵.

We should not neglect that the project of modern international law was of course also one of emancipating in dogmatic terms from domestic law by constructing it as a legal system on equal stance with national law. In the 1930s textbooks about cases and precedents as well as methodologies for treaty-interpretation were systematically edited. The literature on international law included reflections about the – in normative terms – ‘superior’ character and status of universal law, among others projections of the *League Covenant* as ‘higher law’ comparable to domestic ‘constitutional law’ (cf. Lauterpacht 1933, Jellinek 1880, Koskenniemi 2001) and inter-war lawyers argued a good deal for the systematic nature of public international law (see Kelsen 1928, Verdoss 1926, Grewe 1988). One notion that is indeed foundational for the idea of modern universal law, is the formal notion of a ‘quasi-constitutional’ quality of international law, i.e. the conviction that an international rule of law creating a system of law is intrinsic to the idea of international law (insofar as it is intrinsic to juridical thought) and that it constitutes general law, i.e. general principles of law as structurally given in international law.

The post-World War II period was marked by the need to deal with the legacy of the Nazi-regime and the unprecedented genocidal scope of the Holocaust that nurtured the idea of universal law (and justice) in a twofold way, in terms of universal law as a compulsory legal code (a prospect leading to the *Universal Declaration of Human Rights*) and in terms of universal jurisdiction (leading to *International Tribunals* for crime-prosecution, and recently to the establishment of the *International Criminal Court*).

The drafting of the UDHR (see above) was inspired by the need to prevent uncivilised and barbaric state behaviour such as known from the Nazi-regime stripping citizens of civil and legal protection, subjecting them to inhumane practices and denying them the basic necessities for survival. The answer to that challenge marked a break with inter-war human rights developments insofar as the *Third Committee* (which discussed the draft UDHR) stressed the need to protect individual rights in contrast to group- and minority-rights. Inter-war conventions aimed at protecting the rights of religious and ethnic minorities as groups vulnerable to possible systematic oppression by dominant majorities (cf. Lauren 1998). The lesson drawn from experiencing WWII and genocide was in a way that emphasizing minorities and highlighting their differences leads to encouragement of opposition and conflicts between groups: “[t]he very identification of groups as bearers of rights encourages oppositional conflict among them. So the framers of the UDHR followed another course, emphasising the rights of individuals to essential civil, political, social, and economic conditions as well as their equality in such protections, with express avoidance of contributing to the power of groups” (Twiss 2004: 42). If we regard the process of the making of the UDHR that took about one and a half years, involving delegates from fifty-six countries representing diverse cultural, moral, polit-

⁴ As an early commentator notes: „The law of the people does not serve any particular nation, but belongs to humanity as a whole“, Nippold 1924: 14.

⁵ N.b., the first president of the Permanent Court of International Justice, the Dutch jurist Bernard Loder, in his address to the *League of Nations’* General Assembly in December 1920: „You said to us: ‚the time has not come’ and what did we reply? We simply gave in. We said: ‘You think that we are going too fast’ and you have taken the reins in hand to hold us back and slow us down. Alright, we will slow down if you wish, and may even come to a halt. You want today for yourself and you will get it; but tomorrow will be ours”, quoted in Sacriste and Vauchez 2007: 104.

ical, philosophical, and religious traditions, it is quite an interesting point in case that deep justificatory conflicts were deliberately dismissed. The *Third Committee* debates led to the conclusion that the UDHR maintains metaphysical and justificatory ‘neutrality’ but agrees upon enforceable practical norms protective for human dignity and welfare. It upheld the notion of a common understanding and a practical normative consensus on human rights, a consensus that is international, cross-cultural and cross-traditional. So in a way the protagonists of the UDHR invoked an international consensus as a cross cultural overlapping agreement on practical norms which is supported by diverse cultural, moral, or philosophical schemes; a consensus that is at the end of the day largely self-sufficient and legally binding because it is expressing an overlapping moral knowledge and understanding that needs no further justification. The appeal is that of a “shared practical wisdom” of the UDHR (ibid. 65).

A parallel course of actions – we will come back to debates about the UDHR below – is related to judicial prosecution of Nazi-crimes. The base for the war crime tribunals in Nuremberg and Tokyo was laid down in the *London Agreement* (8. Aug. 1945) about the charter of the *International Military Tribunal*. It lists a number of crimes that have previously not been part of international law, and explicitly recognised the ‘individual subject’ with rights and according responsibilities. In that respect, Art. 6 emphasises the jurisdiction of the *Tribunal* dealing with individual responsibility. Art. 6a lists ‘crimes against peace’, Art. 6b ‘violations of the wars or customs of war’, Art. 6c ‘crimes against humanity including murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population ... or persecutions on political, racial, or religious ground ... whether or not in violation of domestic law’. For the first time in the history of international law, political accountability and criminal responsibility have been determinately interwoven into judicial procedures. This *caesura* provided the foundation and created precedents to push the Nuremberg concept of ‘Crimes against Humanity’ in a global arena. Especially in reaction to the Balkan crisis in the late 1990’s, the Holocaust had been reconfigured as de-contextualised to transpose acts of injustice and to sensitise for genocidal practices. Recent examples for such a development can be seen in the Establishment of the *International Tribunal to Prosecute Persons Responsible for Humanitarian Law violations in Former Yugoslavia* (1993) that work on the base of juridical responsibility of individuals and the inauguration of the *International Criminal Court* (2002). Art. 5-8 Part II of the *Rome Statute of the International Criminal Court* quite extensively enumerate aspects of ‘crimes of genocide’, ‘crimes against humanity’, ‘war crimes’ and ‘crimes of aggression’ and emphasises in this respect the superiority of human rights as well as a shift from national to international jurisdiction⁶.

