Bradley Shingleton | Eberhard Stilz [eds.]

The Global Ethic and Law: Intersections and Interactions

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Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at http://dnb.d-nb.de

ISBN: HB (Nomos) 978-3-8487-1474-2
ePDF (Nomos) 978-3-8452-5517-0

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB (Bloomsbury): 978-1-4742-5926-2
ePDF (Bloomsbury): 978-1-4742-5927-9
ePub (Bloomsbury): 978-1-4742-5925-5

Library of Congress Cataloging-in-Publication Data
Shingleton, Bradley/Stilz, Eberhard
The Global Ethic and Law: Intersections and Interactions
Bradley Shingleton/Eberhard Stilz [eds.]
183 p.
Includes bibliographic references.

ISBN 978-1-4742-5926-2 (hardcover Bloomsbury)
ISBN 978-1-4742-5927-9 (ebook (pdf) Bloomsbury)
ISBN 978-1-4742-5925-5 (ebook (epub) Bloomsbury)

1. Edition 2015

Dedicated to Hans Küng
In appreciation and gratitude

Acknowledgments

The editors wish to thank the following persons for their assistance in bringing this book into existence: each of the authors for their contributions; the Stiftung Weltethos in Tübingen, especially Stephan Schlensog, Guenther Gebhardt, and Markus Weingardt for their generous support of this volume; and Ilonka Oszvald, Washington, D.C., for her most helpful and professional assistance in editorial matters. Without the invaluable assistance from each of these persons and institutions, the publication of this book would not have been possible.

Foreword

„Die theoretische Arbeit bewegt ... mehr Zustände in der Welt als die praktische; ist die Welt der Vorstellungen revolutioniert, so hält die Wirklichkeit nicht aus. “

“Theoretical work does more ... to change conditions in the world than practical work; once the world of ideas is revolutionized, reality cannot hold out.”[1]

—Georg Wilhelm Friedrich Hegel

Theory and Practice

These words by Georg Wilhelm Friedrich Hegel provide a good justification for why Bradley Shingleton and I intend to publish this work. It presents in updated and revised form a majority of the presentations given in 2011 at the Washington symposium “Global Ethic and Law.”[2] The contributions aim consistently to stimulate theoretical discussion on the complex relations between law and ethics. For if one knows only about the law and nothing of ethics, one knows little and certainly nothing profound about the law. Likewise, if one is interested in the mechanisms by which ethics becomes real, one cannot ignore what the state makes possible or indeed translates into legal norms. Legal and ethical norms order and determine daily how we live our lives and coexist with others, including when we are not thinking about such norms and even when we resist or reject them. It is not for theory’s sake alone that law and ethics are so important, but rather for their practical significance in a complex society. Hegel’s timeless insight quoted above highlights the fundamental importance of intellectual work in shaping our reality.

But one might ask: are there not already enough scholars working on this subject? Or as the Tübingen grandfather of German corporate law Harm

1 “Hegel to Niethammer on October 28, 1808,” in *Briefe von und an Hegel*, 1st ed. (Hamburg: Johannes Hoffmeister, 1952), 253.

2 Video of the presentations is available at http://berkleycenter.georgetown.edu/events/symposium-on-global-ethic-law-and-policy. Jochen von Bernstorff and Peter Kirchschlaeger added their important contributions later.

Peter Westermann put it: is not "the advancement and effectiveness of 'ethics' or ethos now so timely a subject as to be on every man's tongue?"[3] And is there not already in Germany and the United States an exhaustive list of notable publications on the relation between law and ethics?"[4]

Conceptual Confusion

These are rhetorical questions. Each contribution in this volume lays out clearly for sympathetic readers what is missing from the discussion in both principle and detail. Take terminology to start. What law and justice are; how ethics, ethos, and morality are to be differentiated: these are in no way adequately defined concepts. Consider just one example: according to Ronald Dworkin, moral norms prescribe how we should treat others, while ethical commandments relate to how one leads one's own life.[5] In the German-speaking world, by contrast, it appears that morality encompasses both categories, while ethics as a philosophical discipline refers to a self-reflexive theory of morality.[6] Inevitably we will continue thinking about the concepts of law and justice, especially their relationship to each other. Our views will, furthermore, diverge.

This should come as no surprise. We can define only that which has no history, as Friedrich Nietzsche understood already. Even the concept of law

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3 In Mathias Habersack, Karl Huber, and Gerald Spindler, eds., *Festschrift für Eberhard Stilz zum 65. Geburtstag* (Munich: Verlag C.H. Beck, 2014), 689.

4 Among recent German-language publications, the following deserve emphasis (in general and for English-language scholarship, refer to the contributions in this volume): Tatjana Hörnle*, Kultur, Religion, Strafrecht—Neue Herausforderungen in einer pluralistischen Gesellschaft, Gutachten C zum 70. Deutschen Juristentag* (Munich: Verlag C.H. Beck, 2014); B. Beylage-Haarmann, A. Höfelmeier, and A.-K. Hübler, eds., *Ethik und Recht—Die Ethisierung des Rechts* (Berlin: Springer, 2013); Hartmut Kreß, *Ethik der Rechtsordnung* (Stuttgart: Kohlhammer, 2011; Anton Pelinka, ed., *Weltethos und Recht* (Münster: LIT Verlag, 2011); Silja Vöneky, *Recht, Moral und Ethik* (Tübingen: Mohr Siebeck Verlag, 2010).

5 Ronald Dworkin, *Gerechtigkeit für Igel* (Frankfurt a.M.: Suhrkamp, 2012), 33 ff, 323.

6 See, for example, (following Niklas Luhmann) Heinz-Dieter Assmann, "Recht und Ethos im Zeitalter der Globalisierung," in *Juristen-Rechtsphilosophie*, ed. Kristian Kühl (Hamburg: Verlag Dr. Kovac, 2007), 25ff; Otfried Höffe, "Stichwort Ethik,'" *Lexikon der Ethik*, 7th ed. (München: C.H. Beck, 2008); see also Hans Küng, *Handbuch Weltethos. Eine Vision und ihre Umsetzung* (München: Piper, 2012), 33f.

is bound by time. Change applies not just to statutes, a substrate of law ("congealed law"), but to the concept of law itself—and simply because what law regulates and refers to is always changing: our social existence, our experiences, our values.

Globalization and Law

Globalization is a defining characteristic of our age. We come closest to doing this concept justice if we understand it as indicative of an unfolding process for which there is still no end in sight: a progressive coming together of the world and its inhabitants that has been unleashed by new modes of communication and transportation. Its result is above all an ever stronger (and ever more apparent) interdependence. What an individual, a company, a state does or allows, no matter where in the world, has potentially global consequences.

If law is truly about ordering our coexistence, it cannot ignore this unfolding process. Lawyers must increasingly think outside the box of their national legal systems and their own conventions of legal thought. Since law is determined by the state, legal systems are self-contained regulatory spaces effective within the boundaries where they originate. Those applying the law look within those boundaries for the "right" law to apply to their legal problem. The fact that there are often corresponding legal problems in other legal systems is left to comparative law specialists and rather seldom taken into account in practice. This is not a sustainable approach. In matters pertaining to the foundations of law and not a particular national manifestation of it, a perspective limited by national boundaries will be completely untenable.

Global Ethic

Ethical thought, on the other hand, has for a long time—if not always—taken shape free of the constraints of national boundaries. The stream of philosophical-ethical thought has reached humanity everywhere, having over the ages made fruitful the most diverse fields, and having emptied finally into a truly global discourse of today.

Nevertheless, scholars have been slow to consider systematically and scientifically whether or not there is a global human ethic and how one might explain and describe it. Hans Küng got things started with his 1990 "Global

Ethic Project" and has since attracted an increasing number of scholars.[7] The first globally recognizable initiative was the declaration of a global ethic by the Parliament of World Religions in 1993.[8]

In his contribution to this volume, Shingleton notes correctly that this was the point when criticism began. According to the critics he cites, the declaration was an expression of static thinking. It attempted to codify and thereby circumscribe a global ethic in a document. But Küng is well aware of how dependent upon time and context ethical norms are.[9] The Global Ethic Foundation does not consider the currently identifiable core values of the globe to be immutable and beyond discussion. The process of forming humanity's values is not closed off and never can be—so long as humans remain intellectually active beings.

Ethics, Science, and Law

Among the drivers of change are external circumstances. Ethics, too, must search for new responses to new life circumstances. Conversely, we might recall Hegel's words quoted above: our thought does not simply follow changes in reality, but can just as well influence them and even bring them about.

The focal points of ethical reflection change as well. Increasingly, the world of commerce is coming under the purview of ethics. Corporate social responsibility found a way of acting that goes beyond formal laws in following prescribed rules ("compliance"): these are no longer foreign concepts to today's corporations. The liberalism of Milton Friedman, for whom such ideas were the product of an illiberal socialism, can be regarded as overcome. Today's corporations see all too clearly that they are members of society and recognize all too well the economic benefit to be gained from this new way of thinking and acting. Initiatives such as the "Manifesto for a Global Economic Ethic,"[10] the "Global Compact" of the UN, the OECD's "Guiding

7 See "Einführung," in *Wissenschaft und Weltethos*, ed. Hans Küng and Karl-Josef Kuschel (Munich: Piper, 1998); see also Küng, *Handbuch Weltethos*, passim.

8 See Hans Küng, ed., *Ja zum Weltethos. Perspektiven fur die Suche nach Orientierung* (Munich: Piper, 1995), 21f.

9 Ibid., 34f.

10 Hans Küng, Klaus Leisinger, and Josef Wieland, *Manifest Globales Wirtschaftsethos, Konsequenzen und Herausforderungen für die Weltwirtschaft* (Munich: Deutscher Taschenbuch Verlag, 2010).

Principles of Multinational Corporations," or the current "ISO-Norm 26000 on the Corporate Responsibility of Organizations" prove that we are dealing here with a global development.

Such proclamations notwithstanding, it seems to me that the economic sphere is just now on the verge of a new ethical consciousness. Certainly, isolated declarations printed on glossy brochures or cultural patronage will not suffice. In the long run, it will also not be enough to treat the subject from a utilitarian perspective in terms of economic advantage.

Presently, it remains to be seen if and how far applicable law will compel corporations to act accordingly.[11] In the end, corporate leaders will be judged on the basis of how well their actions benefit the firm's bottom line. In the corporate world then, does "Ethic pays" simply mean "Ethics, so long as it pays?" Certainly, we can anticipate that the ethical turn in the law mentioned at the outset will influence traditional ways of thinking more powerfully than before—a noteworthy and substantial example of how necessary cooperation between lawyers and ethicists will be.

It seems equally certain to me that commercial law will not be the only realm in which law and ethics meet fruitfully. The connection between human rights and values is obvious. Its impact is felt in the emergence of constitutions and resounds in their interpretation. The international foundation of human rights in the UN Charter, the Treaty on European Union, and in many individual international conventions cannot fail to have an effect on international law and at the same time on global ethical sentiment.

In the same way, we hope this work will widen the impact of the Global Ethic project. We are grateful to the authors for participating in this effort and for contributing their work—in the Hegelian sense—to changing "conditions in the world."

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President of the State Constitutional Court of Baden-Württemberg
President of the Global Ethic Foundation

Tübingen, July 2014

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11 See, for example, Bernd Erle et al., eds., *Festschrift für Peter Hommelhoff: zum 70. Geburtstag* (Cologne: Otto Schmidt Verlag, 2012), 1133, 1137ff; Habersack et al., *Festschrift für Eberhard Stilz*, 689, 690f.

Contents

Global Ethic, Law, and Politics

Hans Küng

This chapter on basic principles makes clear that a Global Ethic should form the underlying basis for global law, because this global law requires moral commitment and the power of moral persuasion.

A. Current Cases

Neither global law nor the Global Ethic are detached from the realities of life. Thus I will not comment on the relationship between law and ethics as *more theologico* with abstract norms but, rather, in terms of *more iuridico* —with concrete cases. But which ones? There are any number of prime examples of unethical practices in many areas.

I. The Banking System

Legal regulations for the financial system were certainly not lacking prior to the global financial crisis. And yet, the crisis was tied not least to the fact that critical actors, with great style and panache, lied, stole, were disingenuous, and bore false witness—amounting to a failure at the ethical level.

As advisors and sellers in their own business affairs, banks operated on the basis of foolhardy prognoses, with largely incomprehensible and worthless financial products and completely overblown compensation. There was uncontrolled speculation with derivatives, whose prices were determined by stocks, credits, and other securities. Through securitization and clever packaging of unsecured subprime loans, among other suspect practices, this problem spread worldwide and led to a global crisis. Stock market analysts on Wall Street and elsewhere recommended the purchase of these financial products (especially those introduced by their own investment houses) and accumulated millions while share prices went into freefall and their clients lost millions.

Paul Krugman was right when he wrote after the arraignment of Goldman Sachs executives by the Security and Exchange Commission (SEC): "For the fact is that much of the financial industry has become a racket—a game in which a handful of people are lavishly paid to mislead and exploit consumers and investors. And if we don't lower the boom on these practices, the racket will just go on."[1]

In 2011, after working for a year and a half with 700 witnesses and millions of documents, the Financial Crisis Inquiry Commission published an investigative report commissioned by the U.S. Congress in which the credit rating agencies and financial institutions were accused of greed and incompetence. The Commission was particularly critical of the regulatory authorities. The SEC, the Office of the Comptroller of the Currency, and the Federal Reserve Bank were accused of having violated their mandate; they did not "act in keeping with the political will" by scrutinizing the financial firms and holding them responsible for their actions. One could have added that their political will also was not reinforced by any ethically based intent to assume responsibility.

II. Economy

Bribery has been tolerated for many years. In fact, in the Federal Republic of Germany, money for bribes for foreign business partners—also known as "beneficial expenditures" (*nützliche Aufwendungen*)—were completely legal and even tax deductible. This was the state of affairs up to 1999, until pressure from the United States, which two decades earlier had declared bribery of foreign business partners illegal under the "Foreign Corrupt Practices Act" (1977), became too great. Siemens, Daimler, MAN, Ferrostaal, and many other firms engaged in corruption—though everything, of course, was conducted under the seal of "absolute secrecy."

"Everyone does it, they just haven't been caught," a Siemens representative in Munich told me. I disagreed and pointed to the international firm Bosch. There, every employee must sign a written statement agreeing to abide by the firm's regulations and further accepting that Bosch will not provide assistance of any kind if company regulations are violated and dam-

1 Paul Krugman, "Looters in Business Suits," *International Herald Tribune*, April 20, 2010.

ages are incurred. One hopes that Bosch will preserve its integrity and honest image in the coming years.

Even after the ban in 1999, however, various German firms casually continued handing out bribes. Some of them eventually had to pay hundreds of millions of euros in fines in addition to the legal costs they incurred. So was the bribery really worth it? Specialists, some from Transparency International, disagree that it was, just as they dispute the supporting claim that without bribes, Daimler would end up selling fewer cars or Siemens fewer high speed trains.

My problem, however, is with how people who act perfectly respectably at home could otherwise act so disrespectfully. I mean this less psychologically than ethically, but it is precisely the ethical dimension that some managers believe they can discard. They hold themselves to the letter of the law, they say, but exploit the greatest opportunities from which they can trick their way out of the legal provisions and stipulations.

What would have happened, then, if the ethical dimension had been respected from the very beginning? In a few words:

- During the period in which slush funds were still legal but already deemed objectionable, management would have instituted measures to abolish the system of bribery.
- Large corporations would have initiated contacts with other corporations in order to build a strong and common front against this type of corruption. The chief of an auditing firm confirmed this to me several years ago at the World Economic Forum in Davos, when I had asked him to comment on possible provisions to fight corruption. His firm had over 2,000 employees and conducted reviews of government contracts, particularly in Africa. Perhaps if someone, say, in the pharmaceutical or automotive industry, could unite the largest corporations to agree on guidelines, change would be possible.
- Already in 1999, when such payments became illegal, ethical and responsibly thinking managers would have ordered that from then on everyone had to comply with the law.
- Managers who were legally unassailable yet had acted in an ethically irresponsible manner would not have been promoted—a benefit to the firm and the common good.

At the beginning of the Davos World Economic Forum in January 2011, its founder and president, Professor Klaus Schwab, declared that "Too many managers are still focused on short-term success instead of effective man-

agement. The view that what we have to deal with is above all a fundamental moral crisis, is still largely absent."

III. Politics

The second Iraq war under George W. Bush was clearly a war of aggression that violated international law, a preventive war premised on suspicions that is strictly forbidden under the United Nations (UN) Charter. The UN Charter is the first document in world history that once and for all completely prohibits wars of aggression. This is why the Iraq war found no support in the Security Council or in world opinion—and rightly so. In spite of this, the war was initiated by President Bush and supported by British prime minister Tony Blair. It was blatantly obvious that the war was built on monstrous lies and was contrary not only to international law but to the Christian ethic. It left behind a trail of political instability, economic distress, social misery and hardship, and religious fragmentation.

The construction of the Guantanamo detention camp and other post 9/11 reactions of the Bush administration also clearly stand in direct contradiction to the Geneva Conventions and thus to international law. These conventions and laws were ignored, circumvented, and their meaning reinterpreted in order to accomplish dubious political goals.

Of course, this ethical dimension is relevant not only in "high politics" but in the politics of everyday life. Former German Constitutional Court judge Paul Kirchhof warns that,

> Today we must with great earnestness ask ourselves whether people are not overwhelmed by their various rights to freedom when the binding norms of one's inner peace—care for fellow human beings, competing with fairness and integrity, and the willingness to engage in social behavior and take on honorary offices as a daily matter of course threaten to become lost. Litigation shows us that a fight for parking spaces can lead to blows, efforts to find new markets can lead to corruption, prestigious football victories showered with money feed off of intentional "tactical" fouls, and elderly parents at times grow lonely despite having large families … *Freedom is built on pre-legal, ethical attachments*. Parents impart these standards by their example and the family culture they create and schools through training and education. One's professional life creates it in the surrounding work environment and through the work itself, and churches teach it in the messages they proclaim. In this respect we don't "read" growth and the future in balance sheets, but in the face-to-face encounters with other free human beings. This living together, which we consider just and eq-

> uitable, finds its full measure not only in the laws of the state but also in principles of ethics and morality developed and understood by human beings."[2]

"*Quid leges sine moribus*—what help are laws without morals?" Of course there is a need for laws and regulations. Today there are parts of our social environment where far too much is regulated, while other parts are not regulated enough. But surely regulations cannot replace social norms. If these regulations are not supported by ethical values, standards, and attitudes, then just as these recent experiences show, they will be ignored on a grand scale, redefined, and even repudiated.

Now, after these concrete examples, a basic clarification in a second line of thinking:

B. Law and Ethics: Two Different Dimensions

The cases mentioned above illustrate the difference between the dimensions of law and of ethical behavior (*Ethos*). The legal dimension is seen as a domain of laws and regulations, of adjudication, and, of course, of legal studies and of jurisprudence. In this legal dimension, the direct analysis of legal rights and their enforcement is possible and often necessary. External sanctions of various kinds are available so that legal rights can be asserted and enforced.

In contrast, enforcement or coercion at the level of ethics is not possible: the dimension of morality, of mores and customs, of ethical behavior, lies at the level of conscience—in other cultures the realm of "the heart," in Kant's words the "internal court of justice." Here, nothing can be directly determined (say, perhaps, whether someone tells the truth), and nothing can be coerced (say, perhaps, for someone to tell the truth). Up to now, forensic psychologists have not identified body signals or specific vocabulary that can discern with any great reliability when someone lies; and while lie detectors can measure bodily functions, even they cannot definitively expose a liar. And yet one's conscience regulates its own internal sanctions, that is, a pang of conscience, that can even find its way into one's sleep. The psychosomatic consequences can be even worse. In German the words *Ethos* and *Ethik* are often used interchangeably but in practice must remain sepa-

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2 Paul Kirchhof, "Das Mass der Gerechtigkeit. Bringt unser Land wieder ins Gleichgewicht!" [*The Measure of Justice: Bring Our Country Back into Balance!*] (Munich: Droemer HC, 2009), 34–35.

rate: *Ethos* (in English, "ethic") means ethical/moral behavior. The term *Ethik* refers to a field of science that deals with the development of philosophical and theological ethics (in English, "ethics"), understood as a teaching or a system of ethics.

Of course, both levels have something to do with one another. I do not share the opinion of legal positivists who want to divide law from ethical behavior completely. Such positivism rejects every necessary and often every dependent connection between law and ethic. Today, in contrast, many lawyers reject this view—and rightly so; with the acceptance of formal criteria related to the formation of laws, the implementation of laws, and the effect of laws, the question of an ethical justification for the content or substance of the law has not at all been resolved. The unjust laws passed under Nazism and Communism clearly showed the devastating consequences of such legal positivism. A recent counterexample is one offered by the Obama administration, which has begun to correct the many legal manipulations of the previous Bush administration, particularly by its Department of Justice officials, and which raised anew the question of moral criteria in the making and interpretation of laws in the United States and in the rest of the world.

But if I am not a legal positivist, then I am also not one of the natural law philosophers who believe that law and ethic stand in direct relationship to one another and that all positive statutory law is based on natural law. This natural law consists of basic principles that, independent of human consent and human-generated (positive) law, would always remain in force, more precisely, in principles that themselves would be established within "the nature of things" or from an a priori defined "nature of human beings."

But since Kant, a sharp distinction has been drawn between morality and law. As a theologian I cannot understand why the natural world, the nature of human beings, should contain within itself a criterion or measure for determining what is morally right.

So, for example, the question regarding what a naturally derived morality would be in terms of sexual or social relations would, seemingly, be easy to answer. But precisely this question elicits very different answers: with regard to content, the terms nature and law are seen quite differently, so that the concept of natural law has proven itself to be easily instrumentalized, even subject to manipulation. An example for how disastrous the deduction of moral precepts/commands can be is the ban against contraception issued by Pope Paul VI in the encyclical *Humanae Vitae* (1968), apparently because it is against the laws of nature.

