Chapter Seventeen

Redefining Sovereignty via International Constitutional Moments?

by
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It ranks among the accomplishments of the "new generation of interdisciplinary scholarship"[1] that the social embedding of law has once again become part of the international research agenda. For decades realists and normativists have had hardly anything to say to each other since the pioneering work of Hans Morgenthau and E.H. Carr, on the one hand, and George Scelle and Hans Kelsen on the other.[2] But from 1990 on a plenitude of works have appeared that attempt to merge once more both "optics".[3] Anne-Marie Slaughter has proven to be a pivotal force in these debates. She has given significant impetus to the legalization debate, the network conception of international governance, the discussion of international legal liberalism and in the discourse on the methodology of international lawyers. Among political scientists as well as in the field of international law, she has been able to find a receptive audience.[4] In the ever-growing discussion on global constitutionalism, Slaughter has also made a contribution. Together with William Burke-White, she has dedicated herself to "constitutional moments"[5] and informed by political science and legal theory, she has attempted to outline the transformation of basic constructions of international law using the example of the fight against terror.

I

From a methodological point of view, Slaughter/Burke-White's text stands squarely in the tradition of interdisciplinary studies as practiced in the United States. After evaluating political positions of the nation states concerning the fight against terror, the authors come to the conclusion that following the events of September 11, 2001, a globally valid principle of "civilian inviolability" had emerged. This not only represented a new global "grundnorm",[6] but also an "international constitutional moment". As a legal consequence Slaughter/Burke-White describe the emergence of new rules which in particular contain a transformation of the norms of the prohibition of the use of force. At the heart of the matter, therefore, the authors offer a political analysis of the so-called "new threats" which lead Slaughter/Burke-White to normative demands:

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[1] Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 393 (1998).
[2] MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2002).
[3] Robert Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487 (1997).
[4] Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993); Anne-Marie Slaughter, Andrew Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); Anne-Marie Slaughter Burley, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995); Kenneth Abbott et al., *The Concept of Legalization*, 54 INTERNATIONAL ORGANIZATION 401 (2000); Steven Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999); ANNE–MARIE SLAUGHTER, A NEW WORLD ORDER (2004).
[5] Anne-Marie Slaughter & William Burke-White, *An International Constitutional Moment*, 43 HARV. INT'L L.J. 1, 2 (2003).
[6] They constantly use the German expression.

> To respond adequately and effectively to the threats and challenges that are emerging in this new paradigm, we need new rules. Just as in 1945, the nations of the world today face an international constitutional moment. In the words of British Foreign Secretary Jack Straw: "Few events in global history can have galvanized the international system to action so completely in so short a time."[7]

Had the authors been satisfied with a requirement *de lege ferenda*, this would have been relatively unproblematic, and it would have been but one attempt among many others to develop an adequate strategy for contemporary challenges in the framework of a political debate. But the key to the work of the "new generation of interdisciplinary scholarship" in the USA lies much more in the fact that they mix paradigms of argumentation from political and legal science which cannot be cleanly delineated as "to be" or "ought to" and are produced through the application of a political concept of law. In other words, Slaughter/Burke-White mix requirements *de lege ferenda* with analyses *de lege lata* to such an extent that they do not limit themselves to the formulation of the desideratum to modify Art. 2 (4) of the UN Charter, but rather they determine: "The principle of civilian inviolability provides the common ground for the coalition arrayed against Al Qaeda."[8]

II.

Ironically for this enterprise that blends both facts and validity, Slaughter/Burke-White invoke precisely *the* author whose work was characterized by the clean separation of "to be" and "ought to". Slaughter/Burke-White write: "Translating these various sources of support for civilian inviolability into a globally acceptable grundnorm, "[9] thus interpreting Hans Kelsen's *Grundnorm* clearly as a substantive norm. They take up the idea of the political optimization of values and principles as represented by the New Haven School and others[10], and dignify the "principle of civilian inviolability" in direct reference to Kelsen, even using the German terminology of global "grundnorm",[11] as the basic norm of world society. This, however, has nothing to do with Kelsen's conception. For him the *Grundnorm*, the basic norm, is a fiction. It shapes the answer to the question of the validity and self-determinacy of the legal order. Kelsen sketches the concept of an externalization of the foundation of validity of law in a scientific hypothesis in whose validity there can be no doubt:

> "no further question can be raised about the basis of its validity; for it is not a posited but a presupposed norm. It is not a positive norm, posited by a real act of will, but a norm presupposed in jurist thinking. It represents the ultimate basis of the validity of all legal

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[7] Slaughter & Burke-White, *supra* note 5.

[8] Slaughter & Burke-White, *supra* note 5, at 16. This statement stands in notable contrast to that what they say about state responsibility. C*f. id*. at 19-21.

[9] Slaughter & Burke-White, *supra* note 5, at 18.

[10] MYRES MCDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980); Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866 (1990); see also the political concepts of law in Fernando Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992); Richard Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991 (1995); Kenneth Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. CONFLICT RESOL. 3 (1998).

[11] Slaughter & Burke -White, *supra* note 5, at 18.

> norms forming the legal order. Only a norm can be the basis of the validity of another norm."[12]

The "grundnorm" is therefore only a norm that regulates how norms are created and it is not a norm belonging to substantive constitutional law – as Slaughter/Burke-White maintain. To the contrary, it constitutes Kelsen's attempt to *positivize* the foundation of validity of law and free it from political will, natural law or religious and other transcendental points of view.[13] Kelsen's legal pacifism and the pure legal theory were decidedly characterized by opposing a different model to the "real political" legal instrumentalism in the tradition of Carl Schmitt.[14] The basic intention of Kelsen was to show that it is the legal order that constitutes the political system; that law cannot be found in a legal vacuum[15] and that it is not politics but rather the idea of the "grundnorm" and its presupposed and hypothetical validity that the norms of international law derive their own validity.[16] The basic problem of the international legal order as Kelsen saw it is the auto-interpretive or instrumental approach which nations applied when dealing with international law. This required that a world legal system be placed over and against it. "No law without a court"[17] wrote Kelsen and in another place he lamented, "there exists no authority accepted generally and obligatorily as competent to settle international conflicts."[18] A "world constitutional project" that considers as constitutional moments statements – however seriously uttered – by nation-states meant to justify the proliferation of armed conflict can hardly call upon the name of Hans Kelsen. Because for him as a theoretician of pure legal theory it is decisive that precisely this political instrumentalism concerning the legal system must be ended.[19] Thus for Kelsen, the question of a legal self-constitution[20] becomes the decisive question in the formation of a legal order legitimized by the "grundnorm" and the function of the constitution is justified by the fact that it helps to secure the autonomy of the legal order by regulating the forms of norm creation.[21]

III.