⁶ Article 7, ‘Crimes against humanity’ include: “1. For the purpose of this Statute, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health”. Additionally, Article 7 specifies “2. For the purpose of paragraph 1: (a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack; (b) ‘Extermination’ includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population; (c) ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children; (d) ‘Deportation or forcible transfer of population’ means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law; (e) ‘Tor-

In this context, Levy and Sznajder (2006) analyse how historical memories of past failures to prevent human rights abuses “have become a primary mechanism through which the institutionalisation of human rights idioms and their legal inscription ... have transformed sovereignty” (659), because these memories are more and more articulated through cosmopolitan legal frames and refer to supra-national principles (see also Hirsch 2003). That is to say, even particular national and ethnic memories are transformed by “cosmopolitanised memory”, so an “increasingly de-nationalised understanding of legitimacy is contributing to a reconfiguration of sovereignty itself” (Levy and Sznajder 2006: 659). This is evidenced in two processes, “one, the political will of states to engage with rights abuses is becoming a prerequisite for their legitimate standing in the international community and increasingly also a domestic source of legitimacy; two, and related, legal inscriptions of memories of human rights abuses do recast the constitution of International Law itself and also constitute significant precedents for the cosmopolitanisation of national jurisdictions” (Levy and Sznajder 2006: 661)⁷.

The cosmopolitanisation of jurisdiction or judicial globalisation is itself a complex field of different practices and institutional structures, relating to the spread in transnational, esp. regional human rights courts⁸, international human rights agencies⁹ on the one hand and to the broadening of the institutional application of universal jurisdiction.¹⁰ Part of what is often referred to as phenomena of ‘judicial globalisation’ is not only the spread of trans- and interna-

ture’ means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; (f) ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy; (g) ‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity; (h) ‘The crime of apartheid’ means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime; (i) ‘Enforced disappearance of persons’ means the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time. 3. For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above”.

⁷ For a very good case study about South Africa see Nagy 2006 who reconstructs South Africans post-apartheid search for justice as a “cosmopolitan re-remembering of the nation” (626). She works out how the practice of the *Truth and Reconciliation Commission* was paralleled by litigation under the US *Alien Tort Claims Act* (against multinational corporations assisting the apartheid regime). She demonstrates that the transitional path towards “national unity and reconciliation” was accompanied by apartheid litigation outside the national system as a “cosmopolitan quest by the victim”. About the effects of cosmopolitan justice discourse on the legal discourses in Chile see Golob 2002 who illustrates how Chileans were pushed to reflect on why a so-called consolidated democracy forces victims to seek justice in inter- and transnational fora. Cf. supra, note 14.

⁸ Such as the *European Court of Human Rights* (at European level, the *European Court of Justice*, the *CoE General of Human Rights* (DGII) and the *European Committee for the Prevention of Torture* are of relevance in the context of human-rights jurisdiction), the *Inter-American court of Human Rights* (as well as the *Inter-American Commission on Human Rights* and the *Inter-American Commission on Women*), and the *African Court on Human and Peoples’ Rights*.

⁹ N.b. the replacement of the widely criticised UN *Human Rights Commission* by UN *Human Rights Council* that was approved with a vote of 170 to 4 by the General Assembly 2006: enforcement of mandatory periodic reviews, four meetings per year, individual (not regional) voting patterns. An overview of *Human Rights Bodies* of the UN is available at <http://www.ohchr.org/english/bodies>. Quite important are also the *Committee on the Human Rights of Parliamentarians* of the *Governing Council of the Inter-Parliamentary Union*, the *International Association of Refugee Law Judges* and in particular the various *National Human Rights Commissions*.

¹⁰ A good illustrating case is Judge Baltasar Garzon’s 1998 order of detention against Augusto Pinochet (for murder and disappearances of Spanish Citizens during the ‘Dirty War’) arguing that these were crimes against humanity, giving Spain the right to prosecute the offenders under International Law, i.e., claiming universal jurisdiction.

tional judicial bodies of various kind (tribunals, arbitration bodies, courts), material scope (human rights law, trade and economic law, environmental law etc.) and area of jurisdiction (transnational, f. i. European, Asian, pan-American or global), but also a spread of interpretative schemes transcending national-statist jurisprudence. That is to say, national judiciaries consider trans- and international legal sources as well as comparative methods considering the decisions and the jurisprudence of foreign (esp. constitutional) and transnational courts (see Slaughter 2004, Flaherty 2006). Part of this trend is a growing international network-structure between judges and court-members as well as coordinating practices of different national jurisdictions in international litigation¹¹. These practices of judicial borrowing of legal sources beyond their respective national system is not just resulting from functional imperatives and interdependence structures but to a certain extent the result of ‘global mirror’ justifications holding that where global consensus exists in form of customary international law or *jus cogens*, international and comparative legal materials presumptively reflect commitments that are held ‘domestically’ as well as internationally, especially with regard to fundamental rights (see Flaherty 2004 and 2006). So, unsurprisingly, national courts frequently cite in constitutional and human rights issues the human rights jurisprudence of such transnational tribunals as the European Court of Justice and its Inter-American Counterpart¹².

If we regard the more concrete idea of ‘Universal Jurisdiction’ for human rights violations in the sphere of crimes against humanity the practical implementation by national courts has – and still is – particularly difficult and thorny. However, apart from the failure of effectively guaranteeing individual plaintiffs access to judicial remedies and of incorporating the possibility of Universal Jurisdiction in the national codes of criminal procedure, the cases and esp. public resonance to the debates about the various cases illustrate a growing concern with these and related issues (for a good overview see Kokott 1999). Interestingly enough, U.S. courts have been quite reluctant in accepting their duty of Universal Jurisdiction; yet, there have been quite some spectacular cases under the *Alien Tort Claims Act* of 1789, dealing with international breaches of human rights. The *Alien Tort Claims Act* allows foreign victims of serious human rights abuse abroad to sue the perpetrators in U.S. courts, and it states that ‘the district courts shall have original jurisdiction of any civil action by an alien for a tort . . . , committed in violation of the law of nations or a treaty of the United States’. So the *Alien Tort Claims Act* grants U.S. courts jurisdiction in any dispute where it is alleged that the “law of nations,” or international laws, are broken. Beginning in 1981, in the landmark *Filartiga* decision, U.S. courts have recognised that a limited number of international crimes including genocide, crimes against humanity, war crimes, torture, disappearances, extrajudicial executions, forced labour and prolonged arbitrary detention violate the ‘law of nations’ and that claims for such abuses can therefore be brought under the *Alien Tort Claims Act*¹³. Under the *Alien Tort Claims Act* and the *Torture Victim Protection Act* cases have been brought forward

¹¹ Flaherty (2006) shows that such diverse leading national courts like in India, Canada, Zimbabwe, Hong Kong, South Korea, Botswana, Israel, and Germany f. i. cut across lines. The South African constitution even requires reference to international and comparative law for domestic interpretation. In his study of the US-Supreme Court jurisprudence Flaherty (ibid.) points out that even US courts – after an isolationist phase – consider international and foreign sources, most notably in decisions on privacy, affirmative action, and the death penalty (see also Cleveland 2005, Posner and Sunstein 2006). At the same time, he highlights the mainstream doctrine of the Founding generation, esp. its Federalist leadership that was holding “the law of nations in sufficient regard as to create a presumption that the Constitution should be interpreted consistent with international law where possible” (ibid.: 480).