Law and ethical behavior also cannot be completely separated, as in legal positivism, or seen as being directly related, as in the teachings of natural law. I myself would argue for an indirect relationship. Such a relationship would also replace the so-called "interpretative conception of legal reasoning," as presented by arguably the most important significant legal philosopher in the Anglo-Saxon realm, namely, Ronald Dworkin at Oxford University.[3] I cannot go into any great detail here. Rather, I would like to delve more deeply into the problematique through a more exact investigation of "global law" as well as "Global Ethic."

C. What Is Meant by "Global Law?"

What I understand as "global law" is neither a utopian "global state" nor a future "global constitution" that as a new legal entity would supersede all existing local, regional, and national constitutions. Rather, what I really mean is *existing international law and transnational law, including legal enactments of global institutions*.

Generally, jurisprudence makes a distinction among the three sources of "public international law": contract (treaty) law, common law, and general legal principles.

1. "International Treaty Law" meant here is the "positive," "statutory" law as set down in formal international treaties and conventions. That is, it is a law generated through a legislative process that has a rational and technical advantage as a result of the specificity of its provisions. But international law for quite some time managed to get along without laws institutionally generated by states, because it was based above all else on customary international law, the second source of international law.
2. "International Customary Law," or common law, is rooted in the generally binding practices of states and created by a continuous, steady exercise supported by the legal convictions formed within a legal community—hence the term customary law. At a time when there was no written law, or at the least only a handful of individuals who could read or write, such customary law was generated and conveyed through this actual exercise. Compared with international treaty law, customary law has a great

3 Dworkin is the author of *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986).

advantage in that it has been preserved through long and ongoing experience and refined through reflection.

3. It could thus largely keep itself distant from and free of the strong influences of individual states and from one-sidedness. International customary law carries on this great tradition and legacy. This legacy also highlights the relationship between legal regulations and prohibitions, on the one side, and moral responsibility on the other. However, this interrelationship becomes more evident through the inclusion of a further legal source of international law:
4. "General legal principles": According to Article 38 paragraph 1 of the Statute of the International Court of Justice, the general international principles of law constitute the third legal source for international law (*Völkerrecht*), after international conventions and customary international law.[4] The extent to which these general international legal principles are compulsory—that is, binding—is debatable, including whether they have the same compulsory status as treaty law or customary law.[5] Even if one did not recognize their binding obligation, these general principles nevertheless can exert a great degree of influence on the international legal system. They can even reflect a self-producing consensus over fundamental principles, a consensus that can mature into a legal norm.[6] A consensus exists among jurists that certain general legal principles are essential for the functioning of every legal system. Of course it would also help tremendously with the task of implementing general legal principles into law if a consensus among jurists could be achieved that the implementation of general legal principles through an *Ethos* is necessary. My conviction is that without an ethical foundation, the implementation of these principles of law—from the very outset—would be rendered questionable.

Hence, now, the question:

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4 Compare with W. Graf Vitzhum, International Law (*Völkerrecht*), Berlin, 2007, 12–19; 71–73.

5 To this end, for example, M. Herdegen, International Law (*Völkerrecht*), Munich, 2009, 145ff.

6 "General legal principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate." (Restatement of the Foreign Relations Law of the United States, published by the American Law Institute, 1987).

D. What Is Meant by the "Global Ethic?

I quote the definition in the "Declaration Toward a Global Ethic," approved by the Parliament of World Religions on September 4, 1993, in Chicago: "By a Global Ethic we do not mean a global ideology or a single unified religion beyond all existing religions, and certainly not the domination of one religion over all others. By a Global Ethic we mean a fundamental consensus on binding values, irrevocable standards, and personal attitudes. Without such a fundamental consensus on an ethic, sooner or later every community will be threatened by chaos or dictatorship, and individuals will despair."

In the Chicago Declaration, two fundamental principles and four imperatives are broadly outlined. The first fundamental principle is treating others humanely: "Every human being must be treated humanely and not inhumanely." Then there is the fundamental principle of mutual reciprocity, or the Golden Rule: "Do not do to others what you do not want others to do to you." On these two principles are built the four basic values and standards that are found in all great religious and non-religious ethical traditions:

- Do not kill, torture, torment, or harm. This means: a commitment to a culture of non-violence and respect for life.
- Do not steal, exploit, bribe, or corrupt. This means: a commitment to a culture of solidarity and a just economic order.
- Do not lie, deceive, fabricate, or manipulate. This means: a commitment to a culture of tolerance and a life lived in truthfulness.
- Do not abuse one's sexuality or betray, humiliate, or debase others. This means: a commitment to a culture of equal rights and partnership between men and women.

As far as I have determined, there was one prominent expert on international law in the twentieth century who had something like a foreshadowing of a global ethic, and who already in 1955–1956 had used the term "world ethic." It was the Zürich Professor Max Huber (1874–1960), president of the Permanent Court of International Justice in the Hague, the predecessor of today's International Court of Justice, and for many years the president of the International Committee of the Red Cross.[7] Huber developed the term "in-

7 See M. Huber, "Prolegomena und Probleme eines internationalen Ethos," in *Die Friedens-Warte*, vol. 53, 1955/56, 305f and 328f.

ternational ethic" as something that supported law but yet was above it, or transcended it—thus not capable of being grounded in law: "Neither law nor convention can hold their ground over the long term without the authority of an ethic from a different and higher realm to back them up, one that can elevate mere convention into morality."

But Max Huber was of the opinion that the multiplicity, discrepancies, and dichotomies of existing religions and ideologies was so great that they could scarcely be overcome enough to be consolidated in a "global ethic." In his view, a legal "world organization" would be more attainable than a "global ethic." Today we have such a "world organization." However, one can believe that these legal "world organizations"—the United Nations, the International Court of Justice, and more recently the International Criminal Court—often do not function demonstrably well because their international laws are not supported by a global ethic. Even Huber recognized the problem: "The law allows itself to be bent, like iron, as long as it is not an ethic itself. Ethic, by contrast, is like a crystal." And so the bending of laws undertaken by the Bush administration failed not least because of the crystalline properties of an ethic—present in the international public and in Bush's America—that prohibits government officials themselves, their spin doctors, and their offices from lying, just as bankers and managers, together with their senior staff, are prohibited from stealing. In this sense, general legal principles, in contrast to commonly held opinions, have not shown themselves to be "soft law."

And now to the project of a Global Ethic. It was initiated over twenty years ago with the book *Project Global Ethic* (English title: *Global Responsibility*, 1990), at a time when the word "globalization" was hardly well-established, but today is widely recognized. This is evidenced, among others, by the presentation of a Global Ethic Speaker who has been invited to speak every year since 2000 at the University of Tübingen: Tony Blair, Mary Robinson, Kofi Annan, Horst Köhler, Shirin Ebadi, Jacques Rogge, Helmut Schmidt, Desmond Tutu, and Stephen Green. *Project Global Ethic* is frequently editorialized on and has, not least, been put into practice in many schools via the pedagogical tools developed by The Global Ethic Foundation. As a new project, it often encounters a great deal of misinterpretation. Permit me then to respond briefly to some of the recurrent misunderstandings:

Question 1: Is Project Global Ethic a religious project?

Answer: No, it is an ethical project that religious and non-religious individuals can and should support. It can be philosophically based as well as theologically based.

Question 2: Are the ethical similarities—of peoples, religions, and world views—presumed by the Global Ethic founded on a democratic justification, that is, on a consensus of prudent or rational societies and nations, and thus in the final analysis, on majoritarian views?

Answer: No, the Global Ethic is not a western conceived "superstructure." There is a substantive reason for this, namely, that the Global Ethic is built on the ancient wisdom of humans collected through empirical evidence and on the essential rules of life as they have developed since the embodiment/personification of human beings as they emerged out of the animal world. Human beings had to learn to behave like humans, for example, to learn not to kill other human beings the way they could kill animals. This fundamental ethic is reflected in various religious and ethical traditions and in cultures as well as in common law. The Jewish Torah, the Hindu Bhagavadgita, the sayings of Buddha, the words of wisdom of Confucius—all remain explicitly or implicitly the foundation or framework for the faith, life, belief, and action of hundreds of millions of people. Religions should hold on to their own separate identity and emphasize it in their religious teachings, rites, and communities. At the same time, however, they should recognize and put into practice the fundamental directives they share with one another.

Question 3: But isn't the Global Ethic a western project that should be superimposed on the rest of the world?

Answer: Absolutely not! It is precisely the emphasis on humanity (*Humanum*) and the Golden Rule of mutual reciprocity that you find in Confucius, already five hundred years before Christ. And the four fundamental ethical maxims mentioned earlier—do not kill, steal, lie, and sexually exploit others—are found in Patanjali, the founder of yoga, in the Buddhist canon, and of course in the Hebrew Bible as well as the New Testament and the Koran.

Question 4: Shouldn't ethical norms be completely culturally independent, and isn't everything in other cultural traditions "completely different" anyway?

Answer: Without a doubt, there are large differences in the realization of ethical norms. And dependent on time and circumstances, in particular

epochal periods or paradigms, there is also a certain "obscuring" and "entombment" of norms (such as the Jesuanic non-violence during the period of the crusades or the at least in part culturally sanctioned female infanticide in South and East Asia). But certain *fundamental ethical standards* apply (or should apply) *to all cultures*. Whether a gangster murders in Japan, New York, southern Italy, or Australia; whether a government leader in Germany, the United States, Peru, India, or Japan lies to parliament or to the public; whether a scientist in Ulm or Nairobi falsifies his or her findings; or whether a banker in New York, Hong Kong, Munich, or Zürich manipulates his or her balances or accounts: this person typically must count on the loss of his or her credibility and on legal sanctions, especially when the sanctions against one's own bad conscience have no success, or when the person has no conscience at all.

Question 5: Don't the ethical human obligations so important to the Global Ethic stand in contradiction to the human rights that were first formulated during the European Enlightenment?

Answer: On the contrary, without observing these basic human obligations we have to one another there is no realization of human rights in general, and that is why it is not enough to proclaim or demand support for human rights. They must be backed up by the obligations or responsibilities we have to one another, which constitute the flip side of having respect for human rights. In all Asian cultures a proclamation of respect for human rights without responsibilities vis-à-vis others and the community is largely ineffective. And from these moral responsibilities, human rights are more easily understood and substantiated.

I could easily vouch for this from my own personal experiences, especially in China. However, more important, is the following question: does it all come down to the Global Ethic being just a nice program on paper? How does it look applied in the real world—in practice?

E. Global Ethic and Global Law in Practice

Despite and in part because of globalization, today we live in a politically and religiously divided time that is marked as much by the presence of widespread war and conflict as by a general absence of direction. I am not a cultural pessimist, but with all of the positive development that has oc-

curred, we can point to one thing that cannot be ignored: We live in a time in which many moral authorities have lost their credibility, and in a time in which many state, cultural, and, unfortunately, religious institutions are increasingly pulled into a maelstrom fed by deep and profound identity crises.[8] At a time in which many standards and norms have begun to slip, many people in various stages of their lives—particularly the young—hardly know what is good or bad.

Who then would wish to argue with the view that a new social consensus is needed, and at the global level, because it is precisely globalization that demands a Global Ethic. This requires the political will of those who hold responsibility, especially in attempts to work for the common good of all people that comes at the cost of much sweat and demands much sacrifice, including, under certain circumstances, the sacrifice of state sovereignty. All of this is hardly possible without an ethical impulse; without ethical momentum or moral energy, as was shown, for example, by the Marshall Plan, the development of a Universal Declaration of Human Rights, or the founding of a united Europe.

Of course, regarding the Global Ethic Project, it is a question of a decades-long process of change in conscience, just as the question of women's emancipation, ecology, and peace initiatives occurred. And in this process of realization, the general normative rules of the global law and Global Ethic will be subjected to the iron-hard test of practical experience.

Thereby, what holds true as a matter of principle: universal norms always must be applied in a situation-specific manner: norms without context are hollow; a context without norms is blind. This means: norms must illuminate the situation, and the situation must define the norms. To be morally good is thus not only what is in the abstract good or right, but what is concretely good or right. In other words, only in the particular situation does the responsibility or commitment become concrete. But in a particular situation, in which of course only the person affected can judge best, that commitment can for all intents and purposes become absolute. This means: our "what we ought to do" (*Sollen*, in German) is always situational, but in a certain situation the *Sollen* can become categorical, for example, without the "ifs and buts." Thus, in every concretely moral decision one must always bind together the general normative constant to the particular situational variable.

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8 Regarding the Catholic church, see my book, *Can We Save the Catholic Church? We Can Save the Catholic Church!* (London: William Collins, 2013).

Of course, I know that judges must render binding decisions in specific cases; they should not and cannot base decisions on abstract norms, and the Global Ethic does not make the judgment of an individual case any easier. These cases could break down quite differently:

- There are any number of relatively simple cases by which positive law fully suffices for the decision and a recourse based on general legal principles or Global Ethic principles is unnecessary. There is positive law such as the law of the road in traffic regulations, which has as such nothing to do with the ethic; driving on the left side of the road would be just as possible, which certainly could then become an ethical duty because it would be an issue of life and death.
- But there are also highly complex cases such as the stock market trade in derivatives—pure financial competition without any real exchange of goods. The extent to which this is unethical requires a precise examination by financial experts and the application of economic law and economic ethics. If in the end it is a matter of deception and stealing, then it would be immoral. Then the derivatives market would be banned and the offenders punished.

All of this means that the global ethic will not offer a legal or ethical casuistry but, rather, principles and guidelines for casuistry. In fact, general legal principles already can be supported through universal ethical principles, just as they have been adopted by the representatives from all major religious traditions in the already cited "Declaration Toward a Global Ethic" of the Parliament of the World's Religions (Chicago 1993).[9] I indicate only how in this document the most important universal basic legal principles are reinforced through ethical principles. Two examples:

1. The legal foundation of equitableness (*aequitas* in Roman and canonical law): This basic principle is a corrective to the positive norm and requires basing the appraisal of a case on a natural sense of justice or fairness, which can contribute significantly to overcoming the discrepancy between the dispensation of justice and the sense of what is right. It permits a more elastic application of positive law, which, for example, in the area

9 Newly reformulated in the succinct UN style, these basic principles can be found in a 1997 recommendation of the InterAction Council by former state and government leaders under the direction of former federal chancellor Helmut Schmidt, entitled a "Universal Declaration of Human Responsibilities."

of criminal law can have as an effect either a reduction in the harshness of a penalty (as perhaps for an adolescent) or an increase in the penalty. This basic principle can be understood as a legal application and concretization of the first basic principle of a human ethic, namely, of the *principle of humaneness*, or the humanity principle: *every human being must be treated humanely, not inhumanely*.

Of course the humanity principle must be more strictly defined. What does "more humane treatment" mean? In a fundamentally ethical sense, this means: every person should not be treated bestially or like an animal (the catchword here is Abu Ghraib, but also gulags and concentration camps) but, rather, humanely, humanly, judiciously—that is, according to his or her human dignity and attributable basic values.

For judicial practice, this sets at least negative constraints: "inhuman" is in practice easier to define than what "human" is; given the sexual abuse of children and adolescents, the murder of parents, teachers, and school mates by other youths and the rape of women, it is unnecessary to go into this in any more detail.

Likewise, I do not need to explicate further that positive "humane treatment" is not always easily ascertained, as can be seen in the never-ending and still unresolved discussion about this, especially in the field of employment law.

2. The basic legal principle of "good faith" (bona fides): it means that a certain behavior is demanded of every person, a behavior made manifest in honest, real, and truthful people. This fundamental principle is supported by a second basic principle of the global ethic, namely, that of *mutual reciprocity*, or the Golden Rule: Do not do to others what you do not wish done to yourself.

   This Golden Rule is no idealistic slogan or rallying cry, but an ethical guideline that itself can be observed in the battle of economic competition and in political conflicts of interest—insofar that competitors and political enemies should be treated as fellow human beings and not to be "liquidated" (physically, in the media, or otherwise). Ethical criteria in economics and politics are not suspended, and lies and deception are not permitted either in the banking industry or in foreign policy. This does not exclude the unavoidable compromises and pragmatic solutions that are part of real life.

F. Global Ethical Principles in Support of Basic Legal Principles

Although the Global Ethic Declaration was not intended as a collection of legal formulations or as an analogue to the UN's Declaration of Human Rights, its contents have international importance—and this precisely in an era of regional warlike conflicts, genocide, environmental pollution, discrimination, a grossly unequal division of material goods, climate change, and the precarious or inadequate access of many people living in the world to goods that are indispensible to life.

And that is why the principles of the Global Ethic Declaration can be a support for, and even a source for, the basic principles of international law. Three characteristics of these ethical principles convey this view:

1. They are acknowledged by a broad international consensus. Admittedly, this consensus exists first within religious groups rather than within nation states, but most of these groups are, in their orientation, themselves transnational and transcultural. And the global ethic also is supported by prominent politicians—as, among other examples, the previously mentioned Global Ethic Speeches in Tübingen make clear.
2. Although the Global Ethic principles are not intended as legal rights and responsibilities, they nevertheless have *obligatory power*. They are obligatory, not freely chosen standards of behavior. So, for example, the denunciation of corruption in the economy, as stated in the declaration, can over time find its expression in the international convention (or common law) against bribery. Increasingly, legal and non-binding ethical norms regarding codification of specific formulations have led to binding agreements. This is true especially in human rights legislation and in international environmental law.
3. Several principles in the Global Ethic Declaration are well suited as precursors for international legal norms: they address topics today that the process of globalization raises. The second directive of the Declaration that, for example, deals with a fair economy is relevant for transnational activities of multinational firms that only concern themselves with a body of rules and regulations favorable to their maximization of earnings.

G. A Manifesto for Fair Economies

The newest document of the Global Ethic shows that all of this is not just wishful thinking. Well before the beginning of the financial crisis, a working

group consisting of economic scholars, entrepreneurs, and ethicists was commissioned by the Global Ethic Foundation to work on a "Manifesto for a Global Economic Ethic" that was introduced to the public in fall 2009 in New York, Beijing, Basel, and Melbourne.[10] The Global Ethic Foundation established its own website for it: www.globaleconomicethic.org.

Both principles from the Global Ethic Declaration of 1993—the humanity and reciprocity principles—form the foundation (Part I) of the new manifesto (Art. 1-4). And as in the global ethic declaration, the manifesto builds on the four imperatives previously discussed: do not kill (Art. 5-6), do not steal (Art. 7-9), do not lie (Art. 10-11), and do not sexually abuse (Art. 12-13).

Allow me to provide an example of how the values of justice and solidarity are concretized in the manifesto. Article 8 deals with corruption: "The attainment of profits is the prerequisite for a firm's ability to compete and to exist and, thus, the basis of their social and cultural engagement. But corruption harms the well-being of the entire community, the economy, and the people because it leads to a failed process of allocation and wasted resources. The rolling back and elimination of all corrupt and unfair trading practices such as bribery, anti-competitive arrangements, patent violations, and industrial spying requires preventative engagement that is compulsory for all active participants in the economy."

One might ask: what is so special about your manifesto? In reality, there are any number of other very useful ethical declarations and business codes of conduct. The special characteristic of our manifesto is evident in two dimensions in particular:

It becomes manifest first in the *continuity* of these values and standards *in a period* that persists despite all failures. These values and standards have the authority of the great religions and ethical traditions of humankind behind it, as they have been set down by countless witnesses in various cultures over the course of centuries. Thus, these are not inventions of our time but, rather, stem from the trove of ethical experiences of humankind that humans together have assembled—since when? Since the human ascended from the animal world and had to learn what it meant to be truly human, and then to act as a human! Learning, for example, not to kill other human beings as they had been free to kill animals.

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10 See the Global Ethic Foundation website: www.globaleconomicethic.org.

Secondly, our document for an ethic for the world economy is founded in the universality of these values and norms in time and space, a universality that despite all evident cultural conditionalities is by no means randomly revealed—but to what extent? Because humans in all cultures were interested in placing life, property, honor, and gender under special protection. In that way the values and norms are not at all chosen arbitrarily: nonviolence and respect for life, justice and solidarity, honesty and tolerance, mutual respect and partnership are structurally constituted and set into the central aspects of life.

From this it is clear: our manifesto does not presume to set up a specific ethical system, such as, say, that of Aristotle or Kant—no "ethics" in the strict sense. It only explicates a few elementary ethical values and standards that through empirical analysis have been established as being common to all humankind. Thus it is an "ethic" that functions as an inner ethical conviction or mindset, as a personal commitment to orient one's life toward binding values, strong standards, and personal bearing or virtue. It offers of course no solutions, panaceas, or pat answers for all possible problems in economic life or in the related areas of bioethics, scientific ethics, or political ethics. However, it does point to concrete ethical baselines upon which every respective individual decision can and should be oriented. We hope that as many people as possible accept this manifesto as their own guideline for their decisions in their daily economic life.

In 1990, when I laid out the programmatic foundation for the work on the Global Ethic in my book *Project Global Ethic*, no one could have imagined which national and economic circles this topic would have attracted. Back then, some considered this project to be utopian. But the Global Ethic is no utopia, no "nowhere"; rather, it is a *vision*: it shows how an admittedly not ideal but better world should and can look like. It is a forward-looking vision: we and all people with whom we work throughout the world are convinced of the urgent necessity for a commitment to respect and understanding between cultures and a commitment to ethical standards in society, in politics, and in economic relations. And the Global Ethic is a realistic vision that, of course, cannot be created overnight, but that must take some time. And so it was with the social problems of thirty or forty years ago: a new understanding of peace and disarmament, an awakening sensitivity toward environmental problems, a new and fair view of the roles of men and women. All these questions had an ethical dimension as well, and the change in thinking took decades—until this very day.

And so we, too, need a new view of life regarding the relationship between global law and Global Ethic, and I hope that I have been able, through this chapter, to highlight for you their intrinsic, inseparable connection.