Slaughter/Burke-White's use of the semantic of the *Grundnorm* is therefore obviously a *marketing trick* and hides the fact that the father of the constitutionalism of Slaughter/Burke-White is not the master-mind behind pure legal theory. To the contrary, their political-juridical

[12] Hans Kelsen, *The Function of a Constitution*, *in* ESSAYS ON KELSEN 109, 115 (Richard Tur & William Twining, eds., 1986).
[13] Andreas Fischer-Lescano, *Monismus, Dualismus? – Pluralismus. Selbstbestimmung des Weltrechts bei Hans Kelsen und Niklas Luhmann, in* VÖLKERRECHTSPOLITIK. ZUM STAATSVERSTÄNDNIS VON HANS KELSEN (Hauke Brunkhorst, ed., 2005, forthcoming).
[14] Expressly against Schmitt, Hans Kelsen, *Wer soll der Hüter der Verfassung sein? (1931)*, *in* 2 DIE WIENER RECHTSTHEORETISCHE SCHULE: AUSGEWÄHLTE SCHRIFTEN VON HANS KELSEN, ADOLF JULIUS MERKL UND ALFRED VERDROSS 1873, 1884-1885(Hans Klecatsky, ed., 1968).
[15] HANS KELSEN, DAS PROBLEM DER SOUVERÄNITÄT UND DIE THEORIE DES VÖLKERRECHTS 236 (1920).
[16] *Id*. at 251.
[17] HANS KELSEN, HAUPTPROBLEME DER STAATSRECHTSLEHRE 35 (1932).
[18] HANS KELSEN, PEACE THROUGH LAW 13 (1944).
[19] *Ibidem.*
[20] Hans Kelsen, *Die Selbstbestimmung des Rechts*, *in* 2 DIE WIENER RECHTSTHEORETISCHE SCHULE: AUSGEWÄHLTE SCHRIFTEN VON HANS KELSEN, ADOLF JULIUS MERKL UND ALFRED VERDROSS 1445-1453 (Hans Klecatsky, ed., 1968); see also the analysis by ROBERT CHRISTIAN VAN OOYEN, DER STAAT DER MODERNE. HANS KELSENS PLURALISMUSTHEORIE 55-60 (2003), and JOCHEN VON BERNSTORFF, DER GLAUBE AN DAS UNIVERSALE RECHT. ZUR VÖLKERRECHTSTHEORIE HANS KELSENS UND SEINER SCHÜLER 169-172 (2001).
[21] Kelsen, *supra* note 12, 113.

evaluation technique stands in the tradition that was vehemently opposed by Kelsen in the Weimar debate: it is the emphasis on political decision-making, according to which it is not law but rather politics which must decide significant questions. Carl Schmitt formulated it unequivocally as early as 1934[22] and Hans Morgenthau wrote in 1940 in the *American Journal of International Law* that

> [i]n the international field the authoritative decision is replaced by the free interplay of political and military forces. […] a competitive contest for power will determine the victorious social forces, and the change of the existing legal order will be decided, not through a legal procedure [...] but through a conflagration of conflicting social forces which challenge the legal order as a whole.[23]

In 1929, Morgenthau had already dealt with the *Begriff des Politischen* ["concept of the political"][24] in his dissertation *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* ["International jurisprudence, its essence and its limits"]. The very heading of a subchapter in Morgenthau's dissertation suggests the influence of Carl Schmitt's essay *Der Begriff des Politischen* which appeared in 1927 in the *Archiv fuer Sozialwissenschaft und Sozialpolitik*,[25] even though Morgenthau does not quote the essay. In a fashion similar to Schmitt, who wanted to see so-called "political governmental acts" excluded from juridical review in national legal orders,[26] Morgenthau postulates (and here he argues normatively) the primacy of political decision-making: *political questions* are not to be decided in the legal arena, but rather in the political one. Otherwise, political tensions would be subject to the impact of means "that are in no way suitable for it."[27] He continues by maintaining he has found scientific proof for disputes that cannot be adjudicated:

> We have been able to prove the distinction of international conflicts in two categories whose ability to be resolved by legal judgment is not based on the arbitrariness of malicious or incompetent governments, but on a necessity proven by scientific means which are the expression of a defined empirically given situation. Further, the blurring of the borders between these two categories cannot be removed by means of juridical techniques, and comes about by necessity because of the contemporary state of inter-state relations.[28]

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[22] Carl Schmitt, *Der Führer schützt das Recht (1934), in* POSITIONEN UND BEGRIFFE 227, 230 (3rd ed. 1994).
[23] Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 275 (1940).
[24] *Id*. at 46-47.
[25] Carl Schmitt, *Der Begriff des Politischen*, 58 ARCHIV FÜR SOZIALWISSENSCHAFT UND SOZIALPOLITIK 1 (1927).
[26] CARL SCHMITT, DER BEGRIFF DES POLITISCHEN 22-23 (7th ed. 2002) (text of the 2nd ed. of 1932); see also Schmitt's text "Der Führer schützt das Recht" from 1934: "In the 19th century Dufour, one of the fathers of French administrative law, defined every governmental act (acte de gouvernement) that evaded of judicial review in such a way that its goal is the defence of society, whether against internal or external, clear or hidden, or present or future enemies. Whatever one thinks of such conditions, they nonetheless refer to a legally essential feature of the political governmental act, which even in liberal constitutional states lead to legal recognition. In the case of doubt the fact that the limits of acts that are either empowering or non-empowering are not in the domain of the courts is self-explanatory when one considers the earlier references to the special feature of the governmental act and leadership roles." Carl Schmitt, *Der Führer schützt das Recht, in* POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR, GENF, VERSAILLES, 1923-1939, 227, 230 (3d ed. 1994).
[27] HANS MORGENTHAU, DIE INTERNATIONALE RECHTSPFLEGE, IHR WESEN UND IHRE GRENZEN 89 (1929).
[28] Morgenthau, *supra* note 26, at 146-147. By the way, this statement is found in a chapter that Morgenthau titles: "Rechtspolitische Folgerungen" [consequences for the politics of law]. *Id*. at 131)

>From a legal point of view the explosiveness of this assertion is that Morgenthau not only states the existence of non-justiciable governmental acts but also assigns the authority to decide about justiciability/non-justiciability to the realm of politics. He develops this thought further in his post-doctoral thesis presented in Geneva in 1934. Even though this was written at the start of the 20th century, it represented nothing new. Morgenthau could refer to a rich body of literature on legal realism. [29] In his dissertation[30] Morgenthau could rely on the work of the most significant representative of so-called Scandinavian legal realism, Anders Lundstedt who in 1925 in the domain of international law saw "nothing but the crudest policy of force."[31] Thus, what was new in Morgenthau's realism was not the marginalization of law; the legal realists preceding him had already developed it. Rather new was that he connected this strategy of marginalization to a political scientific analysis that reached the intuition of his audience not only in the 1920s and 30s: law does not create peace; the utopias of Kant and the neo-Kantians surrounding Hans Kelsen have failed. What counts is not legal hairsplitting and a "misunderstood legalism and formalism"[32] but rather the big questions of war and peace, which can only be decided politically and – it must be emphasized that Morgenthau argues normatively -- which is a question that shall only be decided politically.

The legal-theoretical language that Slaughter/Burke-White use by adopting Kelsen's "pure legal theory" appears harmless. But Anne-Marie Slaughter has described in one of the programmatic essays on the content of the interdisciplinary program of the "new generation of interdisciplinary scholars" a fundamental shift in the tasks of jurisprudence and degrades law to a political/social technique whose own value, function, and rationality would be replaced by an analysis of political conditions:

> (1) to diagnose international policy problems and to formulate solutions to them; (2) to explain the function of particular legal institutions; and (3) to examine and reconceptualise particular institutions of international law generally. [33]

All of these are tasks have nothing to do with the actual work of the lawyer who is to examine the legality of a specific behavior in the light of a valid norm. Such an analysis may perhaps serve to describe strategies for handling a problem *de lege ferenda*. But one cannot define the valid law in this way. This approach neglects existing international norms and sacrifices legal self-logic upon the altar of political instrumentalism. [34] This can in particular be raised against Slaughter/Burke-White and in general against those political legal theories for which law has always been without its own intrinsic value: "[L]aw is *instrumental* only, a means to an end, and is to be appraised only in the light of the ends it achieves."[35]

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[29] On American and Skandinavian legal realism in the 1920s see, ULRICH FASTENRATH, LÜCKEN IM VÖLKERRECHT 33 (1991), with further references.

[30] Morgenthau, *supra* note 27, at 162; Morgenthau also quotes the legal Realist, ADOLF LASSON, PRINZIP UND ZUKUNFT DES VÖLKERRECHTS (1871).

[31] ANDERS LUNDSTEDT, SUPERSTITION OR RATIONALITY IN ACTION FOR PEACE ? 205 (1925).