¹² „Domestic reliance on jurisprudence of other jurisdictions will lead to better informed judges, lawyers, and commentators . . . Greater comparative knowledge in turn will continue to produce better considered and usually more just decisions that affect society in general. And outside any particular jurisdiction, the practice can only help fortify the international rule of law, and so foster greater global order and stability”, Flaherty 2006: 503.

¹³ This jurisprudence is backed by *The Torture Victim Protection Act* of 1991 which approves of these decisions and extends rights to U.S. citizen plaintiffs to bring claims against individuals acting under “actual or apparent authority, or colour of law, of any foreign nation” for torture and extrajudicial killing.

against the Japanese legacy during WWII for sexual slavery (comfort women-cases), against the Castro-regime for forced labour, against the Bosnian Serb leader Radovan Karadic (rape camps), against the former dictator of Haiti, Prosper Avril, and against a Guatemalan defence minister and Indonesian military official, among many others. In a class-action civil suit against the estate of Ferdinand Marcos, the former dictator of the Philippines who had substantial assets in the United States, victims were receiving compensation. Three victims from El Salvador filed suit against two Salvadoran Generals, who were living in retirement in Florida. In 2002, a jury in West Palm Beach Florida found the generals liable for torture¹⁴. More recently, suits have been filed against multinational corporations accused of direct complicity in crimes committed by foreign governments and their security forces, or accused to assist grave human rights abuses¹⁵.

II.2. Counter Legacies and the Reliance on a Universal Code

The different dimensions of an ‘ethos of international law’ we have reconstructed – historic, practical, dogmatic and institutional – demonstrate that a cosmopolitan reference point is hardly deniable, i.e. that there is insofar a point of convergence that international law is the ultimate normative foil for what we might call human dignity and that it is the litmus test for normative relevant practices of nation states. The above sketched phenomena have of course been accompanied by critical debates, counter-proposals and practical contestations and resistance. However, as we will exemplarily illustrate, attempts to challenge international law and to establish ‘counter-legacies’ are themselves driven by the notion of an ‘ideal’ international legal order. They all take, at the baseline, recourse to a ‘universal code’ (see Günther 2001) hypo stating a regulative vision of universal right. At the same time they are, so the assumption, directed at an amelioration of the factual existing international legal order – be it in normative and dogmatic terms, in practical and institutional, or in procedural terms. Challenging the existing order and establishing critical movements or counter-legacies is not directed at denying the idea of universal law but at improving and restructuring it in to order to make it more responsive to individual demands of justice and to participatory inclusion of agents of justice.

But let us take a look at some examples: Twiss (2004) f. i. worked out, how processes of ‘globalisation from below’¹⁶ – by which he has all those practices and social, civic and political movements in mind that are directed at challenging the (material and formal) status quo of established and consolidated institutional collaboration of the ‘big powers’, i.e., phenomena

¹⁴ It has frequently been pointed out that the “politics” surrounding litigation under the *Alien Tort Claims Act* is much more important than the success of the lawsuits, not least because it represents a public fora for universal and cosmopolitan quests of justice. Frequently, the cases are accompanied by public *amici curiae* briefs of broad transnational social support. A good example is the above mentioned apartheid litigation: *Re South African Apartheid Litigation*; 346 F. Supp. 2d 538; U.S. Dist. LEXIS 23944 is a consolidation of nine lawsuits by three groups of plaintiffs and NGOs who are suing 35 multinational corporations for supplying goods and services to the apartheid security state in the face of international sanctions and for sustaining the apartheid legacy. Nagy 2006 works out that this kind of litigation was also a result of the problems associated with the *Truth and Reconciliation Commission* that was limited in its mandate, i.e. it “emphasised torture, severe assault, and murder over the everyday violence of racial discrimination, forced removals, and pass laws”, 632, cf. supra, note 7.

¹⁵ These cases are surely embedded in debates about state responsibility for international activities of transnational corporations. In this context, national and international courts started to investigate the extent to which extra-territorial activities of transnational corporations that violate directly or indirectly (by omission or assistance) international human rights law gives rise to home state responsibility, as an obligation under international law (esp. customary international law and human rights law). See McCorquodale and Simons 2007 for an excellent analysis of recent cases and decisions. Cf. the *Articles on the Responsibility of States for Internationally Wrongful Acts* of the *International Law Commission* and the *General Comment on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant of the Human Rights Commission*.

¹⁶ About the differentiation between globalisation from above and globalisation from below see also Falk 1993, Brecher, Braun and Cutler 1993.