The History and Essence of the Global Ethic

Stephan Schlensog

A. Introduction

In order to understand the origins and aims of the Global Ethic idea we need to go back well over twenty years: to the late 1980s—that period of world-historical change and upheaval in Europe. It was hoped that the fall of the Berlin Wall, which brought about the end of the Cold War, would herald a new era in international relations. Opening the frontiers between East and West offered the formerly divided Europe a world-historical opportunity. Hundreds of millions of people hoped for a period of peace, stability, and a flourishing economic environment, a new era of peaceful exchange of ideas and human encounter.

At that time, no one could have believed that just over ten years later, following the horrific terrorist attacks in New York and Washington, the world would enter a new phase of global confrontation culminating in two wars with thousands of victims. This was a confrontation that appeared to have cultural and religious causes, although as we now know, its actual roots lie in pragmatic politics based on power and the protection of interests. And many people are afraid that these ambiguous wars helped to spread religious terror rather than defeat it.

However, in the 1980s, when the Global Ethic idea was first raised, for many scholars the idea that religion could constitute a political factor as well as the concept of religion as a dimension of statecraft was still relatively new. Only a few scholars of political science approached such questions, and for most religious scientists and theologians, if they considered such matters at all, inter-religious and inter-cultural dialogue had at best merely a peripheral political dimension.

Hans Küng, the founder and first president of the Global Ethic Foundation, was one of those exceptions. He had been concerned for many years with the analysis of the paradigm shift from modernity to postmodernity and with its consequences for politics, religion, and society.

Hans Küng's analysis, presented in his booklet *Global Responsibility: In Search of a New World Ethic* in 1991, culminated in the conviction that the

increasingly globalized human race will only survive in the long term if, within this world, "there is no longer any room in it for spheres of differing, contradictory and even antagonistic ethics." He said that this world does not need a uniform ideology, or a uniform religion, but given all the differences between races, nations, and cultures, it needs a few connective and binding values, standards, and attitudes: Our globalized world needs a Global Ethic!

The decisive factor is that we do not need to reinvent this Global Ethic. Because for thousands of years, humanity's major religious and humanist traditions have been urging people to apply elementary ethical principles and standards: the principles of humanity and reciprocity (the famous "Golden Rule" of doing unto others as you would be done by), and values like nonviolence, fairness, truth, and protection of sexuality.

And it was a powerful endorsement of the Global Ethic idea that the Chicago Parliament of the World's Religions in 1993 adopted a "Declaration Toward a Global Ethic," which formulated these principles and values as the core of a joint Global Ethic. Today, in our current world situation, such a document would scarcely be possible any more, and for this reason many quite rightly call the Chicago Declaration a milestone in the history of the interfaith movement.

The signatories of this Declaration—representatives of every conceivable religion in the world—make it clear right from the start exactly what is understood by "global ethic": "By a global ethic we do not mean a global ideology or a single unified religion beyond all existing religions, and certainly not the domination of one religion over all others. By a global ethic we mean a fundamental consensus on binding values, irrevocable standards, and personal attitudes."

Hans Küng's emphasis on the ethical similarities between religions and cultures and their consequences for inter-religious dialogue as well as for politics was at the time new and challenging to many people. With his slogan "*No Peace Among Nations without Peace Among the Religions"—which he used for the first time in 1984—he opposed those who unilaterally emphasize the potential for conflict represented by religions.*

Of those emphasizing the conflictual aspect of religion, first and foremost was Samuel Huntington with his theory of the unavoidable clash of civilizations, who had offered many people what they saw as plausible patterns of interpretation following the 2001 September attacks. Whereas Huntington evidently knew little about the complex historical interconnections of religions and cultures, about fluid transitions, mutual enrichment, and peaceful

coexistence, Hans Küng emphasized the potential for peace that religion offers, along with understanding and dialogue, despite all the well-known tensions and conflicts.

The Global Ethic idea is based on the conviction that people of different religions and cultures should not only focus on what divides them, but on what they have in common. We especially need to learn that as far as values and ethic is concerned, we are united by far more than we often believe possible. And these common values are fundamentally important, not only for the life of individuals and families, but for all areas of our modern society: education, the economy, national and international politics, law, and culture as a whole.

This is why the Global Ethic project is not an explicitly religious project, as some believe, but a generally ethical project. Our society's fundamental values cannot and should not only have a religious basis, but also a philosophical and secular basis. Thus a global ethic can be shared by religious and non-religious people alike, so that secular humanists and agnostics can identify with it in the same way as religious believers.

And the Global Ethic idea is not, as some of its critics claimed, a Western invention, which is to be imposed on the rest of the world in a colonialist fashion. The Global Ethic idea is not an invention at all. It is our common ethical heritage, which draws on all of the world's leading religious and humanistic traditions. Since the emergence of mankind, people have had to learn to be truly humane, developing values and ethical principles as a basis for successful coexistence. And this took place worldwide and in all cultures, despite the fact that throughout history, humans have and will continue to transgress these principles.

To what extent do law and politics need the motivation and support of ethic? Because we are not merely examining these questions in a national but in a global context, we also have to ask for an ethic that can be accepted globally by people of all cultures. The question of a Global Ethic as a basis of law and politics is far from an academic luxury. In fact it is directed toward the principles and requirements of our society, not only here in the United States, but also in Europe and elsewhere. Hans Küng had a great deal to say about this in his chapter.

The Global Ethic idea is not a utopian one. It is a vision, based on the conviction that the commitment to respect and understanding between cultures and the commitment to ethical standards in politics, economy, and society is a political necessity. Above all, it is a realistic vision, which is already

being put into practice in many different ways. One example among others: the work of our Global Ethic Foundation.

In Tübingen, we have been researching and working on the topic of Global Ethic for over twenty years. Our Foundation was established in 1995 and boasts partner organizations in Switzerland, Austria, the Czech Republic, Mexico, Columbia, Brazil, and China. The Foundation is doing basic scientific work on Global Ethic and disseminating and conveying this idea. Through its practical work, the Foundation is seeking to incorporate the Global Ethic idea into the social and political reality in a variety of ways and at many different levels.[1]

Our work is based on interfaith and philosophical research, which we have practiced from the outset, and continue to practice, with academics from a whole range of disciplines and from the world's major religions.

But right from the outset, tackling the challenges of our modern society and our modern world were just as essential to our work on Global Ethic. Today, many people are bound to be aware that many challenges and problems associated with ecology, politics, economics, and society also have an ethical dimension. But twenty years ago, such ideas were still new to many, and books such as *Global Responsibility* in 1991 or *A Global Ethic for Global Politics and Economics* six years later had something of a pioneering character.

It was not by a coincidence that Hans Küng was invited by UN Secretary General Kofi Annan in 2001 to join the Group of 21 Eminent Persons who were asked to discuss the foundations for a new paradigm of international relations for the twenty-first century. The proposal drawn up by the group for a future model of coexistence between nations and cultures was finally published under the title "Crossing the Divide." However, its potential has so far scarcely been exploited, and tomorrow we will discuss this question of such a "new paradigm" again.

Over the years, the work of our Foundation has gained new focus more or less organically. The field of education, ideally at the pre-school and then subsequently at the elementary school level, is another important field of our work. Children should learn as early as possible to treat one another with esteem and respect, and to find ways of good and peaceful coexistence. Such coexistence needs to be learned and constantly practiced. Key requirements are knowledge and awareness of one another, not only of our different reli-

1 For details of our work, please refer to our website: www.global-ethic.org.

gions and cultures, but also of our common values, their meaning in our own lives, and, finally, practicing them on a day-to-day basis.

Over the years, we have developed a whole range of educational media and tools, including a comprehensive multimedia project, "Tracing the Way," with its seven films dealing with the world's major cultures. Building on this, we have an exhibit on world religions and global ethic, which is available in a number of languages and is on display in many countries around the world. It was also displayed here in Washington at the IMF, together with the presentation of our films, and at the UN-Headquarters in New York. In addition, we offer an online learning platform, "A Global Ethic Now!," which people around the world can use to find out about all the different aspects of the topic of global ethic.

Another politically significant key topic of our work is the global economy. The global financial crises of the past fifteen years and the repeated occurrence of new scandals on Wall Street and in the corporate world demonstrate that we not only require political and legal rules in order to improve the configuration of the global economy. We also need an awareness of the ethical dimensions of these problems. And this ethical dimension relates not only to structures and institutions, but also to the individual decision-makers and players and their own personal attitude, their own ethical convictions.

Hans Küng dealt with these topics already fourteen years ago in his book *A Global Ethic for Global Politics and Economics*, and facing up to economic decision-makers and actors has been a constant component of the work of our Foundation. In April 2012 we were able to establish a Global Ethic Institute at Tübingen University: it will tackle first and foremost the questions associated with a Global Economic Ethic.

In 2003, former UN secretary general Kofi Annan gave the third "Global Ethic Lecture" at Tübingen University. Nine such renowned lectures by leading international figures have been given in Tübingen to date. At the time, in 2003, the contentious Iraq War had begun, and against the background of those events, Annan asked the question "Do we still have universal values?" And he came to the following conclusion:

> Yes, we do, but we should not take them for granted.
> They need to be carefully thought through.
> They need to be defended.
> They need to be strengthened.

> And we need to find within ourselves the will to live by the values we proclaim—in our private lives, in our local and national societies, and in the world.

Law, Principle, and the Global Ethic

Bradley Shingleton

The questions that the Global Ethic and law pose to each other are both illuminative and provocative. They are illuminative because each has something to offer the other; provocative because each challenges the other. The Global Ethic interrogates the assumptions behind established jurisprudential notions of law, particularly positivist theories according to which law is essentially a social fact. This questioning, in and of itself, is somewhat daring in light of the "state of grave disorder in ethical language" that Alasdair MacIntyre speaks of, in which he claims that "there seems to be no rational way of securing moral agreement on our culture."[1] Further, there is a seeming disinterest among many legal theoreticians in talking about ethics and religion, at least outside of the established contexts of constitutional law and professional ethics. Harold Berman referred to the "almost wholly secularized Western legal culture."[2] I would add that it is not only secularized, but in many quarters is resistant to consideration of broader ethical questions, particularly about justice. While this cultural climate complicates the development of an ethically satisfying understanding of law, it does not frustrate it altogether. To the contrary; the Global Ethic can help leaven contemporary understandings of law and contribute to more adequate notions of justice. In short, the Global Ethic can help deepen law's ambition.

For its part, law and modes of legal reasoning—particularly the process of the explication and development of constitutional norms—is instructive for the elaboration and articulation of the Global Ethic.[3] That process of

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1 This essay is for Jane B. Shingleton.
Alasdair MacIntyre, *After Virtue*, 2nd edition (Notre Dame, Ind.: Notre Dame University Press, 1981), 6.

2 Harold Berman, "Law and Logos," 44 *DePaul Law Review* 143 (1994): 155.

3 At the outset I would like to distinguish generally between "a" Global Ethic and "the" Global Ethic. There have been various attempts to formulate a global ethic. I am only concerned here the specific document drafted by Hans Küng in 1993 and endorsed by the World Parliament of Religions entitled "Declaration Toward a Global Ethic," as well as Küng's books: *Global Responsibility: In Search of a New World Ethic* (New York: Crossroad, 1991), *A Global Ethic for Global Politics and Economics* (New

development would address, at least in part, one of the persistent criticisms of the Global Ethic—that it is minimalist.[4] For some, this more or less renders the Global Ethic useless and irrelevant. This accusation is questionable because Hans Küng acknowledged the Global Ethic's provisional character early on.[5] Behind the charge of minimalism is an assumption that the Global Ethic is exhaustively contained in static, documentary form—the "Declaration Toward a Global Ethic" (1993). This criticism loses force when the Global Ethic is viewed, instead, as an evolutionary undertaking, capable, indeed inviting of, further development. Moreover, minimalism is not necessarily a deficiency. As Sissela Bok has argued, it can facilitate the recognition and acceptance of common values, establishing that they are widely found, broadly accessible, and may serve as a basis for negotiation and dialogue.[6]

Another criticism of the Global Ethic is that its fundamental ethical directives are excessively abstract. Indeed, they are general in form. But the same is true of norms generally, including legal norms. The literal text of a constitution is of limited help in determining how its norms should be understood. An incremental process of interpretation supplies contour and content to such norms. This accrues, for example, through a process of analogical explication involving consideration of past interpretation (*stare de-*

York: Oxford University Press, 1998), and *Handbuch Weltethos. Eine Vision und ihre Umsetzung* (Munich: Piper, 2012). Of course, alternative formulations of a global ethic are important, such as the Recommendation of the Interaction Council for a General Declaration of Human Responsibilities of 1997 and the Manifesto for a Global Economic Ethic of 2009. Küng either co-authored or was deeply involved in drafting these documents, so they deserve analysis in any comprehensive study as well. Sissela Bok discusses several of them, such as the declaration of the 1993 United Nations World Conference on Human Rights, and the papal encyclical *Veritatis Splendor* (1993). See Sissela Bok, *Common Values* (Columbia, Mo.: University of Missouri Press, 1995).

4 See, for example, Paul Hedges, "Concerns About the Global Ethic," *Studies in Interreligious Dialogue* 18 (2008): 153–68; Jean Porter "The Search for a Global Ethic," 62 *Theological Studies* 105 (2001): 117.

5 In his first book on the Global Ethic, Küng stresses the importance of ongoing, basic research into the origins of religious traditions, which are a constituent source of the Global Ethic. See *Global Responsibility*, 138ff.

6 Bok, *Common Values*, note 2, 19. Bok devotes some attention to the Global Ethic, criticizing it for being an inconsistent mixture of minimalist and maximalist elements. See *Common Values*, 31–33. While this criticism is apt as far as it goes, it views the Global Ethic statically and ignores its prescriptive emphasis on its further elaboration through dialogue and research.

cisis), close attention to present circumstances of a given case (case-centric record), and adversarial argumentation (party-driven advocacy). A similar interpretive process can be applied, *mutatis mutandi*, to the Global Ethic. Of course, the parallels between a constitution and the Global Ethic are far from exact. An ethic has traditions and classics to draw on rather than precedents. Law has authoritative decision-makers and interpreters in the persons of judges and hierarchical authorities for the review and revision of judgments while an ethic does not. Further, law has procedures establishing rules about the form and content of acceptable arguments, and requires them to be guided by statute and case law. This, of course, does not obtain for an ethic. Nevertheless, the fundamental interpretive process in law and ethics is analogous. For both of them, interpretation involves appeals to various interpretative modalities that are both internal and external to the interpreted text. These interpretative perspectives include each other—law and ethics. One scholar of U.S. constitutional interpretation, Philip Bobbitt, identifies "ethos" as one of the six modalities of constitutional interpretation. Regarding the U.S. constitution, Bobbitt contends that "ethos derives rules from those moral and political commitments of the American ethos that are reflected in the constitution."[7]

At the same time, it bears noting that Hans Küng has drawn a sharp distinction between the Global Ethic and law, particularly in his earlier writings on the Global Ethic. For example, he writes in a commentary on the Declaration Toward a Global Ethic that it has a different focus than law: "Programmatically, such a declaration must penetrate to a deeper ethical level, the level of binding values, irrevocable criteria and inner basic attitudes, and not remain stuck at the legal level of laws, codified rights and paragraphs with which issue might be taken."[8] The Global Ethic derives these values, criteria, and dispositions not from the constitutional commitments of a political community *pace* Ronald Dworkin, but from the transnational streams of diverse religious traditions, as well as from secular rationality. Though different from the sources of law, they nevertheless can be jurisprudentially relevant. Küng suggests that they can and do serve as sources for basic legal

7 Philip Bobbitt, "Constitutional Law and Interpretation," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Campbell (Oxford: Blackwell, 1996), 127. With respect to law's contribution to the interpretation of religion, see Harold Berman, *The Interaction of Law and Religion* (Nashville: Abingdon Press, 1974), 77–106.

8 Hans Küng and Karl-Joseph Kuschel, *A Global Ethic* (New York: Continuum, 1995), 58.

principles, especially for those pertinent to international law.[9] This essay examines this claim with reference to two questions: 1) How, conceptually, might an ethical idea bear upon a legal concept? 2) Can an element of the Global Ethic—tolerance—serve to suggest how interaction between the Global Ethic and law is possible?

A. The Role of Principle

As a first step, it is necessary to ask how the Global Ethic, broadly understood, might generate ethical principles that are usefully relatable to legal norms. To answer this requires some notion of how ethical and legal norms interact.[10] While hard forms of positivism contend that law and morality are separate from each other, other theories posit some kind of affirmative interaction, usually mediated in some way.[11] Historically, the boundary between legal and ethical norms is porous. Various legal norms evolved from ethical or religious precepts. For example, the law of contract in many legal systems contains various quasi-ethical elements, such as a duty of good faith performance and remedies for unjust enrichment, which have a historical-religious provenance.[12] The law of equity similarly reflects religious and

9 Hans Küng, *Handbuch Weltethos*, 70–73.

10 The terms of principles and norms are frequently either used interchangeably or, at a minimum, not adequately distinguished from each other. Here, a principle refers to a relatively higher-order expression of the relative norm. For example, "no person should profit from her/his own the wrong." A norm is purely evaluative without practical reference, such as a norm of nonviolence. It does not indicate the circumstances of its application as a principal does.

11 As an aside, some discussions of the relation between law and ethics are complicated by terminological imprecision. Morality is sometimes used as a synonym for ethics. "Ethics" may at times be taken to refer to professional codes of ethics and their component elements, such as counsels and guidelines. The concept "ethos" infrequently appears in a jurisprudential context. These imprecisions obscure and confuse. Here ethics is concerned with rightness and value, and morality with duties owed to others. This is close to the distinction between the two that Dworkin employs in *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press, 2011), 195.

12 See Okko Behrends, "Treu und Glauben. Zu den christlichen Grundlagen der Willenstheorie im heutigen Vertragsrecht," in *Christentum und modernes Recht*, ed. Gerhard Dilcher and Ilse Staff (Frankfurt a.M.: Suhrkamp, 1984), 255–303; Harold Berman, "The Religious Sources of General Contract Law: An Historical Perspective," 4 *J. Law and Religion* 103 (1986).

philosophical influences in its historical development.[13] Obviously, many legal norms are purely technical and instrumental in character. They do not relate either historically or normatively with ethical ideas, so the significance of the historical provenance of legal norms should not be exaggerated.

Another source of the connection between legal and ethical norms derives from prescriptive similarities across the two domains. Various fields of civil law contain norms that parallel moral ones; many of the prohibitions of criminal law map onto ethical ones.[14] These commonalities are often historically rooted, but they are normative as well. This is unsurprising, given that the authority of law is as much moral in nature as it is coercive and political. Law finds itself inescapably concerned with right action and a reasonably just social order. "For law's characteristic purport as obligatory and authoritative, like its purport as stipulating appropriate procedures and requiring fair trials and judgment based on truth, itself proposed an evaluation and critique—mainly if not exclusively moral—of alternative social conditions (anarchy, arbitrary domination)."[15] While an affirmative relation between law and justice may indeed be a disputed question in contemporary thinking, it is hard to conceive of any plausibly law-like system of norms that is not concerned with the fairness and rightness of its procedures and material criteria, and with the relative justness of the results it produces.

The argument here proceeds from an assumption of a relative, qualified relationship between legal and moral norms. Law constitutes a relatively autonomous domain, with its own objectives and methods; it is neither substantively nor functionally synonymous with systems of moral values and directives. Law possesses institutional forms and authorities and sanctions coercion to achieve compliance with its obligations. But it also depends upon some degree of moral legitimacy and consistency for its legitimacy and social acceptance. Legal systems that depend upon coercion alone lack an es-

13 See generally, Maria Jose Falcon y Tella, *Equity and Law* (Leiden: Nijhoff, 2008), especially 15–22 (discussing Plato and Aristotole) and 42–43 (discussing Protestantism's influence on the development of equity).

14 See Wolfgang Naucke, "Christliche, aufklärische und wissenschaftstheoretische Begründung des Strafrechts," in Dilcher and Staff, *Christentum und modernes Recht*, 213–21.

15 John Finnis, "Problems of the Philosophy of Law," in *Oxford Companion to Philosophy*, ed. Ted Honderich (Oxford: Oxford University Press, 2005), 501.

sential quality of rightness.[16] Obviously, the notion of the relative dependence/independence of law on morality is contested by positivism. But the progressive qualification of the notion of the strict separation of morality and law suggests that the plausibility of such a rigid view is dubious. The critical point has to do less with the existence/nonexistence of a relation, and more with the *nature* of the relation. One productive way to conceive of that relation involves the notion of principle.

B. Principles and Metaprinciples

The notion of principle is used in a wide variety of contexts.[17] It came to prominence in Anglo-American jurisprudence in the early writings of Ronald Dworkin.[18] In continental legal thought, it is associated with Robert Alexy.[19] Alexy draws upon Dworkin's theory, but moves beyond it in significant ways. Taken together, Dworkin and Alexy mount widely influential arguments for the existence and significance of legal principle as an essential component of legal deliberation and articulation.

For Dworkin, a principle is "a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality."[20] It is not formally enacted, yet it does not command

16 See generally, Wolfhart Pannenberg, *Grundlagen der Ethik* (Goettingen: Vandenhoeck & Ruprecht, 1996); also see the discussion of Helmut Thielicke of the Soviet theory of law. Both the subject and the analysis are dated, but its conclusions remain insightful; Helmut Thielicke, *Theologische Ethik*, v. III (Tübingen: J.C.B Mohr [Paul Siebeck], 1964), 315–20.

17 See "Principle," in Honderich, *Oxford Companion to Philosophy*, 757: "The history of philosophy abounds in principles. . . ."

18 See generally, Ronald Dworkin, *Taking Rights Seriously* (Cambridge. Mass.: Harvard University Press, 1977). Also see Ronald Dworkin, "In Praise of Theory," *Arizona State Law Journal* 29 (1997): 352–76, 355: "… principles are embedded in our legal practice.…"

19 See generally, Robert Alexy, "On The Structure of Legal Principles," 13 *Ratio Juris* 294 (September 2000); also see Matthias Klatt, ed., *Instutionalized Reason, The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2012); Ralf Poscher, "The Principles Theory," electronic copy available at http1://ssrn.com/abstract =1411181. In addition to Dworkin, Alexy also attributes the idea of legal principles to Josef Esser.