[32] Carl Schmitt, *Völkerrechtliche Formen des modernen Imperialismus*, *in* POSITIONEN UND BEGRIFFE IM KAMPF MIT WEIMAR, GENF, VERSAILLES, 1923-1939, 184, 202 (1994).

[33] Slaughter et al., *supra* note 1, at 373.

[34] This is a Schmittian strategy of argumentation, see Andreas Fischer-Lescano & Ralph Christensen, *Auctoritatis interpositio. Die Dekonstruktion des Dezisionismus durch die Systemtheorie, in* 44 DER STAAT. ZEITSCHRIFT FÜR STAATSLEHRE, ÖFFENTLICHES RECHT UND VERFASSUNGSGESCHICHTE, DEUTSCHES UND EUROPÄISCHES RECHT (2005, forthcoming).

[35] Myres McDougal, *Fuller v. The American Legal Realists*, 50 YALE L.J. 827, 834 (1941).

IV.

The problem of this political-legal technique becomes virulent where Slaughter/Burke-White depart from the level of theoretical reflection and legally justify political options to use force which are not as unobjectionable as they try to make them appear. While they consider the "evolving doctrine of humanitarian intervention" as a suitable procedure for the implementation of human rights,[36] and while they insist that the "traditional 'effective control' test for attributing an act to a state seems insufficient to address the threats posed by global criminals and the states that harbor them"[37] and that the "principle of civilian inviolability provides the common ground for the coalition arrayed against Al Qaeda",[38] they also bring up a plethora of ensuing legal questions. One ought not underestimate that the doctrine of humanitarian intervention applies a balancing test (state's rights vs. human rights), that the "effective control test" has also drawn its justification from the fact that this legal construction helps to hold the violence exceptions in international law under "effective control" and that the principle of "civilian inviolability" is open to such a degree that by referring to it one could even justify a humanitarian intervention accomplished by China to liberate the so-called "illegal combatants"[39] at Guantanamo Bay.[40]

The normative components with which Slaughter/Burke-White line their political science analysis however also point to the intrinsic limits of interdisciplinary projects. This limitation consists in the fact that:

> it does not follow that because something is, something ought to be, and because something ought to be it cannot follow that something is.[41]

In other words, it cannot be explained with the methodological approach employed by Slaughter/Burke-White why contemporary political challenges should have led *ipso iure* to the evolution of a global principle of civilian inviolability that even permits a humanitarian intervention; why this represents an international constitutional moment and by which rule a modification of the legal sovereignty principle followed. The attempt to transform the sovereignty principle of international law by relying on a political theory of law points to the weaknesses of interdisciplinary works where their proponents do not only formulate political desiderata but formulate normative claims and try to make them appear *lex lata*. Where they attempt to merge two different streams of logic with a slant to universalisms, i.e. politics and law, the legal character and the surplus value of a self-determined legal system[42] get lost. In other

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[36] Slaughter & Burke-White, *supra* note 5, at 19.
[37] Slaughter & Burke-White, *supra* note 5, at 20.
[38] Slaughter & Burke-White, *supra* note 5, at 16.
[39] On their status: George Aldrich, *The Taliban, Al Qaeda and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002); Rüdiger Wolfrum, *The Attack of September 11, 2001, the Wars Against the Taliban and Iraq. Is there a need to reconsider international law on the recourse to force and the rules in armed conflict?*, 7 MAX PLANCK Y.B. UN L. 1 (2003).
[40] See the recent US supreme court decision in *Hamdi vs. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004), in which Justice Sandra Day O'Connor gives the remarkable explanation, "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens…Whatever power the United Nations Constitutions envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." (citations omitted).
[41] HANS KELSEN, REINE RECHTSLEHRE 5 (reprint of the 2nd ed. 2000).
[42] On this, see Gunther Teubner, *Alienating Justice: On the Social Surplus Value of the Twelfth Camel*, *in* LAW'S NEW BOUNDARIES: CONSEQUENCES OF LEGAL AUTOPOIESIS 21, 35-44 (David Nelken & Jirí Pribán 2001); see also the works of Duncan Kennedy, especially, DUNCAN KENNEDY, CRITIQUE OF ADJUDICATION (FIN DE SIÈCLE) (1997).

words, it is suppressed by a political rationality. Hedley Bull recognized this as early as 1972. Directed at authors who today are categorized as "liberal anti-pluralists"[43] such as those of the New Haven School, but also against Richard Falk, Bull wrote:

> It may be said, however, that the blurring of the distinction between "is" and "ought" imposes a grave obstacle both to the work of identifying what rules are law, and to the work of establishing what rules are good rules […] It is apparent that many students of international law, particularly in the United States, are turning away from international law towards the wider field of the study of international order in all its aspects. This is in itself no bad thing […] It should be recognized, however, that what they are now doing is not properly called the study of international law. And it should be recognized also that the subject they are leaving behind them, the exposition and interpretation of existing legal rules, is one that demands continuing attention.[44]

Bull, who himself was one of the few interdisciplinary thinkers, put his finger on an interdisciplinary problem that presents itself today in much higher profile than it did in the 1970s. His objections against instrumental interdisciplinary research should, therefore, not be underestimated. For in the end, interdisciplinary projects that carry out political science theory as legal theory lead to an unfiltered intrusion of political science reasoning directly into legal rationality.[45] That is nothing less than the attempt to politically usurp law by the fields of theory, methodology and, finally, education,[46] in the words of Philip Allott:

> But there are two serious reasons why it would be regrettable, to say the least, if it were to become the tone and method for international *law*. The first is that it is a tone and a method for political, administrative and legislative debate and is not suitable for use by practitioners and governments applying law to the day-to-day conflicts of international relations. The second is that, whatever the high ideals of those who believe in it and practise it, the danger is that it will be a more apt weapon for those whom they would least wish to assist – the dialectical materialist and the cynical practitioner of *Realpolitik*.[47]

V.

It is precisely in Slaughter/Burke-White's text on *International Constitutional Moments* that these problems become apparent. This rests in the fact that the discussion on global constitutionalism shows better than any other debate that the relationship of law and politics is one of two distinctive communication systems[48] or discourses which are autonomous in their operations.[49] The mutual closeness and openness of these systems can only be understood if one

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[43] *Cf.* the critique of Gerry Simpson, *Two Liberalisms*, 12 EUR. J. INT'L L. 537 (2001).
[44] Hedley Bull, *International Law and International Order*, 26 INTERNATIONAL ORGANIZATION 583, 585, 587 (1972).
[45] See the warnings of Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiators? Your Treaty or Our 'Interpretation' of it?*, 65 AM. J. INT'L L. 358 (1971); Philip Allott, *Language, Method and the Nature of International Law*, 45 BRIT. Y.B. INT'L L. 79 (1971); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); MARTTI KOSKENNEMI, >FROM APOLOGY TO UTOPIA. THE STRUCTURE OF INTERNATIONAL ARGUMENT (1989); DAVID KENNEDY THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).
[46] Generally on this point see, Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 17 (Michael Byers ed., 2000).
[47] Philip Allott, *Language, Method and the Nature of International Law*, 45 BRIT. Y.B. INT'L L. 79, 126 (1971).
[48] NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT (1995).
[49] JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG (1992).

keeps in mind the perspective entanglements with which law and politics take their respective *altera pars* under consideration.[50] Precisely in constitutional law it becomes apparent that law as well as politics are both based on preconditions that neither could generate by itself.[51] Political constitutional law is an evolutionary achievement which represents both separation and linkage between politics and law and, thus, guarantees to each of them its autonomous operation. If, however, in the framework of a political theory of law, the latter is deprived of its intrinsic value, one receives a completely insufficient picture.