we can in our perspective refer to as attempts to establish counter-legacies – considerably changed and broadened the notion of universal human rights (as codified in the UDHR), either by establishing new categories of human rights, by giving new emphasis and demanding application to marginalised classes of persons, or by refining previously recognised human rights (ibid. 41). One case in point is related to the struggles for the recognition of collective rights of self-determination. Within this context, the question of whether to highlight individual or group rights and the question of their compatibility (is there a conflict between the two notions or is it a mutual enforcement) marks an interpretative conflict of human rights that has always provoked ‘counter legacies’. Already the work of the *Third Committee* was in this respect challenged by the concurrent *UNESCO Symposium on Human Rights*, where the importance of recognising the rights of Aboriginal peoples – in addition to individual human rights – was stressed. But only following de-colonisation, the *International Covenants* (1966) on civil-political, socio-economic and cultural rights feature the right of peoples to self-determination and the right to determine their own political status. The *Declaration on the Right of Development* recognised development as a comprehensive economic, cultural, and political process. In the *Draft Declaration of Indigenous Peoples Rights* (1994), indigenous people articulated in ‘one voice’ the claim that they have collective human interests and rights in preserving their ethnic and cultural identities, their ancestral territories, and their continuation as distinctive communities with own social institutions and practices, language, cultural and religious expression. Accordingly, and *prima facie* in contrast to the UDHR, many of the rights claimed in the *Draft Declaration of Indigenous Peoples Rights* are collective rather than individual: collective right to self-determination, collective right to maintain their own distinct political, social, cultural characteristic, legal system and so on. Yet, striking with respect to the *Draft Declaration* is the fact that, although it is a document challenging the UDHR by emphasising collective rights claims, political self-determination and ethical self-governance, it is still committed to the very idea of universal human rights. A worry frequently expressed with regard to the *Draft Declaration* was, whether the recognition of collective human rights in addition to those rights laid down in the UDHR would not neglect the danger of internal oppression and dismissal of individual rights by indigenous communities with regard to their members (see Barsh 1996). Conversely, the *Draft Declaration* repeatedly refers to ‘individual and collective right’ (emphasis added). As Twiss (2004: 45) notes, “[t]his sort of formulation ... suggests the declaration is construing collective rights of the group as the intersections of shared individual interests which are being asserted against those outside the group who would deny or otherwise interfere with those shared interests”. In this way, we can say that it is an idea of shared individual interest that is underlying the notion of collective rights. A second and stronger case of evidence is that the *Draft Declaration* is guaranteeing all individual human rights in international law as well, i.e., it articulates a commitment to conform to standard human rights protection, and it includes equality- and non-discrimination provisions (gender equality, economic non-discrimination, protection of vulnerable sub-populations within their societies).

Another example illustrating the dialectic of challenging the de facto legacy while upholding the regulative ideal of human rights is the struggle for gender-related rights. The non-discrimination Article 2 of the UDHR, mandating that all persons are entitled to all human rights without distinction of any kind, including race, sex, religion, political opinion, national and social origin, has, from the start, been criticised of being too general and reluctant in acknowledging particular protection-clauses for women, especially. Since the 1970s and above all in the course of globalising women’s-movements, the pressure grew to take particular systematic discriminations and vulnerabilities of women in traditional and modern societies into account (insights that were subsequently underfed by empirical studies, see Sen 1999, Nussbaum 1997). In 1979 these movements virtually compelled the UN to adopt a *Convention on the Elimination of All Forms of Discrimination against Women*, advancing a set of gender-specific

ic rights and protections redressing problems of discrimination in law, political participation, education, employment, health care etc. (see Brownlie and Goodwin-Gill 2002). An impressive example of initiating cross-cultural dialogue about local interpretations of women's rights and about the development and implementation of practical strategies for their instantiation and enhancement was the *Beijing Conference on Women's Rights* 1995 (see Bazilli 2000), and at a practical level, the spawning of local mutual assistance women's NGOs¹⁷.

The third example relates to the right to health and well-being, and it will lead us to some more general reflections about global justice movements from below. Environmental and human rights movements have led to a simultaneous opening of human rights interpretations to environmental concerns (and vice versa) and to a re-inclusion of human rights concerns in economic and social law. Regarding the former aspect, the right to health initially framed in Art. 25 UDHR mandates a standard of living adequate for the health and well-being that was, although it included social services and social security, quite restricted in the sense that it was inspired by a biomedical model of health (in contrast, f. i., to the *World Health Organisation* that defined health as 'a state of complete physical, mental, and social well-being and not merely the absence of infirmity' (1947). Beyond the background of the exploitative experiences of developing countries, the *International Covenant on Economic, Social and Cultural Rights* refined Art. 25 UDHR in 1966, and mandated the right of everyone to 'the enjoyment of the highest attainable standard of physical and mental health' including provisions about environmental and industrial hygiene. Environmental concerns were strengthened again, after the WHO, in 1984, under the influence of environmental movements, redefined health as 'the extent to which and individual or group is able to develop aspirations and satisfy needs'. Subsequently, international human rights law envisaged and emphasised the underlying conditions that establish the basis for realising physical, mental and social well-being, including environmental and industrial hygiene, but also sustainable natural resources, a stable eco-system, social justice and equity.

Following this example, the more general point, we want to highlight, is that if we regard human rights and global justice movements during the last decades, we can see that they are in particular challenging the specialisation and fragmentation of international law in normative terms. The counter summits of 'global civil society' that are by now regularly taking place parallel to WTO-meetings, G8 summits and WEF-meetings, the global social movements to promote solidarity with the south, to promote enforceable labour standards, environmental, developmental and human rights-standards, they all urge to acknowledge and enforce human-rights standards within specialised legal regimes. They appeal to a global social contract emphasising the responsibility to effectively guarantee human rights and to balance them with trade- and property-related rights and freedoms¹⁸. One of the underlying ideas is, if we take the Preamble of the UDHR seriously, that national and international human rights law rests on the 'recognition of the inherent dignity and of the equal and inalienable human rights of all members of the human family [as] the foundation of freedom, justice and peace in the world', and if we consider that human rights have become part of the general principles of law recognised by civilised nations (Art. 38 Statute of the ICJ) it seems obvious to demand the integra-

¹⁷ The activities and networks in this context are well documented by the *UN Inter-Agency Network on women and gender equality – Women Watch*, available at <http://www.un.org/womenwatch/>. See also the Beijing+5 and follow-up documentation by the *UN Division for the Advancement of Women*, available at <http://un.org/women-watch/daw/followup/beijing+5.htm>.