20 Dworkin, *Taking Rights Seriously*, 22.

a specific course of conduct: principles "incline" in one direction or another rather than dictate a particular outcome or decision. Further, principles have a dimension of weight, and conflicts between principles must be resolved in light of the relative weight of each.[21] Dworkin connects principles with political rights, which in turn have a moral dimension: "Political rights are creatures of both history and morality...."[22] Principles possess ethical and moral salience in Dworkin's account. But they are not only ethical or moral in essence, for they are institutionally supported, and they must fit with existing positive law. Fit with extant law is a threshold qualification for a principle; once it is met, then law endorses those qualifying principles that are morally best.[23]

For Alexy, a principle is an optimization command (*Optimierungsgebot*). It consists of an "ideal ought" that is "not yet relativized to the actual and legal possibilities."[24] Principles demand realization within the constraints of such possibilities.[25] In other words, optimization requires adherence to a norm to a greater or lesser extent.[26] Like Dworkin, Alexy sees principles as characterized by the dimension of weight that requires balancing and adjustments in implementation based on proportionality when principles collide. [27]

The concept of a legal principle is not uncontroversial. The arguments and counter-arguments about the status of principles and their role in legal thought and practice have become increasingly complex and cannot be summarized or resolved here.[28] For present purposes, the focus is on the characteristic of a principle as a mediating device between legal sources and rules. This follows from its status as a distillation of sources such as case precedents, statutes, and constitutions that relate to specific legal rights and applications. They express, in more or less abstract form, the essence of a legal entitlement or requirement. In contrast to a rule, a principle does not present binary options, nor does it specify concrete obligations or prohibi-

21 Ibid., 26.
22 Ibid., 87.
23 Ibid., 110ff.
24 Alexy, "On the Structure of Legal Principles," 300.
25 Ibid., 298.
26 Ibid., 299.
27 Ibid., 295–97.
28 For a critique of Dworkin's concept of principle, see Larry Alexander and Ken Kress, "Against Legal Principles," 82 *Iowa Law Review* 739 (1997).

tions. It does not tend to a single normative direction.[29] In both Dworkin's and Alexy's theories, principles can be seen as the conceptual means of formulating general norms in such a way that facilitates their consideration in light of factual circumstances. In the common law tradition, analogy is an important means of reasoning from one set of circumstances to another, and it entails derivation of a principle from one case in order to be applied in another.[30] Further, a principle is not merely a generalization of an existing legal rule, but may incorporate higher-order concerns of fairness and justice.

As noted, the contents of the Global Ethic are not legal in intention and effect. Consequently, they cannot be equated with legal principles in a Dworkinian or Alexyian sense. But some of the elements of the Global Ethic can and do interact with legal principles, and can do so in two ways. First, they may contribute to the identification of the moral dimension of legal principles. This dimension, as mentioned above, can be discerned in the historical evolution of substantive areas of law from religious and moral origins.[31] It is also perceptible in the inherently normative character of various legal rights and obligations, such as the right to personal development in German constitutional law or freedom of speech and association in American constitutional law. Such rights are premised on a valorization of human agency and dignity, and they subserve moral ends as well as political values. An adequate interpretation takes account of both the legal and moral dimensions. In this sense, identification of the moral dimension of legal norms is itself a part of the interpretative process, one not restricted to the confines of jurisprudence with its internal moral notions. This meshes with Dworkin's account of the adjudicative process. For him, the interpretative interaction between moral and legal norms occurs initially in the process of gathering and assimilating the "tentative content" of authorities that constitutes the

29 Dworkin writes: "All that is meant, when we say a particular principle is a principle of our law, is that the principle is one which officials must take into account, if it is relevant, as a consideration inclining one direction or another. Dworkin, *Taking Rights Seriously*, 26.

30 One the use of analogy in legal reasoning, see generally Edward Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1962).

31 Two quite different examples are found in John Witte Jr., *God's Joust, God's Justice* (Grand Rapids, Mich.: Wm. B. Eerdmans Publishing Company, 2006), 364–85; regarding the historical origins of marriage in law and theology, and in Christoph Link, "Der Einfluss christliche Werte auf die deutsche Verfassungsordnung," 2 *Akademie Journal* 52 (2002) regarding the historical antecedents of norms in German constitutional law.

initial stage of interpretation.[32] It is followed by the doctrinal stage, which is concerned with the construction of an "account of the truth conditions of propositions of law in light of the values identified at the jurisprudential stage.[33] In this theory, moral considerations figure adjudicative process most prominently in the jurisprudential phase, and residually in the doctrinal one. Their validity is conferred by moral reasoning as well as legal reasoning.[34] But the idea of a principle informed by the Global Ethic relaxes Dworkin's concentration on *political* morality in favor of morality more broadly inclusive of personal and social concerns.[35]

Second, elements of the Global Ethic can assist in the weighing of legal principles.[36] Weight is a significant aspect of legal principles for both Dworkin and Alexy, particularly in situations in which principles conflict. The weight of a principle is determined primarily through the process of judicial interpretation since prioritization of principles is not usually statutorily established. But it will also be affected by their role in the moral economy of a society. To determine weight is to prioritize, and one criterion for prioritization is the broad, possibly universal, acceptance of a norm expressed in a principle.[37] While broad, cross-cultural endorsement is not the definitive consideration for its prioritization, it is nevertheless an aspect of it, particularly when it deals with basic questions that every society must address.[38] The attribute of broad acceptance is significant in the Global Ethic's identification of its constituent commitments. By identifying certain ethical norms that are common across religious traditions and also rationally affirmable, the Global Ethic identifies criteria for aiding the assessment of moral weight. This is helpful for jurisprudence. Law is culturally and socially

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32 Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), 65. The doctrinal stage is followed by the adjudicative stage.

33 Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006), 13.

34 See Andrei Marmor, *The Philosophy of Law* (Princeton, N.J.: Princeton University Press, 2011), 98: "A moral-political justification of the legitimacy of law is a necessary part of any attempt to explain what law is."

35 A similar revision of Dworkin's theory is proposed by John Inazu, "The Limits of Integrity," 75 *Law and Contemporary Problems* 181 (2012).

36 Both Dworkin and Alexy identify weight as a distinguishing characteristic of principle.

37 As Alexy puts it: "The task of optimizing is to determine correct conditional priority relations." Alexy, "On the Structure of Legal Principles," 297.

38 For a constructivist proposal along these lines, see Bok, *Common Values*, 76.

conditioned. In societies in which the rule of law has never been broadly established, and in which there is a suspicion that law primarily reflects economic interest and power, law lacks legitimacy. To the extent the Global Ethic can assist in affirming the moral weight of legal principles across legal cultures, it helps to support the independence and authority of law.

More specifically, how might the Global Ethic influence legal principles? Would it do so in some direct manner? Clearly not; the interaction is indirect and mediated. According to Dworkin, principles are derived interpretatively as providing the best justification for a community's political rights. They are certainly normative, but their normativity is embedded in law and is not external to it.[39] These definitional presuppositions would rule out the Global Ethic as a source for legal principles. Yet Dworkin's distinction between the internal and external morality of law need not be accepted without reservation. Certainly, the moral elements contained in law are distinctive to their jurisprudential context, but to posit a kind of fundamental difference between the two is questionable.[40] It relegates non-legal moral considerations to some kind of remote, background phenomenon that rarely intrudes into the processes of law. More generally, why may or must a community be envisioned only in political terms? That is certainly an essential, if not primary, dimension, but it is neither definitive nor exhaustive. One misses the richness of a more multidimensional, comprehensive notion of community, one that includes other aspects: anthropological, sociological, economic, and geographical aspects. A better account of community has room for these facets. In an expanded context, law becomes less insulated and autonomous and encompasses a broader range of human engagements and concerns. Not only legal justice, constrained by technical procedures, complexity and delay, but justice whole and entire is a deeper imperative of community. The weightier matters of the law also have their place.[41]

If the Global Ethic indirectly yet affirmatively relates to law, another model of the relationship is needed than one that segments morality into

39 Cf. Thom Brooks, "Between Natural Law and Legal Positivism: Dworkin and Hegel on Legal Theory," 23 *Georgia State University Law Review* 513 (2007): 526–27.

40 See Pierre Schlag, "Normativity and the Politics of Form," 139 *University of Pennsylvania Law Review* 801 (1991): 916f., for a critique of Dworkin's distinction between internal and external morality. Brooks attributes the internal/external distinction to Dworkin's concern to avoid being labeled a natural lawyer. Brooks, "Between Natural Law and Legal Positivism," 530.

41 Cf. Matthew 23:23.

internal and external categories. A serviceable notion may be that of a "metaprinciple" ancillary to legal principles. A metaprinciple would conceptualize ethical norms relevant for the process of legal interpretation. It is a "meta" principle because it constitutes neither an optimization command nor an interpretive element, rather it is a kind of orienting ethical framework for the articulation and application of a legal principle. Like a legal principle, a metaprinciple would not "direct an outcome."[42] Unlike a principle, its contents would not be solely derivable from legal sources, but from moral sources that possess some degree of broad acceptance.

Obviously, a metaprinciple does not have the status of a legal precedent or a statutory enactment. It occupies a different space, penumbral to a principle; one that circumscribes and contextualizes it. As such, it is inconspicuous in the *ratio decendi* of a judicial decision or statutory text. It could be, however, influential in the interpretation of the principle by serving as an ethical frame for interpretation, one neither entirely immanent in, nor external to, the principle. In part, a metaprinciple embodies those historically evolved values expressive of the fundamental ethical elements of a just legal order. Legal principles exist within a web of enactments, precedents, and ethical considerations that guide their interpretation and application. A metaprinciple conceptualizes morality as having an orienting role, guiding or "inclining" in a certain normative direction. For example, a map has a diagram (a "compass rose") indicating how the map must be positioned in order to be useful and accurate. It does not appear within the depicted area, yet is it relevant and indeed important for the proper transiting of that area. A metaprinciple has an analogous function in the ethical orientation of legal principles, respecting their relative autonomy while placing them in a larger context.

The notion of a metaprinciple might be seen as inviting an undesirable regress, in which principles are influenced by metaprinciples, which, in turn, imply hierarchically superior values for their ordering, and so forth. This is a conceptual problem inherent in the effort to organize hierarchically ordered values. But the notion of a metaprinciple advanced here is not so much hierarchical and directive regarding principles, rather it is orientational and inclinational. The notions of weighing and balancing would appear to apply to metaprinciples as they do (according to Dworkin and Alexy) to principles.

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42 See Dworkin, *Taking Rights Seriously*, 24.

How, more exactly, does a metaprinciple figure in legislative or adjudicative processes? It is too general to bear upon determinate circumstances. But it can exert pressure on the interpretative process in a way supportive of an underlying ethical norm. It would, in a sense, warrant its significance in the decisional process. Like a principle, it would be influential without directing a single interpretive path. Further, a metaprinciple would emphasize the importance of the consistent application of legal principles. It would affirm Dworkin's rejection of the "checkerboard" application of law based on accidental considerations as unfair. And it would endorse a holistic notion of rights and obligations, something also urged in the Global Ethic.[43] While it is unlikely that these aspects of a metaprinciple would discernibly affect a judicial outcome, that does not mean that a metaprinciple would be inconsequential.

Perhaps the closest analogues to a metaprinciple are equitable maxims. The role of equity in jurisprudence is long-standing in a broad diversity of legal systems.[44] It has been seen, variously, as a supplement to positive law (*secundium legem*), a corrective (*adversus legem*) or antecedent (*praeter legem*) to it. In each of these various relations, equity addresses some deficiency of positive law. Similarly, a metaprinciple provides supplemental, orienting guidance in adjudication; it ameliorates the ability of positive law to produce unjust outcomes offensive to commonsense notions of fairness. Hans Küng identifies equity as a point of contact between the Global Ethic and law.[45] One could perhaps view equitable maxims themselves as expressions of the Global Ethic, thereby avoiding the idea of a metaprinciple. But there are significant differences between equitable maxims and metaprinciples. Equitable ideas can be translated more readily into doctrines and principles that actually figure in the resolution of cases. They provide a basis for imposing flexible remedies for legal wrongs in order to prevent injustice. A metaprinciple is removed from such practical uses. It operates at a pre-interpretive stage in helping to determine the substantive principles to be applied. Further, a metaprinciple is formulated in more general terms than

43 See, for example, Hans Küng, *Wozu Weltethos*? (Freiburg: Herder, 2002), 166–68.

44 *International Encyclopedia of Comparative Law*, l.

45 Küng, *Handbuch Weltethos*, 70. One commentator on Dworkin, Wayne Morrison, notes that Dworkin would consider equitable maxims to be principles of law. Wayne Morrison, *Jurisprudence* (London: Routledge-Cavendish, 1997), 426. If so, then they are relatively more abstract, higher-order principles than those that figure in the both pre-interpretative and interpretative phases.

an ethical maxim, and it is neither determinative nor predictive of an outcome. But both maxims and metaprinciples carry ethical weight, and bring it to bear in adjudicative activity.[46]

The notion of a metaprinciple can best be illustrated concretely by the example of a metaprinciple of tolerance.

C. A Metaprinciple of Tolerance

One of the four irrevocable directives of the Declaration concerns tolerance. It states that the Global Ethic affirms a "commitment to a culture of tolerance and a life of truthfulness."[47] While the Declaration does not discuss tolerance beyond this, it implicitly figures throughout the Declaration.

Though tolerance commonly connotes an acceptance of difference, it encompasses a broader spectrum of meanings. At one pole is a notion of tolerance as passive acceptance of difference. It is self-interested in that it is a necessary condition for the exercise of a right to do as one chooses without interference from others. This might be termed negative, endurance-based tolerance, for its essence consists of non-interference. It negotiates difference through restraint and avoidance. As an attitudinal option, it is equally available to those of strong or weak opinions about a given matter. Negative tolerance is exemplified by Chesterton's remark that tolerance is a virtue of people who don't believe anything. Endurance-based tolerance is easier to legislate and enforce, but it is also more limited, transitory, and dismissive. Goethe expressed this in a maxim: "Tolerance should actually only represent a temporary cast of mind: it must lead to recognition. To endure is to offend."[48]

In contrast, tolerance may assume a more active form, attentive to others and expressive of mutual respect. This active version of tolerance recognizes an entitlement to self-definition and self-expression and a corollary right to have those choices respected, though not necessarily endorsed, by others. There is also an element of modesty in it; an awareness that one's own perspective may be lacking in some way and therefore should not be asserted

46 It would seem that a metaprinciple primarily or only applies to adjudication, as in Dworkin's and Alexy's theories. This would appear to be the case, though not necessarily so.

47 Küng, "Declaration Toward a Global Ethic,"11.

48 Goethe, *Goethes Werke*, Weimarer Ausgabe, I/42.2, 221.

unreservedly. This active version of tolerance expresses a spirit of active engagement rather than passive deference. It may be called affirmative tolerance. Both these kinds of tolerance, as well as various permutations of them, involve reciprocity, but of different tenors. Negative tolerance is based on endurance of difference required by the tactical pursuit of self-interest or simply to be left alone. Affirmative tolerance values engagement of self with other selves.[49] It affirms the diversity of selves, not ignoring self-interest but acknowledging its universality.[50] This leads, ideally, not to self-assertion but to restraint regarding one's own interests.[51] But it includes a sense that others' perspectives may complement and correct one's own. This is desirable both personally and politically. In either polar form, tolerance helps contain excessive self-concern that the Global Ethic disavows.[52] Politically, it is vital as a democratic virtue. As Reinhold Niebuhr observed: "Consistent egoists would, of course, wreck any democratic process; for it requires some decent consideration of the needs of others."[53] Affirmative tolerance encourages the development of such consideration. It is more relational and transactionally informed than the unilaterally asserted rights of negative tolerance. In the example of the right to free speech, affirmative tolerance allows one not only to speak, but also encourages one to listen. It encourages modesty rather than the indifference that often underlies negative tolerance.

A further distinction also seems necessary. Tolerance may be an attribute of a social system or organization (structural tolerance) as well as a personal attitude (attitudinal tolerance). The nature of tolerance—whether negative/weak or affirmative/strong—is essentially the same in either context. But its mode of expression and its limits obviously depend on whether it refers to,

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49 Harmut Kreβ speaks in terms of formal and material tolerance, the former version marked by asymmetrical and hierarchical tendencies, and the latter by a dialogical/activist quality. As such formal tolerance corresponds to negative tolerance, and the material form to affirmative tolerance. Harmut Kreß, *Ethik der Rechtsordnung* (Stuttgart: Kohlhammer, 2012), 255.

50 The notion of tolerance as dialogical is proposed by Kreβ, *Ethik der Rechtsordnung*.

51 Similarly, Küng believes that a critical approach reflects the most appropriate approach to the claims of different religious traditions.

52 The Declaration asserts: "Every form of egoism should be rejected: All selfishness, whether individual or collective, whether in the form of class thinking, racism, nationalism or sexism. We condemn these because they prevent humans from being authentically human." "Declaration Toward a Global Ethic," 7.

53 Reinhold Niebuhr, *The Children of Light and the Children of Darkness* (New York: Scribners, 1947), 151.

for example, a legal system or the actions and attitudes of an individual. By its terms, the Global Ethic relates both to individuals and collective groups. In the specific case of tolerance, this is both possible and necessary, for the two realms interpenetrate each other. It is difficult to image that tolerance would long flourish as an individual practice when it is legally discouraged or proscribed.

Affirmative tolerance may appear as overly idealized, and some indeed have criticized the interpretation of tolerance in terms of mutual respect or acknowledgment.[54] Such critics contend that affirmative tolerance is patronizing and implicitly hegemonic. One might add that it is not a realistic possibility in many routine social interactions. While these objections are noteworthy, they are not fatal. They assume, by implication, that self-assertion or disengagement are the only practical responses to dissensus. Of course, tolerance may be motivated by indifference or a will to self-assertion. The question is whether those motives are so pervasive that affirmative tolerance is an ethical fiction. Such a generalization seems unjustified.

Tolerance is not grounded in epistemological modesty alone, but also in discursive interactions among individuals and institutions. Almost by definition, tolerance appears as a communicative undertaking. One commentator on the Global Ethic, Helmut Fahrenbach, suggests that the Global Ethic relies excessively on transcendent foundational principles, and it would be better served by an emphasis on communicative reason and morality.[55] He proposes the notion of a process, in situations of dissension, reflecting and structuring practical discourse based on understanding and consensus orientation. The concept of tolerance proposed here is responsive to this criticism, for it is based on just such a communicative model of interaction. Discourse cannot function unless a speaker and listener attend to each other. As Glenn Tinder argues, tolerance is an intrinsically communicative activity. He defines community as "that which is realized in the activity of communication." Through communication, persons associate with each other as

54 One critic, Stanley Fish, contends that it amounts to a kind of self-congratulation extends tolerance and perspectives that accept implied requirements such as rational argumentation or humane values. See Stanley Fish, "Mission Impossible: Settling the Bounds between Church and State," in *Law and Religion*, ed. Stephen Feldman (New York: New York University Press, 2000), 383–410.

55 Helmut Fahrenbach, "Die Notwendigkeit des Projekt Weltethos," in *Weltehos und Wisenschaft*, ed. Hans Kueng and Karl-Josef Kuschel (Munich: Piper, 1998), 405.

independent and rational beings."[56] Communication, in turn, is dependent upon some degree of tolerance among its participants.

D. Tolerance and Truthfulness

The Global Ethic posits a connection between tolerance and truthfulness. Contemporarily, the truthfulness of any given outlook is clouded by a pluralism of other perspectives. The very fact of diversity relativizes ultimate questions of purpose and meaning and demotes them to matters of private opinion. One may reject pluralism by retreating and refusing to engage with it. Or one may attempt to negotiate one's way through pluralistic terrain through tolerant engagement with diversity. A tolerant attitude toward diversity can derive value from encounters with pluralism; views that conflict with one's own perspective can supplement, complement, or correct one's own view. Tolerance need not inevitably lead to demoralization or resignation in the face of dissensus; it can prompt reflection and revision. In this respect, tolerance is positively concerned with truthfulness.

The Global Ethic connects tolerance and truthfulness. It does so explicitly and implicitly, though mostly in the latter way. One of its four irrevocable directives is "do not lie." This underscores the fundamental importance of veritable speech for personal integrity and social well-being.[57] Tolerance is also concerned with truthfulness in that it is difficult, if not impossible, to be tolerant of a known lie. If the truth-status of a statement is unclear, then tolerance is even more appropriate and necessary. Law also affirms the importance of truthfulness as well by providing redress for some (but not all) kinds of harmful untruths, while at the same time protecting expressive rights that are possibly mistaken or mendacious. While it does not seek to determine veracity of speech, tolerance is agnostic about truthfulness and its importance in promoting communication. Of course, most intractable disputes involve matters regarding which there is no unambiguously truthful per-

56 Glenn Tinder, *Tolerance and Community* (Columbia, Mo.: University of Missouri Press, 1995), 67. Also see Wolfgang Huber, *Gerechtigkeit und Recht* (Gütersloh: Kaiser, 1996).

57 Tinder also emphasizes the connection between tolerance and veracity, both personally and communally: "Tolerance is unconditionally necessary for veracity and responsibility to be externalized. . . ." Tinder, *Tolerance and Community*, 84.

spective, such as questions of religious truth, or a just social order. That does not mean, however, that falsity is rarely discernible and therefore irrelevant.

How does this relate to a metaprinciple of tolerance? The communicative nature of tolerance suggests that truthfulness and tolerance are reciprocally supportive, as expressed through a common connection with trust. The practice of truthfulness strengthens trust by valuing reliability and fidelity. Similarly, tolerance increases truth by an assurance that tolerant participants in a communicative exchange will attend to each other non-dismissively and without the disrespect of indifference. As trust diminishes, suspicion and defensiveness increase. A tolerance metaprinciple postulates an ethical obligation to entertain diversity of action and expression as constituent of a democratically structured public realm. This invites open-minded consultation in pursuit of better discourse and broader insights.