Unless one wishes to negate a two hundred years old tradition of an idea, "constitutional moments" are to be understood as those which deal with the legal establishment, control and restraint of authority, under the conditions of self-determinacy of the corresponding social basis.[52] That is precisely where the focus of the discussion on global constitutionalism lies:[53] Sovereignty and global law cannot be viewed as contradictory; national sovereignty is the condition of global law and global law is the condition of sovereignty being possible.[54] Therefore, the reciprocal autonomy and union of the two have to be reflected: in other words, the fundamental paradox that international law constitutes nation states on the one hand and on the other, nation states constitute international law.

In this respect, the fight against terror has not changed anything. The war in Afghanistan which Slaughter/Burke-White use as their point of departure for their deliberations on *International Constitutional Moments* was not a moment that readjusted the relationship between law and politics. The world community continues to expect from politics behavior that conforms to international law. It is exactly this which prompted millions of demonstrators around the world to take to the streets.[55] And it is exactly this which led Bruno Simma, in his separate opinion in the *Platforms Case* decided by the ICJ in November 2003, to the "consideration of *Rechtspolitik*,"[56] demanding

> courage of restating, and thus reconfirming, more fully fundamental principles of the law of the United Nations as well as customary international law (principles that in my view are of the nature of jus cogens) on the use of force, or rather the prohibition on armed force, in a context and at a time when such a reconfirmation is called for with the greatest urgency.[57]

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[50] On the functional embeddings of the polycentric constitutionalization processes see, Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search For Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

[51] *Cf.* ERNST-WOLFGANG BÖCKENFÖRDE, STAAT, GESELLSCHAFT, FREIHEIT 60 (1976).

[52] INGEBORG MAUS, ZUR AUFKLÄRUNG DER DEMOKRATIETHEORIE. RECHTS- UND DEMOKRATIETHEORETISCHE ÜBERLEGUNGEN IM ANSCHLUSS AN KANT (1992).

[53] Jochen Abr. Frowein, *Konstitutionalisierung des Völkerrechts*, 39 BERICHTE DER DEUTSCHEN GESELLSCHAFT FÜR VÖLKERRECHT 427 (2000); Andreas Fischer-Lescano, *Die Emergenz der Globalverfassung*, 63 HEIDELBERG J. INT'L L. 717 (2003).

[54] Jürgen Habermas, *Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?*, *in* DER GESPALTENE WESTEN, KLEINERE POLITISCHE SCHRIFTEN X 113, 139-165 (2004).

[55] On the legal dimension of scandalization processes, Gunther Teubner, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 3-28 (1997); Fischer-Lescano, *supra* note 53; Achilles Skordas, *Hegemonic Custom?*, *in* UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 317, 319-325 (Michael Byers & Georg Nolte eds., 2003); Sonja Buckel, *Judge Without a Legislator – Transnationalisierung der Rechtsform*, *in* VÖLKERRECHTSPOLITIK. RECHT, STAAT UND INTERNATIONALE GEMEINSCHAFT IM BLICK AUF KELSEN (forthcoming Hauke Brunkhorst ed.); *cf.* Daniel Thürer, *Irak-Krise: Anstoß zu einem Neuüberdenken der völkerrechtlichen Quellenlehre*, 41 ARCHIV DES VÖLKERRECHTS 314 (2003).

[56] Oil Platforms (Iran v. U.S.), 2003 I.C.J. preface and para. 6 (Nov. 6) (separate opinion of Judge Bruno Simma).

[57] *Id.*

In the military measures in Afghanistan it becomes manifest that power can strike back when offended. But there is nothing special or "constitutional" about that. To garnish the legal constructions which were invoked in this context by the epithet "constitutional moment" is not only flawed as a matter of legal theory, it is an unwarranted exaggeration that ignores the legal discourse on the issue of the intervention in Afghanistan and equally misinterprets the political statements given during the course of the global "fight against terror". The officials and non-officials who were invoked by Slaughter/Burke-White regularly did not connect their demands for civilian inviolability with the issue of *ius ad bellum*. All statements given by representatives of nation states and international organisations with regard to human rights in the context of the military engagement in Afghanistan contain the usual political strategies of rhetorically reinforcing human rights principles. But those techniques leave serious lacunae. Their operationalisation, e.g. juridification, has to be achieved under the conditions of extremely vague values and principles, that share much of the natural law spirit. They remain political decorations if they are not accompanied by access rights to courts.[58] And consequently the repeated invocation of the semantics of universality of human rights, of humanity etc., contrasts with the observation that Afghanistan is less a manifestation for a new global constitutional principle than a dark hour of human rights. In this sense, Amnesty International, for example, quotes in its October 2003 report an Afghan woman with the words: "No one listens to us and no one treats us like human beings."[59] And the Secretary General, in his report on Afghanistan 2004, states: "The absence of legal and social support systems has left many women trapped in abusive situations, from which they sometimes try to escape by drastic measures, including suicide and self-immolation."[60] In this perspective, Afghanistan seems not to be a constitutional moment for human rights but makes visible the serious problem of 'exclusion' of numerous individuals in world society. And the worst imaginable scenario might be that the society of the next century will have to accept the metacode of inclusion/exclusion. And this would mean that some human beings "are included in function systems for (successful or unsuccessful) careers and others are excluded from these systems, remaining bodies that try to survive the next day; that some are emancipated as persons and others are emancipated as bodies". [61]

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[58] See e.g. the discussion on social and economic rights, where the production of well-meaning texts does not go along with the willingness to created access to courts: "However, with regard to the proposed elaboration of an optional protocol to the Covenant incorporating a mechanism for individual complaints, the Union was of the opinion that, if such a mechanism was to be established, it must be provided with a clear framework and avoid any overlap with existing mechanisms" (Representative of the European Community, 33rd meeting of the 58th session of the human rights committee, E/CN.4/2002/SR.33, 7; see also E/CN.4/2001/SR.31, 9); on the operationalization of the norms in question, see: Eibe Riedel, *New bearings to the State reporting procedure: practical ways to operationalize economic, social and cultural rights — The example of the right to health*, in PRAXISHANDBUCH UNO 345 (Sabine von Schorlemer, ed., 2002) and Robin R. Churchill & Urfan Khaliq, *The Collective Complaints System of the European Social Charter - An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?*, 15 EUR. J. INT'L L. 417 (2004).

[59] Amnesty International, AI INDEX: ASA 11/023/2003, cif. 6.3.

[60] Report of the Secretary-General to the Security Council and the General Assembly, *The Situation in Afghanistan and its Implications for International Peace and Security*, UN Doc. A/58/868-S/2004/634, 12 August 2004, para. 50; see also: Commission on Human Rights resolution 2003/77 on the situation of human rights in Afghanistan; further: Kamal Hossain, Special Rapporteur (mandated by Commission on Human Rights Resolution 2002/19), *Report on the situation of human rights in Afghanistan*, E/CN.4/2003/39, 13 January 2003.

[61] Niklas Luhmann, *Globalization or world society: How to conceive of modern society?*, 7 INTERNATIONAL REVIEW OF SOCIOLOGY 67 (1997); on the problem of exclusion see also: Marcelo Neves, *From the Autopoiesis to the Allopoiesis of Law*, 28 JOURNAL OF LAW AND SOCIETY 242 (2001).

VI.