¹⁸ For the ideal of a global social contract see He and Murphy 2007, Smith 2004 and Buchanan 2003. About transnational associational solidarity and networks see della Porta 2005, della Porta and Mosca 2007, Giugni and Passy 2001, and about global civil society Anheier, Glaius and Kaldor 2001. For interpreting these protest and scandalising movements in normative as well as in conceptual terms differently, see for instance Teubner 2000 and Fischer-Lescano 2005. Among others, they analyse the litigation for access to moderately priced HIV medication as well as the demonstrations of the *mandres* in Argentina as societal contributions to legal evolutions by way of enforcing responsiveness by irritation. See next chapter.

tion of human rights into the law of worldwide organisations, i.e., specialised organisations cannot exclude human rights from their field of specialisation, they cannot rest agnostic in this respect (see also Petersmann 2001). We can interpret the *Global Compact* initiative launched by UN Secretary Kofi Annan in 1999 in this light, where economic actors are asked to “support and respect the protection of international human rights within their sphere of influence and make sure their won corporations are not complicit in human rights abuses”. Altogether it is an attempt to integrate human rights considerations in the functionally differentiated and specialised organisations and agencies. So, in a way, these emancipatory, environ- and developmental movements are asking to re-integrate the idea of a ‘universal code’ in international legal regimes, or in other words: to acknowledge a ‘universal rule of recognition’ (see Raz 1979), capable to interfuse different rationalities.

III. Global Constitutionalisation: Normative Challenges

III.1. Structural Defects of the Global Legacy

So far, we have illustrated that the generic and reproductive processes of international law highly rely on the notion of a universal code or rule of recognition. Yet, we are also confronted with specialisations of international law in different legal regimes like ‘trade law’, human rights law’, ‘environmental law’, ‘criminal law’, ‘security law’, and formations of regionally differentiated transnational law regimes that have not only led to fragmentation of international law but also to a “reversal” of “established legal hierarchies in favour of the structural bias in the relevant functional expertise” (Koskeniemi 2007: 4). That implies, international law can neither rely on a clear-cut hierarchy of norms like ‘*lex superior derogat lex inferior*’ nor on an institutional hierarchy like constitutional vs. lower courts. Conflicts of jurisdiction as well as questions about which legal regime is the point of reference to solve a normative conflict arise. In the last decades there have been a lot of cases and *corpi delicti* where the problem was how to resolve whether something is an object of security law or human rights law, of human rights law or trade law, of trade law or environmental law, of *lex electronica* or *lex mercatoria*, of EU-Law or WTO-Law, and so forth. But the point to be made is not just about how to deal with ‘forum shopping’, i.e., the functional, issue-related interest gives rise to ‘choose’ a particular legal regime best serving the interests at stake for the plaintiff at hand. In this respect, opportunities are sheer endless, as any problem may be defined as a human rights problem, a security issue or an environmental question. What might be of higher relevance relates to the normative implications of subsequent conflicts over jurisdictions, or in other words, of “struggles for institutional hegemony” (ibid.).

Some authors indeed highlight pluralism, fragmentation, heterarchy and polycentrism as structural constituents of the contemporary evolution of law¹⁹, at the same time they emphasise the transnational, issue-specific and ecological character of modern (and this notion implies potentially nation-transcending) law (see Teubner 2006). In this view, the emergence of transnational law is foremost a result of functional evolutions caused by the inherent logic of sub-systems potentially reproducing contradictory rationalities. Systemic tendencies (differentiation and sub-system related closure) go hand in hand with an absence of unity and monist ambitions as well as with an outdated of centralised authority (ibid. 337). On the other side of the coin this picture of structural and systemic fragmentation and polycentrism is mirrored in the notion of society as a “poly-normative” world society which is itself highly fragmented and decentred, a sphere that permanently produces new ‘communicative’ (or better: informational) borders. Civil societies too create ‘legal orders’ based on private and social law, either by invoking the ‘legal order’ of contracts or by invoking scandals and ‘myths’ (Fischer-

¹⁹ Paradigmatically cf. Luhmann 1993, Teubner 2000, 2005, 2006, 2007, Fischer-Lescano 2005, Fischer-Lescano/Teubner 2006.

Lescano 2005; Teubner 2000). This aspect might well be interpreted as attempts to establish counter-legacies, i.e. to articulate contesting or challenging normative claims. However, system-theoretical perspectives reject subject centred evaluations (so, human-rights violations do not originate from relations between individuals and as such, from legal subjects). The consequence is that, in normative terms, counter-legacies are but counter-rationalities. Hegemony is explained in terms of totalizing (functional, issue-related) potentials of sub-systems, i.e. rationalities. Accordingly, international law is the outcome of a multitude of different institutional and societal sub-systems at the end of the day each applying its own law. In Teubner's view f. i., a constitutional theory of international law in the traditional sense is obsolete. A new legal approach is required, he argues, an approach that is sensitive to the impossibility of direct, subject-related and personified communication, and one that overcomes the idea of an intersubjective genesis of law. 'Responsiveness by irritation'²⁰ replaces an 'intersubjective justification of norms' and becomes – among others – a tool of a 'polycentric human-rights approach' (ibid. 341). The idea in this context is that human rights law does not depend on individual subjects, but on a logic of decentralised societal communications (see Fischer-Lescano 2005: 18) by way of which world society produces its own *lex humana* in the global *Bukovina*. The hope at that point is that, eventually, those decentred processes of communication establish a 'vital legality'²¹ and lead to successful irritations, i.e. to spontaneous openings of sub-systems where a functional synthesis of political (civil) demand and functional-judicial rationalisation can take place.

To our mind, these kinds of approaches are too short sighted in two respects. At the diagnostic level they neglect the dialectic interplay between partial and fragmental legacies and references to what we have called a 'universal code' as a *conditio sine qua non* of rights-talk in its own right (see above). At the normative and conceptual level, the emphasis on mutual closure and self-restraint (shaken up by spontaneous irritations) as remedies to hegemonic and structurally discriminating side-effects is far too naïve in a way. Because it neglects that, with the co-evolution of potentially conflicting legal regimes there is not only a problem of coherency but also a problem of legitimacy – the fragmentation of international law leads to collisions and conflicts between legal regimes that are not embedded in a framework of meta-rules and second-order procedures. As we have shown, the problem is obvious in cases where several legal institutions are involved, dealing with different rules and interpretative schemes. The risk is that, "if there are not regime-independent ways of describing an issue, the door is open to the unilateral assumption of jurisdiction by experts who feel themselves powerful enough to have the last word" (Koskenniemi 2007: 8). Apart from that, the problem is that certain regimes of jurisdiction become decoupled and independent from justification and public deliberation, and accordingly from 'reciprocal recognition'. In this way it is far from being arbitrary to refer to a universal code of recognition as a point of orientation: What is left if we depart from the idea of a universal scheme for reconciling normative conflicts is the contingency of autonomous 'legal' regimes and the hazard of 'dark' legacies²².