E. Tolerance and Law

Customarily, tolerance is less a distinct legal norm and more a condition for the exercise of rights, such as those of expression, religious freedom, assembly, speech, and press. Tolerance as a condition on the exercise of a right limits its exercise through reciprocal expectations: one may expect non-interference by others if one is prepared to do the same to others. In this sense, tolerance is primarily protective and preventative. It is a value-neutral, rights-oriented norm that is agnostic about purposes and goals. This view of tolerance is congruent with a rights-oriented individualism that characterizes, some contend, western legal cultures. According to Lawrence Friedman, law in western societies is increasingly concerned with the assertion and enforcement of personal rights.[58]

While these characteristics concern attitudinal tolerance, they also relate to structural tolerance, particularly in the form of a legal/constitutional system. For example, Harmut Kreβ views tolerance as a political/legal structural principle required by contemporary pluralism. He writes: "In a pluralistic society, it is the role of the legal order to create the possibility for coexistence and conviviality in the spirit of tolerance."[59] In a similar vein, Christoph Enders describes the German legal system as an "order of institutionalized

58 Lawrence Friedman, *The Republic of Choice: Law, Authority and Culture* (Cambridge, Mass.: Harvard University Press, 1998).

59 Kreβ, *Ethik der Rechtsordnung*, 258.

tolerance."[60] In German constitutional jurisprudence, tolerance is an acknowledged norm; the German Federal Constitutional Court has referred to the democratic *Rechtsstaat* as a "system of intellectual freedom and tolerance."[61] According to this interpretation, tolerance plays a foundational role in a liberal political order; "legalized tolerance" creates legal space within which divergences from established behavioral standards can occur.[62] As such, it stands for a kind of constitutional neutrality, within limits, in personal decisions.

This idea of legal tolerance is patterned primarily on negative tolerance in that it is concerned with creating conditions for diverse perspectives to coexist. This seems appropriate, given that affirmative tolerance aspires to more than facilitating the exercise of rights. Affirmative tolerance seems too hortatory and personalistic to be captured in legal norms. But it is doubtful whether negative tolerance alone is sufficient to avoid violent disagreement and protect diversity. Affirmative tolerance can also be influential in limiting conflict and the ceaseless assertion and counter-assertion of rights. It would seem that neither state not society can wholly disregard the need for affirmative tolerance. Any community, political or other, must also be concerned with truthfulness, even within the model of a "marketplace of ideas."[63] Communicative interaction is a social and political good, and it is promoted by truthfulness and diminished by falsehood. Mutual interaction is supportive of democratic processes. Law should be sensitive to the concerns of affirmative tolerance even if it cannot, and in many cases should not, proscribe false speech or enforce affirmative tolerance.

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60 Christoph Enders, "Toleranz als Rechtsprinzip?" in *Toleranz als Ordnungsprinzip*, ed. Enders and Michael Kahlo (Paderborn: Mentis, 2007), 245. Also see Gerhard Robbers, *Religion and Law in Germany* (Alphen aan den Rijn: Kluwer Law International, 2010), who also emphasizes the structural relevance of tolerance: "tolerance means a positive tolerance of not merely enduring different views, but the duty to actively create an atmosphere of tolerance in society." Robbers, *Law and Religion in Germany*, 79.

61 Christoph Enders, "Toleranz im Recht," *Zeitschrift für evangelische Ethik* (2009): 267.

62 Ibid., 269, where Enders speaks of the legal state as a state that allows for tolerance subject to a reservation for the common good.

63 The marketplace metaphor, often cited in U.S. free speech jurisprudence, is customarily attributed to Oliver Wendell Holmes, a renowned Supreme Court justice and exponent of legal realism. In *Abrams vs. U.S.*, 250 U.S. 616, Holmes referred to a "free trade in ideas." 250 U.S., 630.

The third irrevocable directive of the Declaration speaks in terms of a commitment to a culture of toleration. It mentions tolerance only twice, and is otherwise concerned with the duty of truthfulness. For Hans Küng, tolerance is an implicate of truthfulness. This connection is also emphasized by Tinder, who contends that tolerance derives from veracity—both to oneself and to others.[64]

A metaprinciple of tolerance would endorse the relevance of both negative and affirmative tolerance to law. It shares the Global Ethic's affirmation of tolerance as important for personal and social existence. The structure of the Global Ethic itself illustrates this. It is based on a desire to overcome the historical correlation between religion and violence. While it rejects any necessary linkage between them, it acknowledges that such an association is historically persistent.[65] "No peace without peace among the religions," Küng declares. The reference to "peace" rather than harmony, consensus, or agreement implies that tolerance is significant here. Negative tolerance is a starting point, but it should be deepened by a more dialogical exploration of commonality and difference. This is demonstrated by the Global Ethic's own blend of consensus and dissensus. As Hans Küng notes, the Declaration avoids matters on which belief and opinion diverge, recognizing that a certain amount of dissensus in inter-religious dialogue is unavoidable.[66] At the same time, it identifies areas of consensus, which also encourages tolerance.[67] Consensus counterbalances dissensus, and dissensus makes consensus meaningful. The interplay between consensus and dissensus illustrates the open-ended character of the Global Ethic. The existence of some ethical congruencies across traditions suggests that there may be others—discoverable through further research into the basic sources of traditions,

64 Tinder, *Tolerance and Community*, 82–87.

65 See generally, Wolfgang Huber, "Religion and Violence in a Globalized World," *Bulletin of the German Historical Institute* 47 (fall 2010): 55f.

66 Küng, "Commentary," in *A Global Ethic*, ed. Hans Küng and Karl-Josef Kuschel (New York: Continuum 1995), 70.

67 Most analyses of toleration ground it on disagreement rather than agreement. Cf. Steven Smith, "Tolerance and Liberal Commitments," in *Toleration and Its Limits*, ed. Melissa Williams and Jeremy Waldron (New York: New York University Press, 2008), 243–80. But it seems that tolerance is actually more contextual and less categorical than that. Evidence of agreement within an overall context of disagreement can justify tolerance as much as wholesale disagreement does.

such as the ones Küng has conducted on the Abrahamic religions.[68] But the viability of the Global Ethic does not depend on commonality so much as on interaction. "There is no peace among religions without dialogue among religions." Peace all too often proves to be ephemeral; dialogue should be unremitting. That is only realistic if tolerance is a requisite.

So what are the consequences of a metaprinciple of tolerance in the legal arena? As a second-order principle, it is twice removed from direct legal application. It is neither a rule nor a principle, rather it is antecedent to principle. It informs the interpretative development of principles. One might imagine a metaprinciple of tolerance as suggested here could be a factor in the assessment of weight of a principle, taking account not only concerns of litigants, but of broader societal interests in communicative interaction as well.

An example of this is furnished by a controversial decision of the U.S. Supreme Court handed down in May 2014, *Galloway v. Town of Greece*.[69] The case involved the constitutional permissibility of prayer, specifically Christian prayer, by a municipal government body. In a 5–4 decision, the Court upheld the practice as consistent with the historical practice of sectarian prayer in legislative contexts. The majority opinion referred to tolerance, while the dissent voiced the view that such public prayer caused many citizens to feel excluded and denigrated. The kind of tolerance referred to by the court's majority primarily requires endurance.[70] Consideration of a notion of affirmative tolerance may not have mattered to the court's majority, but then again it may have caused it to view the challenged practice, though perhaps historically grounded, as discouraging the kind of communicative interaction valued by a broader idea of tolerance.

A tolerance metaprinciple would also play a broader, contextualizing role as well. As a social system facilitating ordered coexistence, law is inescapably concerned with the maximization of irenic solutions to conflict.[71] Tolerance is an important interstitial component in law's regulative

68 See his trilogy entitled the "Religious Situation of Our Time: Hans Küng," *Judaism* (New York: Crossroad, 1992), *Christianity* (New York: Crossroad, 1999), and *Islam* (London: OneWorld, 2008).

69 May 5, 2014.

70 The majority opinion stated: "Our tradition assumes that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." Slip opinion, 16.

71 See David Little and Sumner Twiss, *Comparative Religious Ethics* (New York: Harper & Row, 1978).

apparatus in that it aids the exercise of individual rights. It does this not only by establishing limits to rights, but more broadly by creating legal space in which individual development can occur.[72]

Some writers contrast law and tolerance.[73] A more adequate view is one that affirmatively connects tolerance and law. Tolerance contributes to an interpretive context for analyzing individual rights both as to their scope and content. It opposes absolutizing interpretations of rights and their justifications. Of course, claims for tolerance should not be pressed too far. Tolerance remains fundamentally a moral practice and therefore can be only partially and imperfectly absorbed and implemented in legal norms and practices. But it, as other ethical norms, can bear upon the development and application of legal principles.

So this broadened concept of tolerance—encompassing both negative and affirmative aspects—commends itself for jurisprudential consideration. It can enrich rights-based ideas of tolerance, which can be thin, concerned more with entitlement and enforcement and less with respect and recognition. A metaprinciple of tolerance does not subsume individuals into a kind of communal collectivity, rather it proceeds from the irreducible individuality of citizens and neighbors informed by a sense of commonality in difference. It affirms both diversity and complementarity.

F. Conclusion

The interaction between the Global Ethic and law sketched here using the example of a metaprinciple of tolerance is admittedly preliminary and incomplete. Hopefully, though, the concept of a metaprinciple suggests a conceptually useful means of exploring their interaction. Though contemporary law functions largely as an autonomous domain, it must be receptive to broader ethical insights if it is to satisfy its calling as a critical social institution for the amelioration of disputes, preservation of order, and protection of basic rights.

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72 Enders, "Toleranz im Recht," 269.

73 For example, David Heyd distinguishes sharply between tolerance and legal rights, essentially arguing that the two function in separate domains. David Heyd, "Is Toleration A Political Virtue?" in Williams and Waldron, *Toleration and Its Limits*, 171–94.

A Global Ethic and Global Law: The Role of Fundamental Ethical Principles in International Law and World Religions

Brian D. Lepard

A. Introduction

In his chapter in this volume, Dr. Hans Küng lays down a challenge to all those concerned with the role of law in society—how to infuse ethical principles into law. This is a problem that has much preoccupied me in my work as a teacher and scholar of international law, and it is the subject of this chapter. I will first identify the current problems with how international law is conceptualized, and in particular the disabilities created by the doctrine of legal positivism. I will then argue for a new approach to legal interpretation and reform at the global level that incorporates reference to what I call "fundamental ethical principles." At the pinnacle of the family of these principles is "unity in diversity"—the concept that all human beings are morally members of a single human family that ought to be unified, while also honoring the refreshing and stimulating diversity of its members. Finally, I will explore some implications of fundamental ethical principles for how international law is interpreted and implemented in the world today, particularly in the area of religious freedom.

B. The Need for a Global Ethic to Inform Global Law: Problems with the Positivist Model of International Law

Let me first discuss why we need a global ethic to assist in the interpretation and application of international law. We need a global ethic that is judicially relevant because the current, dominant philosophy of international law is a "positivist" one. What does this mean? It means that states are bound only by laws to which they have freely given their positive consent. They are not bound by any higher law, such as natural law. Positivism is a relatively recent development in the history of international law, taking root primarily in the

nineteenth and twentieth centuries.[1] Previously, the great writers of international law, including Hugo Grotius, had maintained that there are principles of natural law by which states must abide, such as "the mutual tie of kinship among men."[2] Grotius argued for a natural law that had religious roots, but that also was rationally coherent and accessible. Yet positivism, with its emphasis on extreme state sovereignty, later swept natural law away. Today, as Küng discusses in his chapter, the two most widely recognized sources of international law depend on the will of sovereign states: first, treaties, which are analogous to contracts between states, and require their explicit agreement, and second, customary international law, which arises from the uniform conduct of states in a belief that their actions are legally required, and thereby reflect their indirect agreement to customary rules.[3] These sources of international law are now codified in Article 38 of the Statute of the International Court of Justice (ICJ), which applies them in reaching decisions regarding disputes between states.[4]

A third source of international law, also appearing in the ICJ Statute, has earned more recent recognition, referred to as "general principles of law."[5] This concept could embrace some principles similar to natural law, but is widely understood to refer to foundational legal doctrines appearing in the legal systems of many countries, such as principles of *res judicata*, estoppel,

1 On the rise of legal positivism, see, for example, Terry Nardin, *Law, Morality, and the Relations of States* (Princeton, N.J.: Princeton University Press, 1983), 65.

2 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, trans. Francis W. Kelsey (New York: Oceana; London: Wildy and Son, 1964), book 2, chap. 25, sect. 6, 582.

3 According to the traditional definition of customary international law, customary law results from the admixture of *opinio juris*, defined as a belief by states that they are already bound legally by a norm, and general state practice that is consistent with that norm. Both the *opinio juris* and state practice elements are viewed as necessary to establish a customary law norm. On this traditional definition, see Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010), 6.

4 See Statute of the International Court of Justice (ICJ Statute), 59 Stat. 1055 (1945), art. 38(1)(a), (b) (referring to "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states" and to "international custom, as evidence of a general practice accepted as law" as sources of international law to be applied by the Court in deciding cases submitted to it).

5 See ibid., art. 38(1)(c) (referring to "the general principles of law recognized by civilized nations"). For a discussion of general principles of law, see Lepard, *Customary International Law*, 28–29, 162–68.

"clean hands," or "good faith."[6] Because these legal systems in turn are normally based on positive acts of a legislature, the core meaning of this source may also be described as positivist.

Legal positivism at the global level essentially maintains that states, as sovereign entities, may act as they please, subject only to those norms that they explicitly or indirectly agree to observe. At its core, then, it promotes state autonomy. Moreover, it defines itself without reference to any ethical principles. It thus tends to uphold a rigid separation of law and morals, as Küng aptly describes in his chapter. Needless to say, the ethical poverty of global legal positivism took its toll on human dignity. Prior to the UN era states were largely free under that doctrine to inflict all manner of cruelties upon their citizenry, and it was not the business of any other nation to raise any protest. This was certainly true during the Holocaust. Indeed, we see vestiges of this doctrine in Article 2, paragraph 7 of the UN Charter itself, which proclaims that the United Nations shall not intervene in any matter that is "essentially within the domestic jurisdiction of any state."[7]

However, the previously tenacious hold of positivism on international law has been gradually weakening ever since the adoption of the UN Charter in 1945 and the Universal Declaration of Human Rights in 1948, both of which allowed ethical concepts, especially human rights ideas, to reenter the domain of international law. For example, the UN Charter, while acknowledging state sovereignty in Article 2(7), affirms that all states have obligations to promote universal respect for, and observance of, human rights and fundamental freedoms in cooperation with the UN.[8] And the Universal Declaration lays down many human rights as a "common standard of achievement for all peoples and all nations."[9]

International law can no longer pretend to be autonomous of ethics, nor can it continue to assert unabashedly that states are free to act with no constraint except treaties and customary international legal rules to which they agree. For example, human rights treaties are becoming ubiquitous, and have helped generate the recognition of new norms of customary human rights law, including norms prohibiting genocide, torture, and ethnic or racial dis-

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6 See, for example, Lepard, *Customary International Law*, 28; Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford: Oxford University Press, 2008), 18.

7 UN Charter, art. 2, para. 7.

8 See ibid., arts. 55, 56.

9 Universal Declaration of Human Rights (Universal Declaration), G.A. Res. 217A (III) (1948), preamble.

crimination, among many others.[10] Moreover, courts are increasingly recognizing some of these customary norms, including the three just mentioned, as peremptory norms—rules of *jus cogens* that cannot be violated by any state under any circumstances.[11] So there are now pockets of "higher law" that particular states cannot disavow even if they have not entered into treaties recognizing them and even if they have persistently rejected their recognition as customary law.[12]

Nevertheless, the relationship between international law and ethics today is an uneasy one, fraught with tension. When norms of state sovereignty (with its attendant emphasis on state security) and ethical imperatives such as the *jus cogens* duty to refrain from committing torture collide, sovereignty often wins the day legally and in the policies of governments.

One problem is that international law, while opening the door to some consideration of ethics and to some legal norms grounded primarily in ethics, has not yet developed a coherent account of just how it should relate to ethics, and which ethical principles ought to inform its interpretation and application. Some legal scholars well versed in philosophy have sought to fill this lacuna by articulating a theory of international law anchored in a particular philosophy, such as that of the great German philosopher Immanuel Kant.[13]

These efforts have had mixed results and not won a wide following among governments. One problem with choosing any particular philosophical foundation for international law that emanates from outside its borders is that governments find it difficult to agree on that particular foundation. For example, why should a self-described Islamic state agree to interpret international law in light of a theory grounded in Kant that makes no reference to

10 See, for example, Lepard, *Customary International Law*, 3–4, 7.

11 See Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969), art. 53 (providing that "a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law," and defining a "peremptory norm of general international law" as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

12 On *jus cogen*s norms generally, and on the inability of states to avoid being bound by them even through persistent objection to them, see Lepard, *Customary International Law*, 37–40, 243–60.

13 See, for example, Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality*, 3rd ed. (Dordrecht: Martinus Nijhoff, 2005).

Islamic values, or, for that matter, to ethical principles already observable in the fabric of existing international law itself?

C. *Toward a Theory of International Law Based on Fundamental Ethical Principles in International Law and World Religions*

Accordingly, I propose that international law ought to be interpreted and implemented in light of a form of global ethic—what I have referred to as "fundamental ethical principles." Fundamental ethical principles are principles that satisfy two criteria: first, they are found already, explicitly or implicitly, in international legal documents such as the UN Charter or the Universal Declaration of Human Rights, and second, they are logically related to a preeminent ethical principle of "unity in diversity," itself found in international law.

Why is it appropriate to turn to these principles? These two criteria suggest the reasons. On the one hand, states themselves have given their assent to them in some fashion, thereby increasing the chances that states will find them relevant and choose to act on them. On the other hand, these principles do not comprise the entire universe of principles endorsed by states in international law, some of which may well be inimical to certain human values, but rather, only those principles that further "unity in diversity."

The principle of unity in diversity maintains that, morally, human beings should regard themselves as members of a globe-spanning family—that is, fundamentally, as brothers and sisters, regardless of man-made boundaries. At the same time, human beings should value, indeed cherish, the vast diversity of human beliefs, opinions, cultures, and physical characteristics that individual members of the human family exemplify. Indeed, we can draw on an image from the Bahá'í Writings, analogizing human beings to flowers in a garden; the garden will be ever the more delightful to the eyes the greater the entrancing diversity of floral species that appear within it, resplendent with a multitude of colors and textures.[14] The fact that human beings should

14 See, for example, 'Abdu'l-Bahá, *The Promulgation of Universal Peace: Talks Delivered by 'Abdu'l-Bahá During His Visit to the United States and Canada in 1912*, 2nd ed., comp. Howard MacNutt (Wilmette, Ill.: Bahá'í Publishing Trust, 1982), 24. ("If the flowers of a garden were all of one color, the effect would be monotonous to the eye; but if the colors are variegated, it is most pleasing and wonderful. The difference in adornment of color and capacity of reflection among the flowers gives

be allowed to take pride in their culture implies that states themselves have a certain moral value as representing some of these common bonds. But the moral standing of states is cabined and regulated by the preeminent principle of the unity of the human family.

This principle has won support from states themselves, as evidenced by relevant passages from a number of important legal documents. For example, the Universal Declaration of Human Rights refers to the "inherent dignity and ... the equal and inalienable rights of *all members of the human family*," and says that all human beings "should act towards one another *in a spirit of brotherhood*."[15] At the same time, the Universal Declaration validates diversity among different groups, declaring, for example, that education should "promote understanding, tolerance and friendship among all nations, racial or religious groups."[16] We find similar complementary principles in the International Covenant on Civil and Political Rights (ICCPR), especially in Article 27, which refers to the rights of persons belonging to minorities.[17] And respect for diversity of thought, conscience, religion, and belief is enshrined in Article 18 of the Universal Declaration as well as Article 18 of the ICCPR.[18]

Importantly, the principle of unity in diversity finds expression in the great religions and philosophies of the world. This can bolster its authority as the keystone in this new ethical system relevant to international law. Why is

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the garden its beauty and charm. Therefore, although we are of different individualities, different in ideas and of various fragrances, let us strive like flowers of the same divine garden to live together in harmony.")

15 Universal Declaration, preamble, art. 1 (emphasis added).

16 Ibid., art. 26, para. 2.

17 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 (1966), art. 27 (providing that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language").

18 See Universal Declaration, art. 18 (affirming that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance"); ICCPR, art. 18, para. 1 (similarly providing that "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.").

this? One reason is that international law itself has been strongly influenced, before the rise of positivism, by great religious ideals. For example, the foundational legal concept of *pacta sunt servanda*—"treaties are to be obeyed"—has its roots in verses and stories from the Hebrew Scriptures as well as the Quran. Thus, the Book of Joshua recounts that Joshua and the chieftains of the Israelites had made an agreement with the Gibeonites to spare their lives based on their representation that they lived in a faraway land. However, the Gibeonites deceived Joshua and the chieftains, in fact living among the Israelites. Nevertheless, upon learning of the Gibeonites' treachery, Joshua and the chieftains insisted that they must abide by their agreement to spare the Gibeonites.[19] Grotius relied on this biblical account, among others, to establish the sanctity of treaties in his classic work *On the Law of War and Peace*.[20] Similarly, the Quran affirms that that treaties bind both powerful and weak nations equally, declaring: "Fulfil God's covenant, when you make covenant, and break not the oaths after they have been confirmed, and you have made God your surety; surely God knows the things you do. And be not as a woman who breaks her thread, after it is firmly spun, into fibres, by taking your oaths as mere mutual deceit, one nation being more numerous than another nation" (16.93–94).[21]

A second reason to base an approach to international law on ethical principles found in the world's religious and ethical traditions is that global jurisprudence ought to reflect the manifold religious perspectives present in the world and also in domestic law. This concept is implicit in Article 9 of the Statute of the International Court of Justice, which says that the court's judges should represent "the main forms of civilization and ... the principal legal systems of the world."[22] A third reason is that support from world religions makes the principle of unity in diversity a practical principle on which to base legal interpretation and reform, for it can potentially garner the support of people and states with diverse religious and philosophical views.