Slaughter/Burke-White misinterpret the rhetoric recourse on the principle of civilian inviolability. In doing so, they perform the *Herkulian* job of effectuating the metamorphosis of political statements – that were solely aimed to pronounce human rights issues – into expressions of a *opinio iuris* concerning a change of the well established rules on the *ius ad bellum*. But they do not say what they do not say: the *enthymen* – in the Aristotalian sense of the word – they try to use a non-existing conditional link between the state practice of military measures in Afghanistan – via ISAF (International Security Assistance Force) and Enduring Freedom – and the legal measures to protect human rights. In fact, none of the politicians can be relied on in such an argumentation. Concerning the use of force in Afghanistan, a lot of legal arguments were put forward, but none of them was of the kind Slaughter/Burke-White want to make us believe they were. Instead of arguing with a doubtful balancing of human rights and state rights, state officials preferred to use the language of public international law as it is enshrined in the United Nations Charter, especially in Article 2 (4) of the Charter which prohibits "the threat or use of force against the territorial integrity or political independence of any state," with only two exceptions:[62] Chapter VII measures and the right of self-defence as set out in Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

The United States maintained in their notification[63] to the Security Council dated October 7, 2001 that international law permitted military action against the Taliban regime in Afghanistan as measures of self-defense:

> In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following the armed attacks that were carried out against the United States on 11 September 2001.[64]

The US maintained to act in accordance with international law. The measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan were to be categorized as self-defense because the attacks of 9/11 were

> made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its

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[62] On the systematic of the Charter: NICO KRISCH, SELBSTVERTEIDIGUNG UND KOLLEKTIVE SICHERHEIT (2001); doubts on the validity of the prohibition of the use of force are only singular statements in legal literature: Thomas Franck, *Who Killed Article 2 (4)?*, 64 AM. J. INT'L L. 809 (1970); Jean Combacau, *The Exception of Self-Defense in U.N. Practice*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 9 (Cassese ed., 1986); against this CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE, 2000, in general see the critique of Mary Ellen O´Connell, *Review Essay. Re-Lashing the Dogs of War*, 97 AM. J. INT'L L. 446 (2003).

[63] The ICJ in its Nicaragua Decision held the reporting procedure of Article 51 for a an important factor in qualifying military attacks as acts of self-defense, because "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence." (ICJ Rep. 1986, 105, para. 200).

[64] UN Security Council, *Letter Dated 7 October 2001 From the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council*, UN Doc No S/2001/946 (2001).

policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.[65]

Several statements of international organizations including the North Atlantic Organization,[66] the Organization of American States,[67] and also the UN Security Council are usually read as endorsing this self-defence approach. Especially Security Council Resolutions 1368 and 1373 are remarkable, as they recognize in very general wording the right to react in self-defense.[68] It is obvious that this recognition is not constitutive for the legality of the measures undertaken, except for the clarification that the Security Council did not want to state that its own measures were to restrict a potential right of self-defence.[69] But even if the Security Council in its resolutions did strictly avoid classifying the terrorist attacks as "armed attacks," the military measures in Afghanistan were the beginning of an ever growing discussion on the re-systematization, re-contextualization and re-description of the two norm complexes of public international law that regulate the exceptional right to use force.[70] In this debate, serious questions of proportionality[71] were raised. Issues of immediacy of self-defence,[72] of anticipatory self-defense[73] and of the relationship between actions under Chapter VII- and self defense

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[65] *Ibidem.*

[66] "[I]t has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all." (NATO Secretary General, Lord Robertson, Oct. 2, 2001, www.nato.int/docu/speech/2001/s011002a.htm).

[67] "Recalling the inherent right of states to act in the exercise of the right of individual and collective self-defense in accordance with the Charter of the United Nations and with the Inter-American Treaty of Reciprocal Assistance (Rio Treaty)." (Twenty-Fourth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser.F/II.24, RC.24/RES.1/01, September 21, 2001, www.oas.org/OASpage/crisis/ RC.24e.htm).

[68] See Security Council Res No 1373, UN Doc No S/RES/1373 (2001). See also Security Council Res No 1368, UN Doc No S/RES/1368 (2001); for further references on political statements and the discussion in legal literature: Derek Jinks, *State Responsibility for Sponsorship of Terrorist and Insurgent Groups: State Responsibility for the Acts f Private Armed Groups*, 4 Chi. J. Int'l L. 83-85 (2003); Mary Ellen O'Connell, *Evidence of Terror*, 7 J Conflict & Sec L 19, 28-32 (2002); Michael Byers, *Terrorism, the Use of Force, and International Law After 11 September*, 51 Intl & Comp L Q 401, 405-10 (2002)

[69] That is why José Alvarez states correctly the Security Council's "refusal to give explicit approval to Operation Iraqi Freedom in advance", José Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873 (2003).

[70] Summarizing the political statements as an "attack on the defence-exception", Andreas Fischer-Lescano, *Angriff auf die Verteidigung*, in DER IRAK-KRIEG UND DAS VÖLKERRECHT 33 (Kai Ambos & Jörg Arnold, eds., 2004).

[71] See with further references for an extensive reading: Michael Bonafede, *Here, There, and Everywhere: Assessing the Proportionality Doctrine and U.S. Uses of Force in Response to Terrorism after the September 11 Attacks*, 88 CORNELL L. REV. 155, 190 (2002); restrictive reading: Mary Ellen O'Connell, *Lawful Self-Defense to Terrorism*, 63 U. PITT. L. REV. 889 (2002); see already: William O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VIRGINIA J. Int'L. L. 421, 464-465 (1990).

[72] In the Nicaragua Case the ICJ held that measures were unnecessary when they were taken "several months after the major offensive of the armed opposition […] had been completely repulsed." (ICJ Rep. 1986, para. 237); see further Davis Brown, *Use Of Force Against Terrorism After September 11th: State Responsibility, Self-Defense And Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 37 (2003).

[73] Restrictive reading: Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 237 (2003); Richard Gardner, *Neither Bush nor the "Jurisprudes"*, 97 AM. J. INT'L L. 585, 589-590 (2003); Mary Ellen O'Connell, *The Myth of Pre-emptive Self-defence*, ASIL Presidential Task Force on Terrorism 17 (2002); id., *Pre-Emption and Exception: the US Moves beyond Unilateralism*, 20 SICHERHEIT UND FRIEDEN 136 (2002); Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 ICLQ 401 (2002); Richard Falk, *What Future for the UN Charter System of War Prevention*, 97 AM. J. INT'L L. 590, 597-598 (2003); Thomas Franck, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607, 619 (2003);

measures[74] were subject of discussion. Also, the *sui generis* character of the ISAF-mission[75] that was placed under the military command of Operation Enduring Freedom[76] was highly controversial. This controversy lost its virulence when the latter had changed its legal character from a self-declared self-defence operation to an intervention on invitation[77] of the interim government in Kabul. This new Government under Hamid Karzai was installed during the Bonn negotiations,[78] and later endorsed by SC Resolution 1383 (2001).[79] It is more or less dependent on the good will of the Afghan warlords, who have effective control over most parts of Afghanistan.[80]

But all these questions are of only secondary importance compared to another argumentation strategy regarding the issue of lawful self-defence measures that accompanies

Christian Schaller, *Massenvernichtungswaffen und Präventivkrieg – Möglichkeiten der Rechtfertigung einer militärischen Intervention im Irak aus völkerrechtlicher Sicht*, 62 HEIDELBERG J. INT'L. L. 641, 657 (2002); extensive reading: Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defence*, 97 AM. J. INT'L L. 576, 584 (2002).

[74] Winston P. Nagan/Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT'L L. 375 (2004).

[75] Thilo Marauhn, *Konfliktfolgenbewältigung in Afghanistan zwischen Utopie und Pragmatismus. Die völkerrechtlichen Rahmenbedingungen der Übergangsverwaltung*, 40 ARCHIV DES VÖLKERRECHTS 480 (2002).