²⁰ If there is something like 'societal constitutionalisation', then it is a scheme of communicative irritations, and of norm-collision-rules balancing and domesticating totalizing tendencies. However, these interferences are weak, non-binding, informal and spontaneous, see Teubner 2006: 328.

²¹ Fischer-Lescano (2005) is borrowing the notion of 'lebendiges Recht' going back to Ehrlich (1967:43).

²² Ironically enough, it seems that Teubner cannot help but to implicitly resort to the idea of meta-rules for handling regime conflicts (about norm collision management and the establishment of 'collision law' cf. Teubner 2007: 8; Fischer-Lescano/Teubner 2007: 127f). Although he hesitates to conceptualise second-order and accordingly institutional mechanism, the importance of balancing spontaneous and complex rationalities and of institutional reflexivity is stressed, cf. Fischer-Lescano and Teubner 2006: 168f, see also Teubner 2007: 8. Apart from that, it is not obvious how a 'project of societal self-organisation', responsiveness and human rights protection (communications violating 'body and soul') should be accomplished if not hand in hand a.) with some minimal structural and institutional guarantees and some notion of 'unity' of the legal system, b.) with a 'universal' structure of rights and obligation, c.) with an egalitarian distribution of legal entitlements not based on voluntaristic/contractual compromises between structurally unequal actors, and d.) with inclusionary and access-

III.2. Constitutionalism in post-national constellations

Alternative approaches, especially those starting from research on European trans- and supranationalisation, are quite instructive in this respect. Because they depart from a similar diagnostic perspective insofar as differentiation, diversification and fragmentation of law and legal regimes are seen as inducing potential interpretative conflicts, norm collisions and conflicts about jurisdictional competences. In contrast to the aforementioned approaches they draw different conceptual and normative consequences upholding the idea of conflict management and resolution on the base of a ‘universal’ notion of reciprocity and inclusion on the one hand, and emphasising the need for institutional structures and mechanism that establish a co-operative scheme of conflict management on the other hand.²³ Joerges (2001 and 2005) f. i. works out that the idea of reciprocal recognition as equals (implying that conflicting normative claims have to be accepted, *prima facie*, as justifiable, i.e. as open to a reciprocal game of reason giving and reason taking) is a premise in order to resolve conflicts by recourse to meta- or second-order rules acceptable to all parties concerned (Joerges 2001: 4; also 1997: 388-910). *Unitas in diversitas* is his formula for integrating diverse and fragmented legacies into a meta-scheme of shared coordination. Apart from that, like scholars from political and democratic theory (see Habermas 1998a, Rawls 1992 and 1998), he puts an emphasis on the feasibility of inclusive and discursive procedures capable of both rationalising and legitimising normative conflict resolution. The emphasis is on the institutionalisation of practices of reciprocal justification, whereas the establishment of a ‘logic of appropriateness’ provides the base for balancing conflicting legacies²⁴.

To our mind, these perspectives are more appropriate to capture even the more precarious problems of global legal developments, in conceptual as well as in normative terms. They make it more explicit that legal systems (however fragmented and contested they are) essentially depend on a universal alignment in order to ground their own pretensions (or better: in order to fulfil the hope they raise by claiming to be a legal system) for overcoming exclusiveness, arbitrariness and hegemonic distortion. Günther is arguing in this direction. His basic diagnosis is that globalisation has produced a multiplicity of transnational legal regimes he labels as ‘project law’ (*Projektrecht*, Günther 2001: 540). At first sight, the development of a plurality of legal regimes seems to be antithetical to universal and monist interpretations of law. At second sight, however, we can identify law’s inherent normativity and function that is to guarantee equal treatment and normative coherence (ibid. 541). In this respect, fragmentation is factually challenging transparency, responsibility and representativeness (ibid.) of a legal system, but it cannot escape the universal inclusive legal grammar (the internal legal perspective). So, despite fragmentation and decentralisation, references to an abstract legal code are ineluctable. The internal legal logic is accordingly not to produce fragmented, exclusive rationalities alien to universality, but to organise diversity by a universal meta-code²⁵.

ible norm-generating mechanism acknowledging a bond between addressees and authors of law.

²³ Cf. for debates on transnationalisation in legal and democratic terms and for attempts to conceptualise a normative ideal of ‘deliberative supranationalism’ Schmalz-Bruns 1999, 2006, Joerges 2005, 2001, Joerges and Neyer 1999. See Bohman 2005 about the idea of a shared understanding of deliberative conflict management in the sphere of transnational constitutionalisation. For constitutional conflicts of the European Union cf. Habermas 2003, Bohman 2004, Closa 2005, Gerstenberg 2002, Eriksen 2005 and Menendez 2005.

²⁴ For approaches from International Relations Theory emphasising an underlying orientation towards a ‘logic of appropriateness’ and for impacts of institutional processes of socialisation see Risse 1999, Schimmelfennig 2005, Finnemore and Sikkink 1998, Keck and Sikkink 1998, for the idea of unintended institutional spillovers in the context of an ‘embedded liberalism’ see Zürn et al. 2007.

²⁵ Research in the context of International Relations studies also gives some sociological evidence to Günther’s reconstruction. Keohane and Buchanan, for example, argue for a notion of global standards of legitimacy, Keohane/Buchanan 2006: 405f, see also Nanz/Steffek 2007, Wolf 2000).

In the name of legal justice, legal certainty and legal fairness, plurality must be organised by an abstract, but shared reference to a code of fair and cooperative conduct.

The question remains, of course, how to capture this idea at the procedural and institutional level – and at global scale. Before turning to this question, we will quickly resume the problems we have depicted so far in normative terms: Firstly, insofar as legalisation implies differentiation and fragmentation of legal regimes that highly rely on partial-contractual agreements, these arrangements are vulnerable to arbitrariness, hegemony and exclusion²⁶ on the one hand, and vulnerable to fragmentation of and conflicts about jurisdiction on the other. Secondly, access to law-generation is exclusive and not responsive to different ‘agents of justice’, contestation and societal inclusion is neither structurally embedded nor procedurally guaranteed – and insofar altogether hesitant and ad-hoc.