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19 See Joshua 9, in *Tanakh: A New Translation of The Holy Scriptures According to the Traditional Hebrew Text* (Philadelphia: Jewish Publication Society, 1985), 349–51.

20 See Grotius, *De Jure Belli ac Pacis Libri Tres*, book 2, chap. 13, sect. 4, 366–67.

21 From A.J. Arberry, trans., *The Koran Interpreted*, vol. 1 (New York: Simon and Schuster, 1955), 297.

22 ICJ Statute, art. 9.

Dr. Hans Küng has endorsed a similar principle as foundational to his conception of the Global Ethic. He says, for example, that the "idea of the Global Ethic requires respect for cultural and religious diversity, as well as for the different legal systems of various countries and regions in so far as they do not contradict basic human rights."[23] He adds that "in spite of cultural and religious diversity, the Global Ethic reminds us of the commonalities in ethos that exist."[24]

Let me give just a few brief examples of support for this principle of unity in diversity in religions and philosophies.[25] According to the Torah, we should love our neighbors as ourselves (Leviticus 19.18), for we all have "one Father" (Malachi 2.10).[26] Jesus upheld the Torah's commandment to love our neighbors, explaining in the Story of the Good Samaritan that for purposes of this ethical directive a "neighbor" is anyone who arises to serve fellow members of the human race who are in need (see Luke 10.25–37). St. Paul affirms human unity, stating in his letter to the Romans that "there is no distinction between Jew and Greek; the same Lord is Lord of all and is generous to all who call on him" (Romans 10.12).[27] The Quran announces that all people were created by God from one soul: "Mankind, fear your Lord, who created you of a single soul" (4.1).[28] A *hadith* affirms that the "whole universe is the family of Allah."[29] And Bahá'u'lláh, the Prophet-Founder of the Bahá'í Faith, proclaimed that the "earth is but one country, and mankind its citizens."[30]

Many observers have noted this shared teaching of world religions on the unity of the human family. Importantly, the Declaration Toward a Global Ethic, adopted under the inspired leadership of Küng at the 1993 Parliament

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23 Hans Küng, *Handbuch Weltethos*, trans. Bradley Shingleton (Munich: Piper, 2012), 26–27.

24 Ibid.

25 For many more examples, see Brian D. Lepard, *Hope for a Global Ethic: Shared Principles in Religious Scriptures* (Wilmette, Ill.: Bahá'í Publishing Trust, 2005), 23–31.

26 From *Tanakh*, 1102.

27 From *The Holy Bible Containing the Old and New Testaments: New Revised Standard Version*, New Testament, 167.

28 *The Koran Interpreted*, vol. 1, 100.

29 Quoted in C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (New York: St. Martin's Press, 1988), 133.

30 Bahá'u'lláh, *Gleanings from the Writings of Bahá'u'lláh*. trans. Shoghi Effendi, 2nd revised ed. (Wilmette, Ill.: Bahá'í Publishing Trust, 1976), 250.

of the World's Religions, declares: "We consider humankind our family. We must strive to be kind and generous. We must not live for ourselves alone, but should also serve others, never forgetting the children, the aged, the poor, the suffering, the disabled, the refugees, and the lonely."[31]

Secular philosophers, too, have extolled a foundational principle of human unity. For example, Immanuel Kant declared that the "peoples of the earth have ... entered in varying degrees into a universal community, and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*."[32] John Stuart Mill said we should cultivate a concern for the happiness of all human beings because of "the social feelings of mankind; the desire to be in unity with our fellow-creatures."[33] And the contemporary philosopher Peter Singer has declared that we should make "'one world' a moral standard that transcends the nation-state."[34]

Many other principles, too, qualify as fundamental ethical principles because they logically flow from this essential principle of unity in diversity and already find nascent recognition in international law. And of course, these principles are endorsed by members of many religions and by the most sacred and aspirational texts of these religions. These fundamental ethical principles include respect for the human rights of every human being; the Golden Rule; duties on the part of everyone to promote and protect the rights of others, and to rescue them when they are suffering; recognition of limitations on state sovereignty and that governments have a moral obligation to act as trustees for the welfare of all who live in their territories, rather than pursue narrow self-interests, as under the traditional positivist ideology; recognition of the duty of governments to punish criminals and those who violate the rights of others; resolution of disputes and a search for truth through a process of consulting with others in a spirit of humility and openness to new perspectives; the promotion of peaceful methods of conflict

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31 Hans Küng and Karl-Josef Kuschel, eds., *A Global Ethic: The Declaration of the Parliament of the World's Religions* (New York: Continuum, 1993), 15.

32 Immanuel Kant, "Perpetual Peace: A Philosophical Sketch," in *Political Writings*, ed. Hans Reiss and trans. H.B. Nisbet, 2nd ed. (Cambridge: Cambridge University Press, 1991), 93, 107–108 (emphasis in original).

33 See John Stuart Mill, "Utilitarianism," in John Stuart Mill, *Utilitarianism, On Liberty, Essay on Bentham, Together with Selected Writings of Jeremy Bentham and John Austin*, ed. Mary Warnock, 251–321 (New York: New American Library, 1974), 268, 284.

34 Peter Singer, *One World: The Ethics of Globalization* (New Haven: Yale University Press, 2002), 153.

resolution among nations and implementation of a global system of collective security; and finally, respect for international law and legal obligations. It is significant, of course, that all of these principles figure prominently in the Declaration of the Parliament of the World's Religions. I provide a much more complete list of these principles in my book, *Rethinking Humanitarian Intervention*.[35]

D. Implications of Fundamental Ethical Principles for the Interpretation and Implementation of International Law: Freedom of Religion or Belief as an Example

I have argued for a new jurisprudence regarding global law under which international law—including treaties, customary international law, and general principles of law—would be identified, interpreted, and implemented in light of these fundamental ethical principles. Some elements of this methodology are outlined in my book on customary international law.[36] I will give here one brief example concerning freedom of religion or belief.

The Universal Declaration of Human Rights asserts that everyone has the right to "freedom of thought, conscience and religion."[37] The ICCPR contains similar language, but also authorizes limitations on the manifestations of religion or belief.[38] Under the traditional "positivist" doctrine of customary international law, scholars have raised doubts about whether a customary law norm protecting religious freedom even exists because of a lack of consistent state practice in favor of such a norm.[39] The problem is that so many states, including but not limited to states in the Muslim world, place

35 See generally Brian D. Lepard, *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions* (University Park: Pennsylvania State University Press, 2002), 39–98.

36 See, for example, Lepard, *Customary International Law*, 97–98.

37 Universal Declaration, art. 18.

38 See ICCPR, art. 18, para. 3.

39 See, for example, Richard B. Lillich, "Civil Rights," in *Human Rights in International Law: Legal and Policy Issues*, vol. 1, ed. Theodor Meron (Oxford: Clarendon Press, 1984), 158 n.242 (declaring that "whether the right [to freedom of religion or belief]—no matter how old or how characterized—is now part of customary international law is doubtful").

severe restrictions on religious liberty.[40] Iran's systematic persecution of the Bahá'í religious minority is but one example of these common state-directed affronts to religious liberty.[41]

Nevertheless, we should determine the customary law of religious freedom in light of fundamental ethical principles, including "unity in diversity." According to this approach, we should indeed recognize freedom of religion or belief as a norm of customary law. Why? First of all, freedom of religion or belief is *ethically* essential in light of the concept of unity in diversity, one of whose hallmarks is respect for diversity of opinions and beliefs. Indeed, it represents one of the most morally important elements of diversity, for it is through exercising independent thought and volition that human beings can ultimately recognize and integrate all other fundamental ethical principles in their lives. This includes thought and volition that incorporate religious or spiritual perceptions and convictions.

This moral primacy of freedom of religion or belief does not, of course, make it customary law per se. Rather, customary law evolves through the development of a belief by states that a norm should be binding on them now or in the near future. That belief may frequently, but not in all cases, be evidenced by their practices.[42] Thus, according to the theory I have developed, we still look primarily to the views of states in establishing the existence and content of customary law. Nevertheless, where state views are unclear or ambiguous, fundamental ethical principles can "tip the scales" in favor of legal recognition of a norm.

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40 On the problem of violations of freedom of religion or belief and for examples of alleged violations around the world, see United Nations, *Rapporteur's Digest on Freedom of Religion or Belief: Excerpts of the Reports from 1986 to 2011 by the Special Rapporteur on Freedom of Religion or Belief Arranged by Topics of the Framework for Communications* (New York: United Nations), www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf.

41 On the persecution of Bahá'ís in Iran, and international efforts to protest and put an end to the persecution, see, for example, Nazila Ghanea, *Human Rights, the U.N., and the Bahá'ís in Iran* (Oxford: George Ronald, 2002).

42 On this new understanding of customary international law, which differs from the traditional definition, see Lepard, *Customary International Law*, 97–98. In particular, I have argued that *opinio juris* should be interpreted as a requirement that "states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain state conduct." Ibid., 97. Moreover, the state practice requirement should be viewed as requiring evidence that states believe that a particular legal principle or rule is desirable now in the near future. See ibid.

In the case of freedom of religion or belief, there is ample evidence that states believe that they should have a legal obligation to respect this right. I have already cited relevant provisions of the Universal Declaration of Human Rights and the ICCPR. Moreover, a wide variety of religious texts uphold freedom of religion or belief.[43] On the other hand, state practice regarding freedom of religion or belief is mixed. States have committed numerous violations of this right, but at the same time have reaffirmed their belief in its validity and importance. Where state practice is thus inconsistent, it is particularly appropriate to turn to ethical principles to resolve the legal status of a putative norm. In addition, it is appropriate to do so where states reasonably believe that a norm directly promotes fundamental ethical principles, and especially compelling or essential ones, in which case state practice may justifiably be given less weight as evidence of *opinio juris*. Because the right to freedom of religion or belief is ethically essential, contrary state practice should not prevent recognition of this legal right. Thus, the concept of a global ethic based in fundamental ethical principles can play a critical supporting role in identifying norms of customary international law, even though these norms are primarily formed by the will and attitudes of states.

Moreover, similar reasoning justifies recognition of the right to freedom of religion or belief as a *jus cogens* right. First of all, states themselves have viewed it as so morally essential that they have sought to impose severe limits on the scope of legal restrictions on the right. For example, it is one of the few rights in the ICCPR that states cannot restrict even in time of war or national emergency.[44] Furthermore, Article 18 of the ICCPR, which generally guarantees freedom of religion or belief, only permits limitations on the *manifestation* of religion or belief; it does not authorize limitations on the basic freedom of thought, conscience and religion itself. The United Nations Human Rights Committee established under the ICCPR has accordingly expressed the view, in General Comment No. 22, that "Article 18 distinguishes the freedom of thought, conscience, religion or belief from the

43 For examples, see Lepard, *Hope for a Global Ethic*, 91–99.

44 See ICCPR art. 4, para. 2 (providing that no derogation may be made from Article 18, among other articles, under the general provisions of art. 4, para. 1, which allows states to "take measures derogating from their obligations" under the ICCPR "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed").

freedom to manifest religion or belief.[45] It *does not permit any limitations whatsoever* on the freedom of thought and conscience or on the freedom *to have or adopt* a religion or belief of one's choice. These freedoms are *protected unconditionally*."[46]

In short, there appears to be a general belief among states that no state can exempt itself from the obligation to honor this right by persistently objecting to it, and that the right has a strongly peremptory character. Furthermore, even if evidence of state views were ambiguous, the essential moral character of freedom of religion or belief should lead to a conclusion that it is a *jus cogens* right and has peremptory status.[47] Again, we see the value of using a global ethic grounded in fundamental ethical principles, including many of the principles identified by Küng, to assist in the recognition and implementation of peremptory legal norms.

E. Conclusion

I have proposed a new jurisprudential methodology for determining, interpreting, and implementing international law that moves it beyond positivism and helps to integrate global law with a global ethic, in the form of fundamental ethical principles based on the unity of the human family. International law must be reformed so that it better serves a global ethic grounded in recognition of human oneness. This reformation will no doubt be an uneasy process, characterized by progress in fits and starts; but morally, international lawyers must take up this call. We cannot allow international law to languish in the old self-interested world of legal positivism. As St. Paul advises, we should "not be conformed to this world, but be transformed by the renewing of [our] minds" (Romans 12:2). And in the words of the Bahá'í

45 See ICCPR, art. 18, para. 3 (affirming that "freedom to *manifest* one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others") (emphasis added).

46 United Nations, Human Rights Committee, General Comment No. 22, "The Right to Freedom of Thought, Conscience and Religion (Article 18)," U.N. Doc. CCPR/C/21/Rev. 1/Add.4 (1993), para. 3 (emphasis added).

47 For a detailed analysis of the *jus cogens* character of freedom to change religion or belief, see Lepard, *Customary International Law*, 364–66.

Writings, we must engage in "endeavor, ceaseless endeavor," to bring about a global law that safeguards human rights and peace.[48]

F. Recommended Reading

Ghanea, Nazila. *Human Rights, the U.N., and the Bahá'ís in Iran.* Oxford: George Ronald, 2002.

Küng, Hans, and Karl-Josef Kuschel, eds. *A Global Ethic: The Declaration of the Parliament of the World's Religions.* New York: Continuum, 1993.

Lepard, Brian D. *Customary International Law: A New Theory with Practical Applications.* Cambridge: Cambridge University Press, 2010.

_____. *Hope for a Global Ethic: Shared Principles in Religious Scriptures.* Wilmette, Ill.: Bahá'í Publishing, 2005.

_____. *Rethinking Humanitarian Intervention: A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions.* University Park: Pennsylvania State University Press, 2002.

Universal Declaration of Human Rights. G.A. Res. 217A (III) (1948).

48 'Abdu'l-Bahá, *The Secret of Divine Civilization*, trans. Marzieh Gail (Wilmette, Ill.: Bahá'í Publishing Trust, 1970), 66.

Global Ethic and Human Rights

Peter G. Kirchschlaeger

A. Introduction

Human existence is at the center of any examination of the relation between the Global Ethic[1] and human rights. The analysis is not embedded in the area of an empirical description of their respective realities. Though relating strongly with concrete reality, the Global Ethic and human rights are part of a normative sphere as both lay out a vision of a better world. These visions do not serve as illusionary ideals but as realistic expectations toward and obligations for the duty-bearers. Beyond that, these horizons share some common concerns. The legitimacy of the normative obligation to fulfill is—neither in the case of the Global Ethic nor in the case of human rights—put under the precondition that the addressees of a decision or action respecting the Global Ethic are also following the directives of the Global Ethic with respect to human rights. They enjoy the ethical behavior and respect for their rights without any requirements but just because they are human.

Religions play a decisive role for both the Global Ethic and human rights. Inspired by Hans Kueng's book *Global Responsibility: In Search of a New World Ethic*,[2] the Parliament of the World's Religions in Chicago in 1993 endorsed the Declaration Toward a Global Ethic—the first time in modern history that representatives of the world's religions agreed on core elements of a shared ethic.[3] While the Global Ethic therefore has a close and constituting relationship with religion, human rights have a multilayered relationship with them.[4]

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1 See Hans Küng, *Global Responsibility: In Search of a New World Ethic* (New York: Crossroad, 1991).

2 Ibid.

3 The principle of humanity, the Golden Rule of reciprocity, see M. Bauschke, *Die Goldene Regel. Staunen—Verstehen—Handeln* (Berlin: LEB-Verlag, 2010), a commitment to nonviolence, justice, truthfulness, and partnership between men and women.

4 See Hans Küng, *Handbuch Weltethos. Eine Vision und ihre Umsetzung* (Munich: Piper, 2012).

As is the case with other non-state actors, contributions by religions to the realization of human rights are of significance because religions can enhance the respect for human rights within and outside their communities. Furthermore, religions can provide a voice for victims of human rights violations if the voice of the marginalized is not heard or if they do not have a voice, for example, in the democratic opinion-forming and decision-making processes of a society.[5] Beyond that, religious communities can call on their members and followers to respect and support the realization of human rights, showing them the harmony between their own tradition, values, principles, and human rights. Conversely, religions can also be bystanders when human rights violations occur; for example, through tolerating discriminatory behaviors or inequalities in their communities. Finally, they can be part of movements or actions that do not respect human rights, or even the perpetrators of human rights violations. The Global Ethic has the potential to bring religions together, recognizing that common efforts for the same core ethical elements that go beyond the minimal standard of human rights can make a positive difference for the realization of human rights.

In addition, the Global Ethic and human rights liberate themselves from arbitrariness claiming universal status for their core elements of the rights and responsibilities of a shared ethic. The justifying foundation for the Global Ethic and human rights build a universal consensus, although one can identify some differences if one examines the specific justification models: while the Global Ethic is based on religious traditions, human rights also start from secular justification-models,[6] although the latter affirmation needs to be differentiated, for example, considering the concept of "adaptation."[7]

With regard to the difference between the Global Ethic and human rights with respect to their justificatory foundations, one can state that the Global Ethic is concerned with building a bridge to humans who do not share religious beliefs or worldviews, while human rights deal with the challenge of connecting with traditions, cultures, civilizations, religions, value systems, and worldviews.

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5 This role of advocacy is often played by religions also because maybe in another context they can find themselves in a position of a discriminated minority themselves and therefore possess an understanding for this marginalized situation.

6 See P.G. Kirchschlaeger, "Wie können Menschenrechte begründet werden? Ein für religiöse und säkulare Menschenrechtskonzeptionen anschlussfähiger Ansatz," *ReligionsRecht im Dialog* 15 (Münster: LIT-Verlag, 2013).

7 Ibid., 162–84.

Further differences between the Global Ethic and human rights will need to be outlined in this chapter as well: While the Global Ethic consists of core elements of a shared ethic of all world religions and builds a higher ethos, human rights embrace a minimal standard of elements and spheres of human existence that humans being need in order to live.

Finally, the Global Ethic differs from human rights as a pure ethical approach, while human rights can be understood with four dimensions (legal, political, historical, and moral). Partly as a consequence, the Global Ethic mainly focuses on the human individual, while human rights entrust the primary responsibility to the states. This does not mean that nonstate actors such as religions, the private sector, nongovernmental organizations, and individuals are not obliged to contribute to the implementation and realization of human rights.

In integrating these common aspects and differences between the Global Ethic and human rights, the complementarities between the two concepts will need to be analyzed: the implementation of law is necessarily dependent on a supporting ethos where the roles that the Global Ethic and human rights can play seem obvious. Beyond that, human rights can enhance the concreteness, the practice-orientation, the substantial materialization of the abstract principles of the Global Ethic, and the clarification of the quality of ethical obligations (negative or positive) of the Global Ethic, while the Global Ethic can support, among others, the bridge-building efforts by human rights with traditions, cultures, civilizations, religions, value systems, and worldviews, and enriches within religious communities the discourse about the question of how human rights can be justified.

B. The Multi-Dimensionality of Human Rights[8]

Every human being is a holder of human rights. Therefore, human rights are "subjective rights." Human rights are those rights that belong to every human being, regardless of skin color, nationality, political convictions or religious beliefs, social standing, and gender or age. Human rights guarantee every human being a protection of the essential elements and spheres of human existence that permit every human being survival and a life as a human.

8 See P.G. Kirchschlaeger, "Die Multidimensionalität der Menschenrechte—Chance oder Gefahr für den universellen Menschenrechtsschutz?" *MenschenRechtsMagazin* 18 (February 2013): 77–95.

To fulfill this function of human rights, the legal dimension of human rights, which embraces human rights treaties as part of international law, regional human rights law, the incorporation of human rights in national law, and the corresponding mechanisms and institutions, plays the decisive role for the implementation of human rights. This legal dimension builds upon political deliberation, political struggle, political opinion- and consensus-building processes, and political decisions to endow all human beings with human rights—the political dimension of human rights.

The political process—taking up the philosophical and/or theological ideas and concepts leading to the idea of human rights, putting them on the political agenda, and establishing human rights first on a national and then on an international level—shows the historical development of human rights. This history constitutes the historical dimension of human rights.

In addition to the historical dimension of human rights, there is the question why every human being is entitled to human rights. This question remains open. The examination of it constitutes the moral dimension. Human rights build a historical, political, and legal consensus that seems to enjoy global acceptance. At the same time, the claim for the universality of human rights provokes doubts and criticism of the legitimacy of human rights. Difficulties in implementing these rights let grow doubts and criticism. In order to remain coherent with their own core concept of the autonomy of the individual, human rights need a moral justification because autonomy (which is at the center of human rights) embraces the claim by every individual to know the reason why one's freedom should be restricted by human rights.[9] Human rights did not "fall from heaven." They are not the "absolute truth." Human rights need to be justified to every human being as every human being is not only a right-holder but also a "duty-bearer"—every human being needs to respect the human rights of others as well. Robert Alexy recognizes that the existence of human rights depends exclusively on the possibility of their justification. Human rights need to be justified to everyone concerned

9 According to Rainer Forst there is a "right to justification" that corresponds to all norms, actions, and conditions. See R. Forst, "Das grundlegende Recht auf Rechtfertigung. Zu einer konstruktivistischen Konzeption von Menschenrechten," in *Recht auf Menschenrechte*, ed. H. Brunkhorst, W. Köhler, and M. Lutz-Bachmann (Frankfurt a.M.: Suhrkamp, 1999), 66–105.

with human rights.[10] The reasons why every human being is a human rights-holder have to be discussed.[11]

Human rights are rights with a certain complexity. In an analysis of the relationship between the Global Ethic and human rights, all four dimensions of human rights need to be considered. In the following pages, the elaboration of the relationship between the Global Ethic and the single dimensions of human rights will also allow us to deepen the—so far only indicated—multidimensional understanding of human rights.