[76] The Security Council in its Resolution 1386 called "upon the International Security Assistance Force to work in close consultation with the Afghan Interim Authority in the implementation of the Force's mandate, as well as with the Special Representative of the Secretary-General" (SEC/RES 1386 (2001), cif. 4). When the Security Council met, the Permanent Representative of the United Kingdom to the President of the Council had already presented a letter dated 19 December 2001 (document S/2001/1217), containing an annex addressed to the Secretary-General regarding the relationship between the ISAF and other forces operating in Afghanistan under Operation Enduring Freedom. The letter which was approved by the Security Council in its Resolution 1386 states that, "for reasons of effectiveness, the United States Central Command will have authority over the former so that activities between the two factions do not conflict with each other, and to ensure that there is no interference to the successful completion of Operation Enduring Freedom."

[77] Generally on this: GEORG NOLTE, EINGREIFEN AUF EINLADUNG (1999).

[78] Under the leadership of Lakhdar Brahimi and supported by the "Six plus Two" group, on 5 December 2001 Afghan warlords - without Taliban participation - signed the "agreement on provisional arrangements in Afghanistan pending the re-establishment of permanent government institutions" commonly called the "Bonn Agreement". As the result of the UN talks on Afghanistan the participants formed an Interim Administration under chairman *Hamid Karzai* and agreed that this administration "shall be the repository of Afghan sovereignty" (Bonn Agreement, I.3, UN Doc. 2001/1154). Having reaffirmed "the independence, national sovereignty and territorial integrity of Afghanistan" (Bonn Agreement, preamble) the parties pledged international assistance, in particular security assistance (see the letter of the Afghan Interim Foreign Minister, UN Doc. S/2001/1223; see also the Military Technical Agreement between ISAF and the Interim Government, Jan. 4, 2002, documentation in: 8 INTERNATIONAL PEACEKEEPING. THE YEARBOOK OF INTERNATIONAL PEACE OPERATIONS (Harvey Langholtz & Boris Kondoch & Alan Wells, eds., 2004), annex: documents on cd-rom, also available at http://www.operations.mod.uk/isafmta.pdf).

[79] S.C. Res. 1383, UN SCOR, 56th Sess., UN Doc. S/RES/1383 (2001), on this see Tanya Domenica Bosi, *Post-Conflict Reconstruction: The United Nations' Involvement in Afghanistan*, 19 N.Y.L. Sch. J. Hum. R. 819, 821-824 (2003); see also S.C. Res. 1536 (2004), 26 March 2004, extending the mandate of the UN Assistance Mission in Afghanistan; for further information: UNAMA's fact sheets, available at www.unama-afg.org; on the constitutional process in Afghanistan and on the decisions of the Loya Jirga, that adopted the new Afghan Constitution on 4 January 2004, see the documentations provided by the Afghan Constitutional Commission (www.constitution-afg.com/draft_const.htm) and by the Max Planck-Institute for Comparative Public Law and International Law, Heidelberg (www.virtual-institute.de/projects/afghanistan/index.cfm).

[80] This is due to the "insufficient progress in the disarmament, demobilization and reintegration of factional forces", see: Report of the Secretary-General to the Security Council and the General Assembly, *The Situation in Afghanistan and its Implications for International Peace and Security*, UN document A/58/868-S/2004/634, 12 August 2004, para. 12.

Slaughter/Burke-White's legal theoretical de-formalization-project in a more legal-dogmatic fashion. This legal dogmatic project raises questions which touch the very basis of the global order, as the fundamental principle of political differentiation of world society is called into question. In 1977, Hedley Bull formulated the maxim that international law has to "state the basic rules of coexistence among states and other actors in international society. These rules […] relate to three core areas: there are rules relating to the restriction of violence among states and other actors; rules relating to agreements among them; and rules relating to sovereignty or independence".[81] Obviously, in a polycentric society, e.g. in world society, this is only one perspective and the demand for "justice" points out that the usurpation of the legal code by political theory and practice tries to marginalize economical, religious, social self governance tendencies and to replace them by a political monopoly.[82] The emptiness of the legal code thus is a demand for justice.[83] This is equally true for the reaction to terrorism. To fight terror primarily by military means is an inappropriate strategy.[84] This strategy leads to fundamental antinomies in world society, and its advocates find themselves – consciously or unconsciously – on the Schmittian mission of deterritorialization, of promoting the end of the primary principle of political order, the nation state. When Carl Schmitt criticised the adoption of the Geneva Conventions in the "Theorie des Partisanen" (Partisan Theory) for the reason that they "loosen or even undermine the clear distinctions between war and peace, military and civilian, state war and civil war" he associated this with the belief that this would open the door "for a kind of war that would destroy those clear distinctions. As a result legalization of compromise [*Kompromissnormierung*] would seem to be a thin bridge over a sewer".[85] Schmitt possessed an "unsurpassed sense for the antiquated"[86] and he was convinced that the attempts to outlaw war with legal means would fail because no one had considered "how the civilian's victory over the soldier is effected if one day the civilian puts on the uniform and the partisan takes it off."[87] Schmitt's prophecy addresses a basic intuition that, despite its antiquity, has remained until this day and is attributed much plausibility: global law is an obstacle to politics and has proven to be counterproductive for the political realisation of a global peace order. The credo "we need new rules"[88] of Old-European and New Haven lawyers is a reaction to the so-called asymmetrical shift in military affairs and accomplishes the project of Carl Schmitt. This is, Martti Koskenniemi states correctly, probably "not because of bad faith or conspiracy on anybody's part",[89] but it is the logic of an argument, the logic of the hybridisation and de-formalisation of clear distinctions, which is going to change the primary principle of the political-juridical order.

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[81] HEDLEY BULL (1977), THE ANARCHICAL SOCIETY 135 (2nd ed., 1995).
[82] Gunther Teubner, *Economics of Gift - Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann*, 18 THEORY, CULTURE AND SOCIETY 29-47 (2001).
[83] Generally: Ernesto Laclau, *Why do empty signifiers matter to politics, in* EMANCIPATION(S) 36-44 (*id*., ed., 1996).
[84] Mary Ellen O'Connell, *The United Nations Security Council and the Use of Force: Fear of False Remedies, Working Paper for the congress "The Security Council and the Use of Force, Theory and Reality– A Need for Change?"*, Universiteit Leiden, 17-18 September 2004, manuscript; criticizing Lee Feinstein & Anne-Marie Slaughter, *A Duty to Prevent*, 83 FOREIGN AFFAIRS 136 (Jan./Feb. 2004).
[85] CARL SCHMITT, THEORIE DES PARTISANEN 37 (1963).
[86] NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT 334 (2000).
[87] Carl Schmitt, *supra* note 85, 92.
[88] Thomas Bruha, *Gewaltverbot und humanitäres Völkerrecht nach dem 11. September 2001*, 40 ARCHIV DES VÖLKERRECHTS 383 (2002); Slaughter/Burke-White, *supra* note 5, 1.
[89] Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 17, 30 (Michael Byers, ed., 2000).

The first dimension of this strategy is to open Article 51 of the UN Charter and to include private acts as possible causes for self-defence actions. This relies primarily on the wording of "armed attack" and is marginalizing an important factor: terrorist attacks regularly do not fall out of an extra-territorial black whole. They are directed from a territory that belongs either to the target state or to a third state. Classifying terrorist attacks as "armed attacks" does therefore not *ipso iure* lead to the legality of a military response that affects the territorial integrity of another state. For the last fifty years Article 51 of the Charter had to be read in the context of Article 2 (4) for which it served as an exception. To isolate Article 51 UN Charter from Article 2 (4) and to reduce the attack-defence-problematique to the actors "target state" and "targeting terrorists" violates not only the *neminem laedere* rule of possibly affected third-states, but will also change the legal construction of the political world and the distinction among territorial states.