We have already mentioned that legalisation beyond the nation state needs to be embedded in a broader scheme of proceduralisation, and that such a scheme involves a second-order system of mediation and inclusion. We have also hinted at the necessity that such a second-order system which is best captured in the terminology of constitutional theory is essentially relying on the notion of a universal code and therefore on a monist idea of law. A monist idea of law involves two structural elements, (a.) one that is related to the argument of law as a system unified at a very general level by a rule of recognition (see Günther 2001, and basically Kelsen 1992: 336ff.), and (b.) one that is related to the argument of law as an inclusive system of self-determination (Kant 1996a: 154ff and 1996b: 429-435). Both requisites – so the premise – can be applied to jurisgenerative processes of transnational law in order to ameliorate these processes for the sake of effectuating the stake of ‘agents of international justice’ (c.).

ad a.) As we have demonstrated, transnational jurisgeneration *in nuce* already relies on an ethos of international law. This reliance is not arbitrary insofar as any kind of legality is constitutively structured by an inherent logic that strives for (principled) unity and coherence – despite factual differentiation and fragmentation. In this light, we can put on view that the present multi-level and multi-institutional arrangements of global law are not antithetical to the idea of a universal legal framework but an intermediary step towards a legal order ‘unified’ by an abstract rule of recognition.²⁷ In the line of Kelsen’s reading of law’s internal logic (as developed in his book about a ‘Pure Theory of Law’, ‘Reine Rechtslehre’, Kelsen 1992), we assume that there is a necessary relation between legal ‘meanings’, i.e. legal norms (however fragmented they be) cannot evolve independently, but are embedded in a system of interrelated, derivative and coherence-driven processes of interpretation. As we have noted before, if one chooses the language of law, one cannot withdraw from its inherent normativity anymore. The result is that global law, too, despite the existence of different legal stages, contexts and functional regimes, follows a monistic alignment. So, the present multi-level-arrangements of global law are neither adversary to a universal legal framework nor detached from a ‘*Stufenfolge*’ of law. The idea is that legal meaning can only be generated by reference

²⁶ Sheer pathologies are f.i. cases like the working-conditions of the *maquilladoras* in Central America or the *Growth Triangles* in Southeast and South Asia where special agreements enable multinational corporations not only to be granted tax-free zones but also to abate social rights and working conditions (see Ong 1999). Insofar as these ‘free-production’ zones are withdrawn from national and international jurisdictional spaces they form “multinational zones of sovereignty” (Benhabib 2007: 25). N.b. that there are currently about 2,400 *bilaterale investment treaties* in existence (UNCTAD 2005), i.e. agreements between transnational corporations and frequently under- or non-industrialised states that usually include strong protections for the corporate investors and restrict the host state’s capacity of regulation, of claiming performance requirements and of enhancing the protection of health, environmental standards, human safety, social and human rights, cf. McCorquodale and Simons 2007.

²⁷ Following monist and constitutionalist approaches of international law – cf. paradigmatically Kelsen 1992 for the idea of a ‘*Stufenfolge des Rechts*’, Kelsen 1992 – we disregard dualistic interpretations of international law, cf. Weil 1987, recently Cohen 2006.

to some broader ‘established’ interpretative scheme that renders this meaning meaningful. There must be some kind of universal principle from which validity can be derived. This basic rule of recognition might be vague and abstract, though still an indication of unity and coherence. Taking this argument as a baseline, however, we depart from Kelsen insofar as we argue that it is not just the legal system’s functional necessity (ibid. 329) to build a coherent and unified architecture, but it is also a normative one – this brings us to the second point.

ad b.) We can specify law’s inherent logic as a normative one, and this contention will finally lead to the conclusion that legal practices have to be considered as essentially cooperative and necessarily inclusive. In order to assure cooperation and inclusion, again, these practices have to take account of a broader understanding of procedural justice. The argument runs like that: Firstly, law and legal arrangements are not just conflict solving or conflict resolving devices but cooperative arrangements at the outset. Even if we take the functional interests of actors as a starting point, juridical procedures draw from transcending these partial and exclusive interests – by referring to neutral reference points, by principled considerations like *audiatur et altera pars* or *ius respicit aequitatem*, by considering side-effects and negative externalities to third parties, and by demonstrating responsiveness towards articulations of externalities. So, secondly, in order for cooperation and sequentially mediation to work, reciprocal recognition has to be assured. The original legal parties, the arbiter or judicial agent as well as those concerned, i.e. potential third parties or agents of justice have to mutually acknowledge themselves as equal legal subjects. This recognition as equals is unequivocally a premise of any idea of reconciliation through law. Thirdly, and this is the crucial point leading to a more procedural and institutional principle, we can assume that the idea of reciprocal recognition immanently leads to the notion of inclusion – not least because reciprocal recognition can be guaranteed only if it includes all agents of justice concerned. However, inclusion of all those concerned is not to be predetermined but left open to critical challenges, and it should be open to contestable as well as revisable processes of justification. That implies, procedural remedies to responsively grant access to potential agents of justice are vital for any legal order to function properly. Accordingly, these normative pretensions lead to the conclusion – in systematic and institutional terms – that a universal constitutional order has to be established, i.e. an order able to assure an inclusive second-order scheme. So in a way, we can sustain that institutionally engineering a global constitutionalism is a ‘moral’ duty following from law’s inherent normative promises.²⁸

ad c.) One consequence is that law-generating processes including partial rule generation and fragmentations of legal regimes have to be re-embedded in such a constitutional second-order scheme assuring reciprocal recognition and inclusion. The first step could be to render the legal regimes more sensitive to justificatory practices, to the normative demands of societal agents concerned and to the need to establish institutional reflexivity. These devices could also lead to a systematic integration of ‘counter-legacies’. If we take the demand for inclusion and participation in norm-generating and -implementing processes within multi-level arrangements seriously, we have to reintegrate the scattered transnational legal regimes at a higher level – to facilitate the disclosure of international law and international institutions, i.e. to render them accessible for social agenda setting and legitimacy generating discourses²⁹. The point is hence that global law has to be organised by an inclusive constitutional (not just legislative) infrastructure in order to organise practices of institutional self-observation in a way reaching beyond partial responsiveness. Broadening the notion of institutional justification and reflexivity (see Forst 1999, on the idea of rationalisation through deliberation see: Apel 2002; Habermas 1991, 1998a und b, 1999a und b) can help to reconstruct the plurality of legal

²⁸ On the relationship between moral justice and law see most prominently Radbruch 2003: 210ff.