C. The Global Ethic and the Legal Dimension of Human Rights

Human rights are "rights."[12] The term "right" defines a normative position of a natural or fictive person in her or his relation to another person. A "right" gives a person opportunities to act, limits the sphere of action, leads to action, and affects corresponding duties. A normative position understood as a "right" receives a certain weight. "Rights" are part of a legal or moral system of norms. Depending on the nature of the system of norms, "rights" can be legal or moral "rights." When one compares "legal rights" and "moral rights," "legal rights" possess the uniqueness of a precise definition of the subject and of the corresponding duties, of the grade of formalization, and in front of all of the connected mechanisms and means of control, implementation, and enforcement. "Moral rights" distinguish themselves with their wider horizon rooted in their universal sphere of validity, which goes back to the sphere of validity of their system of norms.

10 See R. Alexy, "Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat," in *Philosophie der Menschenrechte*, ed. Stefan Gosepath and Georg Lohmann (Frankfurt a.M.: Suhrkamp, 1999), 244–64.

11 The relevance of this question grows even further when there are attempts to exclude a specific group of humans from human rights in general or from some rights, when human rights in general are neglected, or when some rights are denied. Facing these realities, reasons justifying the defense of human rights are necessary.

12 See P. Koller, "Die Begründung von Rechten," in *Theoretische Grundlagen der Rechtspolitik, Ungarisch-Österreichisches Symposium der internationalen Vereinigung für Rechts- und Sozialphilosophie*, ed. P. Koller et al. (Stuttgart: Archiv für Rechts- und Sozialphilosophie, 1990), 74–84.

Human rights as legal rights constitute the legal dimension of human rights.[13] Legal rights as parts of a positive legal system assert a legitimate claim by members of the legal system. States have a primary responsibility to respect and implement these rights.

A better chance of enforcement, fewer problems of interpretation and concretization, and the establishment of public institutions able to meet these obligations lead to the transformation of human rights into positive law.[14] This transformation, which in a constitutional state includes democratic opinion-forming and decision-making processes, leads to the effect—in a Kantian context—of the liberation of the individual from his or her duties related with virtues. The individual has the choice of authenticity, individuality, accountability, and morality.[15]

One aspect should not be underestimated: human rights as positive law in a national context automatically makes a distinction between the citizens of a constitutional democratic state, the human beings living in that state, and other humans because human rights as positive law are part of a national legal system that only applies to the members of that legal community. As positive law, human rights cannot avoid finding themselves to be incompatible with their own universality because as part of a national law, they apply only under certain conditions. This requires that such particularization be counter-balanced. This is achieved in the legal dimension of human rights to a certain extent with a "global process of positive transformation" including international, regional, and global institutions striving for legal enforcement of human rights. Similar to the transformation process on a national level, human rights become positive law at the international, regional, and global level, which alters legal obligations.

The relation between the legal dimension of human rights and the Global Ethic is mainly dominated by the dependence of legal rights in general on a

13 "International human rights are legal entitlements of individuals against the state or state-like entities guaranteed by international law for the purpose of protecting fundamental needs of the human person and his/her dignity in times of peace and war." W. Kaelin, "What Are Human Rights?" in *The Face of Human Rights*, ed. W. Kaelin, L. Müller, and J. Wyttenbach (Baden: Lars Mueller Publishers, 2004), 17.

14 See R. Alexy, Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat, in Gosepath and Lohmann, eds., *Philosophie der Menschenrechte*, 244–64.

15 See G. Lohmann, "Menschenrechte zwischen Moral und Recht," in Gosepath and Lohmann, eds., *Philosophie der Menschenrechte*, 62–95, 90.

corresponding moral awareness and ethos.[16] The implementation and the realization of legal rights—like human rights in their legal dimension—need the support of a corresponding moral awareness and ethos because the respect for the law does not originate in the fear of sanctions but mostly in a corresponding ethical system sharing the same principles.[17] Human rights must go hand in hand with an appropriate ethos to ensure that they are enforced.[18]

Beyond that, an ethical system like the Global Ethic serves as a frame of reference for a legal system, for the law-making process, and for the enforcement of laws.[19]

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16 See P.G. Kirchschlaeger, "Brauchen die Menschenrechte eine (moralische) Begruendung?" in *Menschenrechte und Kinder*, ed. P.G. Kirchschlaeger, T. Kirchschlaeger, et al., Internationales Menschenrechtsforum Luzern (IHRF), Bd. IV (Berne: Staempfli Verlag, 2007), 55–64.

17 This significance of the ethical foundation in order to change the legal system of a society toward a respect for civil rights is underlined by Martin Luther King as well when he states in his speech "Facing the Challenge of a New Age" on the occasion of the NAAACP Emancipation Day Rally in Atlanta on January 1, 1957: "I know that there are those who say that this can't be done through the courts, it can't be done through laws, you can't egislate morals. They would say that integration must come by education not legislation. Well I choose to be dialectical at that point. It's not either law or education. It's both legislation and education." Martin Luther King Jr., "Facing the Challenge of a New Age," address delivered at the NAAACP Emancipation Day rally, January 1, 1957, http://action.naacp.org/page/-/History/Facing.the.Challenge.of.A.New.Age.at.Atlanta.Branch.Emanicpation.Program.1-1-57.pdf.

18 "We all need to become increasingly aware that the realization of human rights is never automatically achieved. Human beings may or may not be born free and equal, but in any case their actual freedom and equality depends on the extent to which authorities and individuals take the human rights message to hear. In other words human rights are not a gift but a task for all of us. If people fail to take action on behalf of their fellow human beings, if they lack sympathy for their suffering and do not show solidarity with the victims of human rights violations, if they do not cry out against oppression and disregard for human dignity and if they do not persist in calling for more justice, there can ultimately be no real peace in our world." W. Kaelin, "What Are Human Rights?" in *The Face of Human Rights*, ed. W. Kaelin, L. Müller, and J. Wyttenbach (Baden: Lars Mueller, 2004), 37.

19 "A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a

D. The Global Ethic and the Political Dimension of Human Rights

Every single human rights treaty[20] goes back to a political process where this consensus was found and at the end ratified in a treaty. Schematically put, morally possible human rights are transformed in legally protected human rights through a political opinion-forming and decision-making process. This is one aspect of the political dimension of human rights.[21] The transformation of human rights into positive law is a political act. This political decision serves the purpose of enhancing the enforceability of human rights, to guarantee a more regulated and controllable judging-process, and to institutionalize the way these rights are bestowed.

Part of this transformation from moral human rights into legal human rights is the selection of those essential elements and spheres of human existence that enjoy the special protection by human rights—a second aspect of the political dimension of human rights. Historical experiences of injustice and their public and political discussion generate protection through juridical rights.[22] At this point one can see an intersection between the political dimension and the historical dimension of human rights.

This process itself includes the third aspect of the political dimension of human rights: for the purpose of coherence with its own principles, the political opinion-forming and decision-making process leading to human rights must also respect the elements and spheres of human existence that are protected by human rights. Specific human rights guarantee the individual a participatory role in the political opinion-forming and decision-making process based on the principle of democracy, the freedom to congregate, and the freedom of expression and information. This means also that the political opinion-forming and decision-making process must remain within the

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false sense of superiority and the segregated a false sense of inferiority." Martin Luther King Jr., Letter from Birmingham Jail, April 16, 1963, para. 14.

20 See, for example, on the UN Convention on the Rights of the Child, C. Bellamy, J. Zermatten, P.G. Kirchschlaeger, and T. Kirchschläger, eds., *Realizing the Rights of the Child*, Swiss Human Rights Book Vol. II (Zürich: Rueffer and Rub, 2007).

21 See, on the political dimension of human rights, P.G. Kirchschlaeger, "Menschenrechte und Politik," in H.R. Yousefi, ed., *Menschenrechte im Weltkontext. Geschichten—Erscheinungsformen—Neuere Entwicklungen* (Heidelberg: Springer Verlag, 2013), 255–60.

22 Winfried Brugger conceives the call for human rights as "answers to exemplary experiences of wrongdoing." W. Brugger, "Stufen der Begründung von Menschenrechten," *Der Staat* 31 (1992): 21.

boundaries set by human rights, for example, the democratic process and democratic decisions are not allowed to be discriminatory.[23]

A fourth aspect of the political dimension can be heard all over the world: "Despite the continuing intercultural disputes about how they are to be interpreted, human rights speak a language that enables dissidents to express their suffering and their demands against their repressive regime—in Asia, South America, and Africa no less than in Europe and the United States."[24] Political statements are made with human rights language, experiences of injustice are identified as "human rights violations," and basic needs and fundamental requests are defined as human rights-relevant.[25]

The political dimension embraces also a fifth aspect where political projects are related to the cause of human rights. As long as human rights are the standards of which the reality of life falls short, human rights remain a political mandate calling for appropriate political decisions and actions in order to minimize or eliminate human rights violations.

The use of human rights as a legal and an ethical frame of reference for other political discourse forms a sixth aspect of the political dimension of human rights.

Human rights cannot avoid the fact that they are sometimes abused for political purposes, which leads to the seventh aspect of the political dimension of human rights. The intensity of the abuse and the damage for the idea and the tradition of human rights are even greater if the pursuit of another political purpose or the political aim itself violate human rights. Not only does this not do justice to human rights, it also does considerable harm to the overall concept. Perceptions of human rights linking human rights, for example, with imperialism and neocolonialism, are the results of abuses of human rights for other political goals.

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23 See P.G. Kirchschlaeger, "The Relation between Democracy and Human Rights," in *Globalisation and Globalisation Studies: Aspects and Dimentions of Global Views, Yearbook*, ed. E. Grinin, I. Ilyin, and A.V. Korotayev (Volgograd: Uchitel, 2014), 112–25.

24 J. Habermas, "Konzeptionen der Moderne, Ein Rückblick auf zwei Traditionen," in *Die postnationale Konstellation, Politische Essays*, ed. J. Habermas (Frankfurt a.M.: Suhrkamp, 1998), 221.

25 The beginnings of the Egyptian uprising, for instance, were characterized by the call for the implementation of human rights, as reported by Nelly Corbel in her talk at a workshop entitled "Democracy and Participation in the Face of Global Changes. The Role of Citizenship and Human Rights Education," held at Networking European Citizenship Education in Madrid on June 28–30, 2012.

The Global Ethic can support the political dimension of human rights reinforcing the voice of human rights in the political discussion in the case of overlapping ethical concerns. The probability of such an overlap is high, taking into account the similar vision both approaches are striving for. Human rights can serve the Global Ethic with concreteness when the Global Ethic looks for political application of its principles.

E. The Global Ethic and the Historical Dimension of Human Rights

If one asks the question of the origin of human rights or when the idea of human rights was introduced, one finds her-/himself in the historical dimension of human rights. These questions lead one to think, of course, of the Enlightenment. In the Enlightenment, the idea and concept of human rights experienced an agglomeration and crystallization. If one looks not only at the use of the term "human rights" but takes also into account the core ideas of human rights, those ideas and concept of human rights had been discussed much earlier in different cultures, traditions, and religions. More research is necessary to get a more accurate picture of the origins of the idea and the concept of human rights. This phase of philosophical, religious, and theological ideas and concepts leading to today's understanding of human rights can be seen as the first stage of the development of human rights.[26]

Following of the initial stage, the legal implementation of human rights on a national level through the "Declaration of Independence of 1776"[27] and the "Declaration des droits de l'homme et du citoyen de 1789"[28] formed the second stage of this historical process. While the texts themselves are full of innovative thoughts and messages, they were still understood as children of their time, namely the declarations had an exclusive understanding of rights-holders: white men of a certain socioeconomic background that were citizens of particular nation-states. This meant that a lot of humans even within these particular nation-states were excluded from being right-holders,

26 N. Bobbio, *Das Zeitalter der Menschenrechte, Ist Toleranz durchsetzbar?* (Berlin: Klaus Wagenbach, 1998).

27 See the National Archives of the United States of America, *Declaration of Independence* (1776), www.archives.gov/exhibits/charters/declaration_transcript.html.

28 See LegiFrance (service public de la diffusion du droit par l'internet), *Declaration des droits de l'homme et du citoyen de 1789* (1789), www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789.

not even thinking about it from a global perspective. In addition, slavery was still practiced and not stopped by these declarations although they certainly had an influence on the process leading to the abolition of slavery.

Because of these shortcomings, a third stage starting with the Universal Declaration of Human Rights of 1948—since then ongoing and consisting of the binding human rights treaties and the corresponding protection-mechanisms—is trying to elevate the concept and the implementation of human rights to a universal level.

From a historical point of view one can recognize a pattern in the development of human rights documents: historical experiences of injustices through the ages and their public perception and political discussion lead to the attempt to stop injustices, to prevent them in the future. For example, the Universal Declaration of Human Rights of 1948 can be seen as a direct reaction to the human rights violations of the Holocaust and its intention to deprive people of their human dignity.[29] World War II and the Holocaust indubitably played a decisive role in the drafting of the Universal Declaration of Human Rights of 1948. At the same time doubt can arise that a single historical experience of injustice can develop a universal effect, despite its unique character. Historical accounts can exclude as well,[30] which would lead in this case to double discrimination. In addition, it seems necessary to emphasize that the explanation of the genesis of human rights does not constitute a moral chain of argument as to why all human beings are holders of human rights. At this point, the difference between genesis (discovery) and validity (legitimacy) has a significant role to play. This difference exists because both aim to answer different questions. While the genesis seeks to clarify why and by whom an idea was conceived or an approach introduced and further developed, validity deals with the issue itself and whether an insight is universal and true. While genesis and validity must be seen in relation to each other, they must also be clearly separated.[31] The exemplary nature of a historical experience of injustice does not constitute a moral

29 "Most of the articles and rights in the Declaration were adopted as direct and immediate reactions to the horrors of the Holocaust." J. Morsink, "The Universal Declaration and the Conscience of Humanity," in R. Huhle ed., *Human Rights and History: A Challenge for Education* (Berlin: Foundation Remembrance, Responsibility, Future, 2010), 25–36, 27.

30 For example, the European perspective on World War II is dominating while the African experiences and perceptions do not receive the necessary attention.

31 See W.S. Salmon, *Logik* (Stuttgart: Reclam, 1983), 25–32.

judgment but a contingent assessment of the experience as a special threat to or a violation of essential elements and spheres of human existence.

Human rights therefore possess a historically contingent nature. This leads to two consequences: human rights are dynamic and open to new essential elements and spheres of human existence that in the future may need special protection by human rights as new challenges and threats rise. Therefore, human rights lose neither their relevance to the present nor their sustained significance for the future.[32] The historical dimension of human rights sends out the clear message that humanity is able to react against wrongs suffered by human beings in the past, in the present, and in the future.

The second consequence of the historically contingent nature of human rights is the expression of doubt about their universal validity and applicability because of their contingent and temporal character, and their local origins. At this point the distinction between genesis and validity mentioned above helps to avoid the "genetic fallacy" of extrapolating from the genesis of an insight to its validity. The historical explanation of the genesis of human rights must, rather, play another role than serving the legitimacy of human rights. As stated above, the historical explanation of the genesis of human rights does not constitute a moral chain of argument as to why all human beings are the holders of human rights but to outline—based on the close examination of processes and interrelations from a historical perspective—new aspects of human rights. These aspects constitute additional knowledge and are of systematic interest for human rights theory and practice.[33] The discourse about the justification of human rights belongs mainly, though, to the moral dimension of human rights.

The relationship between the Global Ethic and the historical dimension of human rights consists principally in the enriching contribution by the Global Ethic toward the analysis of the genesis of human rights regarding the role of religious traditions and theologies. In addition, human rights can

32 "The human rights abuses on the minds of the 1948 drafters occurred during the Holocaust, while today we can point not only to the Nazi atrocities, but to atrocities in Bosnia, Cambodia, Rwanda, Darfur, and in other contexts." J. Morsink, "The Universal Declaration and the Conscience of Humanity," in Huhle, ed., *Human Rights and History: A Challenge for Education*, 36.

33 See, for example, Walter Gut's account of the creation of the Universal Declaration of 1948. W. Gut, "Eine Sternstunde der Menschheit, Die Allgemeine Erklärung der Menschenrechte von 1948," *Schweizerische Kirchenzeitung* 176 (2008): 816–19.

learn from the Global Ethic how to effectively engage with religious sources on normative contents.

The Global Ethic could benefit from the historical research on the genesis of human rights exploring the contributions by religions to the development of human rights if the latter overlap with the fundaments of the Global Ethic and therefore enhance the solidity of the Global Ethic—a direction that Hans Küng's *Grundlagenforschung* (foundational research) has launched.

F. The Global Ethic and the Moral Dimension of Human Rights

I. Complementary Relation Between a Higher Ethos and a Minimal Standard

The Global Ethic consists of core elements of a shared ethic of all world religions, and builds a high ethos. This ethos possesses an individual-ethical and a socio-ethical dimension.

Human rights though embrace a minimal standard of elements and spheres of human existence that a human needs in order to survive and live as a human being. Human rights have primarily a socio-ethical dimension because they deal with the societal conditions of a "good life," and with the position of the individual in the society from the perspective of the individual. The state carries the primary (but not exclusive) responsibility to protect the rights of the individual. If one recognizes the entitlement as holder of human rights of individuals and the corresponding obligations (without being preconditions of the entitlement), the individual-ethical dimension of human rights becomes obvious as well.[34]

The moral dimension of human rights, as part of the multi-dimensionality of human rights, is based on the other dimensions because of the complementary relation among these dimensions. At the same time it plays a constituting role for the other dimensions of human rights most of all because in the moral dimension of human rights the justification of human rights is addressed adequately, and therefore the legitimacy of the claim of universality of human rights can be shown in its moral dimension. The adequacy of the moral dimension of human rights facing the question how human

34 See on how human rights can be an ethical frame of reference P. G. Kirchschlaeger, "Human Rights as an Ethical Basis for Science," *Journal of Law, Information and Science* 22(2), 2012–2013, 1–16.

rights can be justified is based on the argument that a moral justification of human rights can outline plausible reasons that can be universalized—a "conditio sine qua non" for such moral justification is that it not be subject to any traditional, cultural, religious, metaphysical limits.[35] A legal, historical, and political justification cannot overcome the challenge of universalization: a legal justification of human rights, for example, going back to a democratic opinion-forming and decision-making process in a country, cannot satisfy the universality of human rights, as it remains irrelevant for a human not living in that country.[36] Historical and political justification attempts face the same obstacles as legal ones. In the case of historical justification, its focus lies on the historical genesis, not the historical validity that is an additional limiting factor. In the case of the political justification-models, they are often imprecise or too narrow in their understanding of human rights. This can be shown in the approach of John Rawls of the "overlapping consensus."[37]

The necessity of the moral dimension of human rights becomes even more obvious through the following paradigmatic five cases:

- All humans are holders of human rights, even if they live in a state that does not respect human rights at all or does not respect some human rights.
- All humans are holders of human rights and their human rights must be implemented without any difference, even if human rights are challenged by theoretical or practical resistance.

35 See E. Tugendhat, Die Kontroverse um die Menschenrechte, in Gosepath and Lohmann, eds., *Philosophie der Menschenrechte*, 48–61.

36 If, for example, the democratically elected parliament in one country decides to ratify the UN-Convention on the Rights of Persons with Disabilities, it provokes no direct impact on humans living in another country and possesses at most an exemplary effect.

37 For J. Rawls's understanding of human rights see J. Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999); Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); it seems among others to be limited to national borders, to exclude several human rights in an arbitrary way (for example, the right to education), not respecting the principle of indivisibility, and to be too tolerant with states violating human rights. See P.G. Kirchschlaeger, "Wie können Menschenrechte begründet werden? Ein für religiöse und säkulare Menschenrechtskonzeptionen anschlussfähiger Ansatz," *ReligionsRecht im Dialog* 15 (Münster: LIT-Verlag, 2013) 192.

- All humans are holders of human rights, even if alleged "democratic decisions"—in reality just decisions by a majority not respecting the rule of law, in particular the human rights of minorities—aim to deprive some humans or a group of humans of their human rights.
- All humans are holders of human rights, even if there are groups in traditions, cultures, civilizations, religions, and value systems trying to interpret human rights in ways that seriously limit their scope (for example, the position of women in fundamentalist streams of traditions, cultures, civilizations, religions, worldviews; the precedence of communal obligations over individual rights).
- All humans are holders of human rights, even if one deals with a horizontal relationship (between individuals) as human rights regulate simultaneously horizontal and vertical relationships (between individuals and the state) because at the end of the day human rights protect the essential elements and spheres of human existence.

In these five paradigmatic cases, human rights cannot be claimed without reservation if the moral dimension of human rights is not taken into consideration.

Beyond that, human rights protect cultural and religious diversity by acknowledging the significance of religiosity on the individual level as one of the essential elements and spheres of human existence, and the necessity of non-discrimination. Especially through the individual right to religious freedom and through the prohibition of discrimination, human rights contribute not only to diversity but also to the peaceful coexistence of, and the dialogue between, traditions, cultures, civilizations, religions, value systems, and worldviews. Reciprocally, they expect traditions, cultures, civilizations, religions, value systems, and worldviews to respect the branch they are sitting on, namely human rights, and to support it, namely the realization and implementation of human rights—be it within or outside their own communities.

Compared with the Global Ethic, it becomes even more obvious that the moral dimension of human rights does not build superior ethical principles, a comprehensive or a superior doctrine, or a moral system that incorporates other value systems. The moral dimension of human rights constitutes a

minimal standard. Stefan Gosepath[38] describes human rights as a subset of moral rights that human beings have because they are human.[39] This subset of moral rights was placed under the protection of human rights because it comprises essential elements and spheres of human existence that allow a human being to survive and to live as a human being.

At the same time, this minimal standard plays a constituting role as the existence and the discourse of ethics and morality are protected by human rights as well (for example, by the right to freedom of religion, article 18 of the Universal Declaration of Human Rights), and therefore gives the possibility of existence to different ethical approaches, systems, and theories, as for example, the Global Ethic.