It is one of the achievements of modernity that military engagement on the territory of another state needs a legal justification, "which is clear, unambiguous, subject to proof, and not easily open to misinterpretation or fabrication".[90] This legal justification can consist either in a Chapter VII mandate of the Security Council or in Article 51 UN Charter, but the condition of the latter is that the state is responsible for the alleged private attacks. It is still undecided if a dissolution of this nexus is only a norm projection or if it is a norm-in-the-making. But the critical voices against the manipulation of this principle of political organization and to change the underling philosophy of the UN Charter[91] are quite visible[92] and the advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* strengthened their position of a territorial based non-use-of-force-system of the UN Charter.[93] The Court dismissed the Israeli argument drawing inter alia on Security Council Resolutions 1368 and 1373, stating:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack *by one State against another State*. However, Israel does not claim that the attacks against it are imputable to a foreign State. The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and *not outside, that territory.*[94]

The second dimension of the strategy of de-formalisation is the intention to loosen the "effective control test" that the ICJ had developed in the Nicaragua decision.[95] The argument that already the *Tadic*-judgement of the ICTY[96] might have changed the decisive test-criteria of the

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[90] LOUIS HENKIN, HOW NATIONS BEHAVE 142 (1979).
[91] On this: HANS KELSEN, THE LAW OF THE UNITED NATIONS 800 (1950).
[92] See the statements of O'Connell, *supra* note 71; Michael Bothe, *Friedensrecht und Kriegsrecht*, in VÖLKERRECHT para. 11 (Wolfgang Vitzthum ed., 2004); Marcelo Kohen, *The use of force by the United States after the end of the Cold War, and its impact on international law*, 197, 209 in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW (Michael Byers & Georg Nolte eds., 2003); Yves Sandoz, *Lutte contre le terrorisme et droit international: risques et opportunités*, 12 SZIER 319, 338 (2002); but see, Yoram Dinstein, *Humanitarian Law on the Conflict in Afghanistan*, 96 ASIL PROCEEDINGS 23 (2002).
[93] ICJ Rep. 2004.
[94] ICJ, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Rep. 2004, para. 139, emphasizes AFL.
[95] ICJ Rep. 1986, 119-121, 127, paras. 230-234, 248-249.
[96] Prosecutor v Tadic, Case No IT-94-1-A (ICTY 1999); see also the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Arts. 8, 9, 11, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), available at http://www.un.org/law/ilc.

ICJ to an overall-control-test[97] neglects that both decisions are made in quite a different context. Both tribunals had to deal with the problem whether certain acts of violence were attributable to a State. Yet, in the *Tadic* case, a positive answer to the question of attribution led to the applicability of international humanitarian law. In the Nicaragua case, it led to the justification of the use of force because the first use of force in question would have constituted an armed attack by a State. Both regimes use different accountability concepts, the ICTY having to decide on the applicability of humanitarian law on the one side, the ICJ dealing with the sensitive question of the exception to the prohibition of use of force, on the other,[98] and it is a truism that even in national law, accountability differs in a civil law context from accountability in a criminal law context. Furthermore, Derek Jinks has remarked, the application of the proposed rule might have possible counterproductive effects, especially for its advocates. A changed accountability regime of *ius ad bellum* might

> render states less likely to support opposition groups in rogue states for fear that the conduct of any such groups could be imputed to the supporting state. Indeed, this potential implication would disproportionately affect powerful states, like the United States, that actively support regime change in illiberal states. Recall that it was US support for the *contra* rebels at issue in the *Nicaragua* case before the ICJ. Under HSR [Harbor and Support Rule, AFL], the US would have been responsible for war crimes and other atrocities committed by the *contras*. In addition, the US provided extensive material and tactical support to Northern Alliance troops in Afghanistan. Substantial evidence suggests that these fighters committed numerous atrocities during the course of the conflict. Although the US may be accountable for these acts, this accountability would issue from the "primary rules" of the Geneva Conventions that require states "to ensure respect" for its substantive provisions. Two important points follow from these observations: (1) states may be hesitant to support any opposition movements over whom they exercise little or no control (such as the African National Congress in South Africa in the 80s and early 90s); and (2) a decline in such support may frustrate global democracy promotion and antiterrorism efforts.[99]

Consequently, the disregard of primary-rules mechanisms, *e.g.*, cooperation against money laundering, measures against financing of terrorism etc.,[100] and the priority focus on the manipulation of the secondary rules of state responsibility has serious consequences for states. If the attempts to manipulate the test criteria for accountability in the regime of *ius ad bellum* became successful and in future cases an overall-control or the harbour-and-support test were to be applied, the lines between military and police, combatant and civilian, war and peace will again become blurred. In this respect, one of the paradoxes of the present discussion is that the protagonists supporting the recognition of a right of self-defence against non-state attacks on foreign territories also claim that there is *a priori* no possibility of an "armed conflict between terrorists and states in the sense of humanitarian international law,"[101] that terrorists *a priori* do

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[97] See, for example, Thomas M. Franck, *Terrorism and the Right of Self-Defense,* 95 AM. J. INT'L L. 839 (2001); Carsten Stahn, *International Law Under Fire: Terrorist Acts as "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35 (2003).

[98] Fischer-Lescano & Teubner, *supra* note 50.

[99] Jinks, *supra* note 68, at 92.

[100] Esp. these measures suffer from lacking support of nations states, see the letter dated march 31, 2003 (UN.Doc. S/2003/404), of the chairman of the Committee installed by UN Res. 1373 (2001); see also the state reports: http://www.un.org/Docs/sc/committees/1373; on cooperation in police affairs already: „Brahimi-Report", 21 August 2000 (UN-DOC. A/55/305, S/2000/809, para. 118).

[101] Bruha, *supra* note 88, at 413. It must be stressed that Thomas Bruha assumes that general human right standards must be applied at a minimum.

not attain the status of combatants.[102] On the one hand an extension of the exceptions to the use of force is supported, arguing that terrorist acts justify self-defence actions. On the other the advocates of this thesis deny the legal protection of humanitarian law to those who shall be a legitimate object of armed self-defence.[103] This is incoherent, because A shall be *a priori* non-A.

VII.

The projects of Anne-Marie Slaughter, Michael Reisman, Robert Keohane, Kenneth Abbott *et al.* in terms of a political usurpation of law and of a political primacy in decision making concerning the adequate strategy for a globalisation of security issues,[104] will result in the scenario that global aristocratic networks of government[105] could violently implement their understanding of human rights and security against the prevailing practices of other nations in *every* society of this world.[106] In this case the entire world population would become the object of the military enforcement of security principles.[107] The era of statehood would come to an end. The era of a Schmittian – the "New Generation of Interdisciplinary Scholarship"[108] should always keep in mind the entanglement of their mastermind in the *German Reich*[109] – *"Großraum"*[110] would begin. A new *Großraumordnung*, symbolised by the triumph over defined spaces, could discard the territorial sovereignty of the state[111] and draw lines of friendship and enmity in a de-territorialized and de-juridified realm.[112]

It was Hannah Arendt, who first recognised the human rights aspect in this dark prophecy of the end of statehood pronounced by Carl Schmitt. In Arendt's dictum *The Decline of the State*

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[102] Giorgio Agamben's criticism of the treatment of prisoners at Guantanamo focuses on the denial of basic human rights to prisoners: "neither prisoners nor accused, rather mere detainees, they are subject to a ruling body, a detention, the length and existence of which are not determined, seeing as it is exempted from law and judicial review. The only possible comparison is one with the legal situation of jews in Nazi camps who lost all legal identity regarding State citizenship, but at least maintained the Jewish identity." (Giorgio Agamben, *Der Gewahrsam. Ausnahmezustand als Weltordnung*, FRANKFURTER ALLGEMEINE ZEITUNG, April 19, 2003, 33; cf. *id*., STATE OF EXCEPTION (2005, forthcoming))

[103] For a discussion of the status-question: Aldrich, *supra* note 39, 891; Yasim Naqvi, *Doubtful Prisoner of War Status*, 84 IRRC 871 (2002); generally: Rüdiger Wolfrum & Christiane Philipp, *The status of the Taliban*, 6 MAX PLANCK Y.B. UN L. 559 (2002).