²⁹ For emancipative potentials and egalitarian semantics already existent in international law-generating processes see Brunkhorst 1998 and 2007.

regimes and to narrow their present detachment from normative demands by afflicted agents of justice. Although we cannot enter the debates about the desirability of including individual subjects into processes of international law generation we want to highlight that the phenomenological sketch above has also illustrated that we can plausibly start from the assumption that the very idea of universal law is predominantly an idea of individual universal rights law and that it is necessarily envisaging the individual as a legal subject. Insofar as the idea of enforcing this universal law is been driven by a cooperative search to identify agents of justice (a search that was often enough directed against the human rights abuses of nation states), the crucial point is that norm generation, in order to be legitimate, relies on the inclusion and consent of those who are concerned subjects. Therefore, norm-generation should be open to all those agents willing to obligate themselves to practices of reciprocal justification (see Kant 1996a: 212, 214 ff.), i.e. to a game of ‘reason-giving and reason-taking’³⁰.

But a strong principle of justification is not just relevant in the sense that it constitutes discursive veto-mechanisms for societal agents (as such rendering international law more subject-centred and -responsive), it is also a principle constituting a system of institutional checks and balances. The argument is that – regarded at the intra-institutional level – a principle of justification can turn a system of partial self-organisation into a system of mutual self-restraint. *Nemo iudex in causa propria* is the organisational principle assuring institutional self-reflexivity and preventing institutional hegemony. The problems of who is entitled to generate, to implement, to interpret and to enforce norms, in which context, and vice versa, of who is obliged to comply to which extend can adequately be resolved only if based on meta-principles supplying some procedural remedies and coordinating responsible collective action. In the context of international law, this idea is captured by the legal concepts of *erga omnes* and *ius cogens*. These principles can be interpreted as a second order scheme with provisional character (cf. Meisterhans 2007). In this line Fassbender f. i. elaborates a concept of the *UN Charter* as a provisional constitution (2004)³¹. The crux of the matter is twofold: The idea of coercive and compulsory law is not just related to an enhanced and broadened notion of responsibility (not just states and collective entities/organisations but collective actors in general as well as individual subjects, see above) but also to a ‘democratic’ turn of international law-generation. Inclusion is a matter of fact in the course of establishing a legal order of constitutional quality acknowledging legal subjects as well as legal duties of various kinds.

Conclusion

Purpose of the article was to elaborate an idea of global constitutionalism that goes beyond segregated processes of international law generation and transnational legalisation. Insofar as partial legacies are detached from transparent, accountable and inclusive multi-level arrangements they are vulnerable to hegemonic, exclusive and rights distorting tendencies, i.e. they have to be reintegrated into a ‘constitutional’ scheme of cooperation, mutual recognition and an institutional scheme of checks and balances. As we have illustrated, the development of international law is a process of embedding an ethos of international law which is at the same time to be qualified as a dialectic process of contesting the normative status quo of international law by establishing ‘counter-legacies’. However, practices of contestation as well as practices of justification of international law are necessarily driven by a notion of universal right, i.e. they rely on a hypostated regulative ideal of a universal legal code including notions

³⁰ The self-obligation to subject oneself to practices of reciprocal justification, i.e., to play by the rules of a game of ‘reason-giving and reason-demanding’, is indeed a litmus-test for those demanding to be acknowledged as agents of justice and as equals (Kant 1996a: 210). For an overview about state- vs. subject-centred approaches see Bruno 1997.

³¹ On the idea that global law should be understood in terms of *ius cogens* and *erga omnes* see also Frowein 1983 and 1989, and Tomuschat 1993.

of coherence, cooperation and mutual recognition, and inclusiveness with respect to potential ‘agents of justice’. Even the various attempts to establish counter-legacies are directed towards an amelioration of jurisgenerative and jurisinterpretative processes in terms of universal recognition. The consequence we draw in normative terms from the observation of a still deficient – both exclusive and asymmetric – international legal order is to institutionalise and structurally embed law’s inherent normative promises, i.e. to establish a coherent, equality securing scheme of cooperation and recognition. These claims follow the general insight that for the sake of justice, legal certainty and fairness, plurality must be organised by an abstract and principled reference to a universal code of fair and cooperative conduct.

In this light we can interpret the concepts of *erga omnes* and *ius cogens* as founding principles corresponding to the notion of constitutive (in the sense of constitution building proper) rights *and* duties. A constitutional scheme at global level includes at the organisational and institutional level a system of checks and balances guaranteeing mutual self-restraint and responsiveness. At the jurisgenerative level it embraces an inclusive procedural ideal, open and accessible to different agent of justice. In this sense, not just corporate entities (states, organisations, and collective agents) are entitled and eligible to legal subjectivity (*Völkerrechtssubjektivität*) but the individual as a human-rights holder, too. Beyond this background, a monist understanding of international law is a means of expression for the feasibility of equal treatment and recognition as well as inclusion.

The next step would be of course to elaborate a detailed reform proposal which, unfortunately we cannot do in this context. We can only hint at the cornerstones of such a project: The centre for canalizing discourses in the multi-level-game of world society could most plausibly be supplied by the UN-infra-structure which has, although far from being perfect, developed structures responsive and accessible to agents of justice (see Brozus, Take and Wolf 2003, Petersmann 2006, Nanz/Steffek 2007); a nascent corpus of international public law could be employed to constitute organisational and procedural principles of institutional checks and balances (see Delbrück 2000); and the trans- and international human rights covenants could form the humus for a universal ‘bill of rights’. After all, it might not sound anymore like the voice of someone crying in the wilderness, if one claims that “[t]he emerging multi-level human rights constitution, based on national, regional and worldwide guarantees of human rights and of democratic self-determination of people, calls for construing state sovereignty, popular sovereignty and individual sovereignty in a mutually coherent manner so as to protect maximum liberty and other human rights as basic principles of justice” (Petersmann 2006: 5).

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