[104] Recent international relations theory describes these political processes as 'securitization' (BARRY BUZAN & OLE WAEVER & JAAP DE WILDE, SECURITY: A NEW FRAMEWORK FOR ANALYSIS (1998)); see already the enthusiastic dictum of Ernst Forsthoff (one of the most influential students of Carl Schmitt) on the possibilities of a legitimatory exploitation of the security issue (ERNST FORSTHOFF, DIE VERWALTUNG ALS LEISTUNGSTRÄGER 8 (1938).

[105] Philip Allott, *The Emerging International Aristocracy*, 35 New York University Journal of International Law and Politics 309 (2003); Andreas Fischer-Lescano & Philip Liste, *Völkerrechtspolitik*, in 11 ZEITSCHRIFT FÜR INTERNATIONALE BEZIEHUNGEN (2005, forthcoming).

[106] Martti Koskenniemi, *The Police In the Temple: Order, Justice and the UN - A Dialectical View*, 6 EUR. J. INT'L L. 325, 327 (1995).

[107] Ingeborg Maus, *Menschenrechte als Ermächtigungsnormen internationaler Politik oder: der Zerstörte Zusammenhang von Menschenrechten und Demokratie*, in RECHT AUF MENSCHENRECHTE 279 (Hauke Brunkhorst *et al*., eds., 1999).

[108] Slaughter & Tulumello & Wood, *supra* note 4.

[109] On this DIRK BLASIUS, CARL SCHMITT, PREUSSISCHER STAATSRAT IN HITLERS REICH (2001); see also GOPAL BALAKRISHNAN, THE ENEMY: AN INTELLECTUAL PORTRAIT OF CARL SCHMITT (2000).

[110] CARL SCHMITT (1939), VÖLKERRECHTLICHE GROSSRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE (1941).

[111] *Id*., 51, 310-312.

[112] CARL SCHMITT (1959), DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPEUM 299 (4th ed., 1997).

and the End of Human Rights[113] the dangers of the de-territorialization tendencies become visible: Although it is important that human rights and security issues are no longer subjected to the arbitrariness of regional political power, it is equally important to recognise that human rights and security considerations are often offered "as an excuse for political intervention into matters that can only be decided – be it democratically or not – at the national level".[114] If global society's political system was able to convince society of the importance of the distinction between friend and foe, civilisation and barbarism, humanity and bestiality, then policy could be made without having to fear political consequences.[115] In this case political decisions would be determined by unrestrained fundamentalism and radicalism.[116] Such a course would lead to certain catastrophe. Therefore, if the territorial state is not to die a slow death then, firstly, the global political system must stand up as the guarantor of statehood and, secondly, must develop forms of intervention that do not intervene in regional politics.[117] This involves the paradox situation in which the global political system has to guarantee difference and equality at the same time:

> difference, in that the segmentary differentiation into territorial states assists in bringing together the varying regional elements and ensures collective decisions can be made on the global level; […] equality, since the form of the segmentary differentiation must be able to establish a minimum form of 'similarity' of the sectors. This occurs through the reduction of equality to 'statehood' and the reduction of statehood to the possibility of collectively binding decision making capability.[118]

To determine these decision-making processes, to clarify the underlying circumstances and to decide the legally permitted forms of interventions, a minimum of procedure is required.[119] The issues at stake are too fundamental as for being decided solely in the political realm of auto-legitimizing nation states à la Slaughter/Burke-White. The indeterminacies in the distinctions between attack and defence, war and peace, police and military, civilians and terrorists, combatants and non-combatants and in accountability/non-accountability evince the need for legal remedies in which norm-projections are distinguished from valid norms. This legal procedure is necessary due to the increased complexity of problems in global society and to end the abuse of global law by global politics.[120]

Thus, the most important project for global constitutionalists is to strengthen the independence of global law and to implement constitutional moments, *e.g.* Marbury moments.[121]

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[113] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 267 (2nd ed., 1979).
[114] Niklas Luhmann, *Ethik in internationalen Beziehungen*, in 50 SOZIALE WELT 250, 253 (1999).
[115] Frédéric Mégret, *'War'? Legal Semantics and the Move to Violence*, 13 EUR. J. INTL'L L.361 (2002).
[116] NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT 219 (2000).
[117] Luhmann, *supra* note 116, 226; see also Lothar Brock, *World society from the bottom up, in* OBSERVING INTERNATIONAL RELATIONS. NIKLAS LUHMANN AND WORLD POLITICS 86, 90-100 (Mathias Albert & Lena Hilkemeier, eds., 2004).
[118] Luhmann, *supra* note 116, 227.
[119] See: NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN (2nd ed., 1975).
[120] Instructive for the symbolic constitution and the structural requirements of nominal constitutional regimes: MARCELO NEVES, VERFASSUNG UND POSITIVITÄT DES RECHTS IN DER PERIPHEREN MODERNE (1992).
[121] On the absence of a Marbury moment within the UN regime, see, Fischer-Lescano & Teubner, *supra* note 50; Geoffrey Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L. L. J. 1, 45 (1993); Thomas Franck, *'Power of Appreciation': Who is the ultimate Guardian of UN Legality*, 86 AM. J. INT'L L. 519, 638 (1992); but see the Trial Chamber of the ICTY in its decision "Prosecuter v. Dusko Tadic", 10/2/1995 (32 I.L.M. 35, 41-42 (1996)) on the "The Issue of Constitutionality": "These arguments [of the Security Council

Although this appears to be against the spirit of an era, "which" – to adopt a phrase used by Niklas Luhmann already in 1975 – "is naive in political issues and replaces structural achievements by good intentions" and therefore believes more dramatic means of conflict repression are unavoidable.[122] In this perspective the most serious global constitutional challenge lies within global law having to ensure and extend its independence from world politics.[123] To put it in the words of Jacques Derrida:

> Politicization, for example, is interminable even if it cannot and should not ever be total. To keep this from being a truism or a triviality, we must recognize in it the following consequence: each advance in politicization obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited. This was true for example in the Declaration of the Rights of Man, in the abolition of slavery, in all the emancipatory battles that remain and will have to remain in progress, everywhere in the world, for men and for women. Nothing seems to me less outdated than the classical emancipatory ideal.[124]

In order to contribute to this classic emancipatory ideal, to cater for the inclusion of individuals, international constitutional moments have to be moments in which the legal system emancipates itself from political pressure and implements the rule of law in global society. In short: Constitutional moments must be Marbury moments. A "redefining sovereignty" must be a redefining of the autonomy of the global legal system.

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concerning the establishment of the ICTY, AFL] raise a series of constitutional issues which all turn on the limits of the power of the Security Council under Chapter VII of the Charter of the United Nations and determing what action or measures can be taken under this Chapter, particularly the establishment of an international criminal tribunal. […] It is clear from this text [Art. 39 of the Charter, AFL] that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. […] The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be."

[122] Luhmann, *supra* note 119, at 2 and 4.

[123] On this demand, see ANDREAS FISCHER-LESCANO, GLOBALVERFASSUNG. DIE GELTUNGSBEGRÜNDUNG DER MENSCHENRECHTE IM POSTMODERNEN IUS GENTIUM (2004); *cf.* Erika de Wet, *Judicial review as an emerging general principle of law and its implications for the International Court of Justice*, 47 NETHERLANDS INTERNATIONAL LAW REVIEW 181 (2000).

[124] Jacques Derrida, *Force of Law. The "Mystical Foundation of Authority"*, in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 28 (Drucilla Cornell & Michel Rosenfeld & David Carlson, eds., 1992).