The Global Ethic enriches human rights as it adds substantial principles to the discourse that support the respect and the realization of human rights. Some parts of the Global Ethic enrich the minimal standard with elements of a higher ethos—for example, the commitment to truthfulness—other parts of the Global Ethic attribute more weight to elements and spheres of human existence also protected by human rights, for example, the principle of humanity, the Golden Rule of reciprocity, a commitment to non-violence, justice, and partnership between men and women, because the Global Ethic addresses them as well as core elements of a shared ethic by the world religions.

II. Building Bridges Together

Hans Küng launched the thesis in a position paper for the 1989 UNESCO Symposium in Paris: "No world peace without religious peace." This became the program for his book *Global Responsibility: In Search of a New World Ethic*.[40] Küng not only creates this necessary attention on these key issues,

38 See S. Gosepath, "Zur Begründung sozialer Menschenrechte," in Gosepath and Lohmann, eds., *Philosophie der Menschenrechte*, 146–87; S. Gosepath, "Soziale Menschenrechte als Grundsicherung," in *Menschenrechtsschutz im Spiegel von Wissenschaft und Praxis*, ed. C. Mahler and N. Weiss (Berlin: Berliner Wissenschaftsverlag, 2004), 90–109.

39 "E.g. from the outset, without having to have a *specific* relationship to other human beings." S. Gosepath, "Zur Begründung sozialer Menschenrechte," in Gosepath and Lohmann, eds., *Philosophie der Menschenrechte*, 149.

40 H. Küng, *Global Responsibility. In Search of a New World Ethic* (New York: Crossroad, 1991).

but contributes also to the realization of a harmonic coexistence of religions. On the foundation of Küng's research and his approach to the global ethic, the Parliament of the World's Religions in Chicago in 1993 endorsed the Declaration Toward a Global Ethic. In a step of historic singularity and sustainable importance, representatives of all the world religions agreed on the core elements of a shared ethic: the principle of humanity, the Golden Rule of reciprocity, a commitment to non-violence, justice, truthfulness, and partnership between men and women.

This consensus on a global ethic builds a solid foundation for a peaceful coexistence among religions. It can serve as a starting point for further development of a sister- and brotherhood among religions.

The implementation and realization of human rights can benefit from this ethical consensus by religions regarding the core elements of the Global Ethic because this agreement deals partly with elements and spheres of human existence protected by human rights. Therefore, this ethical consensus enhances the building of a "universal culture of human rights,"[41] which depends on the contributions by religions as well. The concept of a "universal culture of human rights" is introduced by several human rights instruments.[42] For example, the "UN Declaration on Human Rights Education and Training"[43] adopted without vote on December 19, 2011, by the UN General Assembly defines as one of the aims of human rights education and training "to empower [...] to contribute to the building and promotion of a universal culture of human rights."[44]

A "culture of human rights" has neither to do with a "globalized culture" which intends to replace other cultures, nor is the idea behind it to create a uniform culture which excludes any form of contextualization. Within a

41 See on the concept of "culture of human rights" the more detailed account in P.G. Kirchschlaeger, "The Concept of an "Universal Culture of Human Rights," in *Proceedings of the 23rd World Congress of Philosophy* (2013).

42 See, for example, the Report of the United Nations High Commissioner for Human Rights on the implementation of the Plan of Action for the United Nations Decade for Human Rights Education (A/51/506/Add.1); revised draft plan of action for the first phase (2005–2007) of the World Programme for Human Rights Education (A/59/525/Rev. 1); the UNESCO/Bilbao Prize for the Promotion of a Culture of Human Rights.

43 The author has contributed as a consultative expert to the development of the UN Declaration on Human Rights Education and Training during the entire preparation process of the Declaration.

44 UN Declaration on Human Rights Education and Training, Article 2/1.

"culture of human rights," the diversity of cultures and traditions continues to be protected by the individual right to cultural life, and the individual right to freedom of religion. "Culture of human rights" means that the structure, actions, and responses of an entire society are informed by and based upon human rights. Article 4 of the UN Declaration on Human Rights Education and Training[45] elaborates the aim: "[...] a universal culture of human rights, in which everyone is aware of their own rights and responsibilities in respect of the rights of others, and promoting the development of the individual as a responsible member of a free, peaceful, pluralist and inclusive society."

A "culture of human rights" depends on contributions from different actors: governments by implementing and respecting human rights, public authorities by orienting their decisions and actions toward the values and principles of human rights, a society by publicly accepting and taking a stand for human rights, individuals by respecting the human rights of the other with the awareness of their own rights,[46] and traditional, cultural, and religious communities by showing their members the commonly shared elements of their own "truth."

If one looks at the reality, a "universal culture of human rights" needs the support, for example, of the Global Ethic as it is not yet as accepted as it should be. Human rights are still a "minority-phenomenon," because the vast majority of human beings are still not enjoying the realization of their human rights. Their universality is still a claim, not reality. The universality of human rights and a "universal culture of human rights" struggle with particular interests, for example, of states that claim the priority of their sovereignty over the universality of human rights; of traditions, cultures, civilizations, religions, and value systems that most of the time are expressed by their institutions or leaders concerned about a possible loss of institutional power and influence and usually do not relate with the core elements of the religious truth shared by the communities; or by the private sector that claims self-regulating approaches and uses this to define its sphere of influence within

45 See P.G. Kirchschlaeger, "Human Rights Education as an Important Instrument for Realizing Human Rights. The Draft UN Declaration on Human Rights Education and Training," *HURIGHTS*, Osaka 96/3 (2011): 12–13.

46 See L. McEvoy and L. Lundy, "Securing a Human Rights Culture through the Protection, Promotion and Fulfilment of Children's Rights in School," in *Judges, Transition and Human Rights*, ed. G. Anthony, K. McEvoy, and J. Morison (Oxford: Oxford University Press, 2007), 495–514.

certain limits. Obviously religions can contribute to a "universal culture of human rights."

Regarding the claim of universality, both the Global Ethic and human rights face similar challenges. A concept with a claim of universality first meets criticism from particular points of view, and second, this criticism looks sometimes quite similar as one will see in the following.[47] In the case of the Global Ethic, it faces the criticism of leveling or minimizing the differences among religions. At this point it should be emphasized that every single religion is actually recognized in its particularity and honored in its uniqueness while pointing out core elements of a shared ethic. The first is not at all diminished by the latter.

Furthermore, Küng clarifies by addressing some misunderstandings of the Global Ethic—that the Global Ethic does not want to create unity but peace among religions by recognizing all the differences and at the same time some common core elements of a shared ethic.

Beyond that, Küng emphasizes that the Global Ethic does not strive to replace, but to support, religions.

Finally he shows that the Global Ethic is not a "western program" but is based on all world religions.[48] This last argument going back to the origins of the Global Ethic and showing that the elements building the Global Ethic coming from world religions serves as a religious justification of the Global Ethic.[49]

Although it is the goal of Küng that the Global Ethic is plausible to non-believing human beings as well,[50] it must be acknowledged that there is a challenge of rational accessibility to the Global Ethic as a concept based on a religious foundation.[51]

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47 In addition, the possibility of global ethics is discussed from different perspectives. See, for example, R. Burger, E.-P. Brezovszky, and P. Pelinka, eds., *Global Ethics. Illusion or Reality?* (Vienna: Czernin Verlag, 2000); M. Frost, *Global Ethics: Anarchy, Freedom and International Relations* (New York: Routledge, 2009).

48 See H. Küng, *Handbuch Weltethos. Eine Vision und ihre Umsetzung* (Munich: Piper, 2012), 28–33.

49 Küng outlines other justification-approaches. See Küng, *Handbuch Weltethos*, 43–97.

50 Küng, *Handbuch Weltethos*, 43–97.

51 "Die Religionen können (. . .) nicht erwarten, dass säkulare Philosophien religiöse Autoritäten akzeptieren, denn philosophisch muss sich jede Autorität ihrerseits bewähren und geniesst nur so lange Anerkennung. Andere zureichende Gründe gibt

Similar to the Global Ethic, human rights, with their claim of universality, are sometimes perceived as a danger for religions. Although the UN Conference in Vienna in 1993 reconfirmed the validity of the universality of human rights, the universality faced critics from different sides also because of its alleged "western origin." In the case of human rights, this criticism was surprising as human rights protect the freedom of the individual to religion and belief[52] and to a cultural life (article 18 and 27 of the Universal Declaration of Human Rights of 1948), and therefore enhance cultural diversity. But human rights are individual rights and represent the perspective of the individual, not of the community: human rights do not protect religions as such but *the freedom* of the individual to share the beliefs, thoughts, and world views of a community, to be part of a community, and to practice their way of life. This difference is criticized as an individualistic bias of human rights, overlooking article 29. The latter positions the individual within its community and underlines the important role of the community for the development of the individual and the responsibilities of the individual within the community. Regarding the universality of human rights, I would underline the fact that religions benefit indirectly from the human right to freedom of religion and belief. This right enables and enhances the authentic practice of an individual and thus the peaceful coexistence of religions and the dialogue between them. It is an achievement of humanity to protect this diversity.[53] As the source of protection of ideas, traditions, and beliefs, human rights can therefore in exchange expect to be respected by religions.[54] They

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es philosophisch für die Begründung ethischer Normen ebenfalls nicht, weil die Philosophie nun mal methodisch keine Grenzen des Fragens kennt," H.-M. Schönherr-Mann, *Globale Normen und individuelles Handeln. Die Idee des Weltethos aus emanzipatorischer Perspektive* (Würzburg: Verlag Königshausen & Neumann, 2010), 110.

52 See on freedom to religion P.G. Kirchschlaeger, "Religionsfreiheit—ein Menschenrecht im Konflikt," *Freiburger Zeitschrift für Philosophie und Theologie* 60 (February 2013): 353–74.

53 "While I do not deny that human rights establish moral boundaries, it needs also to be seen that these rights enable members of religious communities and of other variants of cultural groups to maintain their distinct identity." S. Zurbuchen, "Universal Human Rights and the Claim to Recognition of Cultural Difference," in *Universality: From Theory to Practice. An Intercultural and Interdisciplinary Debate about Facts, Possibilities, Lies and Myths*, ed. B. Sitter-Liver and T. Hiltbrunner (Fribourg: Academic Press Fribourg, 2009), 285.

54 See O. Höffe, "Transzendentaler Tausch. Eine Legitimationsfigur für Menschenrechte?" in Gosepath and Lohmann, eds., *Philosophie der Menschenrechte*, 29–47.

ask religions to contribute toward their implementation—be it in their own society or in other societies. Thus, human rights affect religions. Where human rights affect religions, human rights strengthen those forces within religions that are already committed to upholding human rights. Clearly, the basis for this view is an understanding of religions neither assuming that all religions accept the existence of another religion, nor that every religion is able to coexist with another religion and is prepared to discuss a consensus. At the same time, its foundation is not a static, monolithic image of religions. Rather, it proposes a dynamic understanding of religions including the recognition of the possibility of a diversity of different movements within a religion unified around a shared nucleus. Consequently, liberal, conservative, or traditionalist movements within individual religions may often resemble each other across the boundaries of religions more than their internal co-movements.

The Global Ethic and human rights try to build bridges among religions by proposing a universal vision for humanity, by claiming for universality for them and, at the same time, by celebrating diversity. Each can support the other in this endeavor: human rights protect the Global Ethic as they protect morality. The Global Ethic, as a universal consensus among religions that shares core ethical elements with the moral dimension of human rights, can support the struggle for a "universal culture of human rights."

III. Material Concretization of Abstract Principles

While the Global Ethic is built by core elements of shared ethics by the world religions, human rights can enliven these abstract principles as human rights are protecting essential elements and spheres of human existence that humans need for survival and life as a human.[55] For example, when the Global Ethic includes the principle of humanity, human rights protect through article 1 of the Universal Declaration of Human Rights of 1948[56] the content of this

55 For an insight on a concrete example of a local initiative for the application of the Global Ethic see C. Burmann and S. Grillmeyer, *Was uns zusammenhält. Weltethos vor Ort in Nürnberg, Veröffentlichungen der Akademie Caritas-Pirckheimer-Haus*, Bd. 8 (Würzburg: Echter Verlag, 2013).

56 "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

ethical principle, and even further by the other 29 articles that are actually further concretizing this sphere of human rights protection, such as the right to non-discrimination (article 2), the right to life, liberty, and security of person (article 3).

Human rights provide to the Golden Rule of reciprocity practical content. Not only is it the duty to respect all humans as holders of human rights, but there is also a responsibility for the individual to contribute to the realization of every specific human right. More concretely, the question regarding the bearers of the obligations corresponding to human rights is answered in the moral dimension of human rights, taking into account the reciprocity of human rights. Thus, as an individual, one has come to know the obligations that correspond to the human rights she/he enjoys. These obligations arise, among other things, from one's awareness that one shares her/his human rights with all humankind and that it is therefore her/his duty to do her/his bit to contribute toward the enforcement of human rights for all in order to legitimize her/his own claim to human rights. At this point it must be noted that there is an asymmetry between rights and obligations. The position of an individual as a right-holder—as mentioned in the introduction—does not depend on her/his fulfillment of obligations.[57] In this context one has to look back to the origins of the human rights idea, which aimed to protect the powerless against the powerful.[58] To demand something in return for achieving human rights in the form of conditions or requirements would amount to a contradiction of the fundamental human rights idea, as it would be tantamount to further weakening the already powerless.

The commitment to non-violence of the Global Ethic finds its concretization, for example, in the right to life, liberty, and security of a person (article

57 See W. Wolbert, "Menschenwürde, Menschenrechte und die Theologie," *Salzburger Theologische Zeitschrift* 7 (2003): 161–79. Werner Wolbert emphasizes: "These rights are not forfeited by wrong behavior. Men and women do not have to prove themselves worthy of being granted human rights." See W. Wolbert, "Menschenwürde, Menschenrechte und die Theologie," 176.

58 See H.-J. Sander, *Macht in der Ohnmacht, Eine Theologie der Menschenrechte* (Quaestiones disputatae) (Freiburg: i.B.: Herder, 1999), 178.

3),[59] and in the abolition of torture (article 5).[60] The commitment to justice[61] is elaborated in article 7[62] and in article 10.[63]

The commitment to truthfulness finds its concretization partly in article 10 and article 19,[64] but its ethical meaning goes beyond this application by human rights belonging to a higher ethos which the Global Ethic represents as above-mentioned, while human rights protect a minimal standard.

The commitment to partnership between men and women is concretely filled by human rights, for example, by the right to non-discrimination in article 2,[65] and article 16.[66]

Beyond that, human rights can support the Global Ethic since they are characterized by an essential universal consensus, practical orientation, the ability to be enacted as positive law, and by their legal and institutional mechanism of protection and implementation.

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59 "Everyone has the right to life, liberty, and security of person."

60 "No one shall be subjected to torture or to cruel, inhumane, or degrading treatment or punishment."

61 On the concept of "justice" see P.G. Kirchschlaeger, "Gerechtigkeit und ihre christlich-sozialethische Relevanz," *Zeitschrift für katholische Theologie* 135 (April 2013): 433–56.

62 "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

63 "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

64 "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

65 "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional, or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

66 "(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

IV. Negative or Positive Obligations?

The Global Ethic and human rights face the question of whether they entail positive or negative obligations. While the response from the perspective of the Global Ethic is not easily given because the abstract principles can already be respected by fulfilling a negative duty (this seems to be obviously the case with the Golden Rule of reciprocity, the commitment to non-violence, the commitment to justice, and the commitment to partnership, while there could be doubts regarding the commitment to truthfulness embracing a positive duty as well), human rights in general can be understood as a call to take the perspective of a victim of a human rights violation. For a holder of human rights whose rights are being violated, it does not matter if the duty-bearer has to obey a negative or a positive obligation or how complex it is to clarify who is responsible for enforcing his or her rights.[67] She or he is entitled to having her or his rights defended. Therefore, the criterion for distinguishing between positive and negative obligations is what it is required in a particular situation or context to ensure that human rights are enforced. Human rights (that is, both positive and negative rights) entail both positive and negative obligations, irrespective of whether they are positive or negative human rights or whether they are subjective rights to freedom, political rights to participation, or social participation rights.[68] After all, human rights are an entitlement of human beings irrespective of whether their enforcement in a particular context or in a particular situation entails positive or negative obligations.

This response by human rights has implications for the Global Ethic as well as highlighting aspects of the Global Ethic that would require further attention in future research.

V. Reciprocally Enriching Discourse about Justification of Human Rights

Human rights constitute a historical, political, legal, and moral consensus that seems to enjoy global acceptance. At the same time, the claim for the universality of human rights and the difficulties in implementing these rights

67 On the concept of "responsibility" see P.G. Kirchschlaeger, "Verantwortung aus christlich-sozialethischer Perspektive," *ETHICA* 22 (1/2014): 29–54.

68 See W. Kaelin and J. Kuenzli, *Universeller Menschenrechtsschutz* (Berne: Staempfli Verlag, 2008), 110.

provokes doubts and criticism of the legitimacy of human rights. Finally, in order to remain coherent with their own core concept of the autonomy of the individual, human rights need a moral justification. This is because autonomy embraces the claim of every individual of knowing the reason why one's freedom should be restricted by human rights. These challenges lead to the question of how human rights can be justified.

The relevance of this question grows even further when there are attempts to exclude a specific group from human rights in general or from some rights, when human rights in general are neglected, or when some rights are denied. Facing these realities, reasons justifying human rights are necessary. Firstly, an ethical model of justification of human rights based on the principle of vulnerability could contribute to meet this challenge.

Secondly, the discussion itself with communities about the reasons justifying human rights can also build a bridge to traditions, religions, cultures, civilizations, value systems, and worldviews. The discourse can lead to justification models based on traditions, religions, cultures, civilizations, value systems, and worldviews. Such justifications may be limited in their immediate relevance with regard to the world outside a specific community, since they are based on ideas that are difficult to grasp or follow for those outside the community, or because they lack convincing rationality. Thus, they may fail because they do not comply with the pluralistic addressees and the claim to universality of human rights. At the same time, they have an internal function, since they grant access to human rights and achieve a significant motivational impact.

Furthermore, they can strengthen the validity of human rights within a specific community. Without an additional internal justification of human rights, it might be assumed by some that human rights are something that is purely secular, that is, that they have no relevance for the traditions, religions, cultures, civilizations, value systems, or worldviews in question. This conclusion, however, clearly contradicts the universality of human rights.

Thirdly, the process of bridge building can be understood as "adaptation."[69] An adaptation process makes it possible to attach one's own traditional, cultural, or religious foundations with regard to human rights, and gives access to human rights from the perspective of one's own tradition, religion, culture, civilization, value system, or worldview. As opposed to

69 See P.G. Kirchschlaeger, "Wie können Menschenrechte begründet werden? Ein für religiöse und säkulare Menschenrechtskonzeptionen anschlussfähiger Ansatz," *ReligionsRecht im Dialog* 15 (Münster: LIT-Verlag, 2013), 162–84.

"interpretation," which does not exclude the possibility that content is changed, "adaptation" preserves the identity of human rights but translates them into one's own language. Beyond that, communities identify problems and imbalances in international human rights theory and practice from their perspectives as contributors to the human rights discourse—staying within the scope the framework provided by the concept of human rights and by specific human rights. "Adaptation" is therefore dialogical.

This discourse about the justification of human rights, including the concept of "adaptation," can be enriched by the Global Ethic. As the latter builds a consensus of the world's religions on shared core ethical elements, and because the Global Ethic enjoys a complementary relation with human rights (as elaborated so far), core ethical elements could serve at least as starting points or as pillars of religious justification models of human rights.

G. Conclusion

Because of the outlined commonalities, differences, and complementarities for both the Global Ethic and human rights, not only in the case of the challenge of justifying human rights, the respective other can be a helpful and enriching partner. The Global Ethic can serve for the human rights discourse (with and within religions) as an example of positive and sustainable fruits of boundary-crossing dialogue among religions. It is also something that originates from different religious communities and respects not only the collective but also individuals, and that holds humanity in its diversity together on an ethical level.

All this would not be possible without the protection by human rights guaranteeing the individual the necessary freedoms for this endeavor. The Global Ethic thus benefits from the partnership with human rights. Beyond that, human rights remind the Global Ethic constantly that the core elements of a shared ethic based on a religious foundation needs to maintain its openness and respect for religious non-believers. Together, the Global Ethic and human rights serve universal interests for humanity. And together, both can be enhanced in their contributions to the realization of a better world.

Dignity, Human Rights, and the Vulnerability of the Individual

Jochen von Bernstorff

In the 1940s the young international human rights movement rediscovered the human dignity concept and initiated a development that led to the codification of the dignity term in the Universal Declaration of Human Rights (1948) and the new German Basic Law (1949). In this chapter I will argue that the combination of dignity and rights is a discursive phenomenon of the "age of extremes"[1] that both altered the understanding of human rights and of the dignity term significantly. Far-reaching implications of this new semantic combination was a new understanding of human dignity as something that requires interpersonal respect and needs to be protected by the state as a constitutionally entrenched and internationally recognized rule. Individual enjoyment of the most basic human rights thus, in conceptual terms, becomes a precondition for a life of dignity. This twentieth century understanding of human rights was coined during and after World War II and cannot be fully captured by both the scholastic *Imago Dei* and the Kantian (autonomy-) traditions of the dignity term. In its inception it can be interpreted as a reaction to twentieth century experiences with the vulnerability of the human being. This genealogical understanding of the close relationship between dignity and rights can explain and shed light on the emergence of global ethical standards[2] as a reaction to fundamental experiences of injustice in the twentieth century.

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1 The concept of the "age of extremes" is taken from Eric Hobsbawm, *The Age of Extremes: A History of the World* (New York: Vintage Books, 1996).

2 Hans Küng and the foundation "Weltethos" have developed a pragmatic intercultural and interreligious project to promote global ethical standards that comprise central human rights norms, understood as both entitlements and corresponding duties of individuals and institutions. See Küng, *Handbuch Weltethos. Eine Vision und ihre Umsetzung* (Munich: Piper, 2012). This contribution attempts to shed light on the global rise of the concept of human dignity and human rights and the interrelatedness of the two concepts as an ethical standard.

A. The Rise of the Dignity Concept

1. Universal Declaration of Human Rights and German Basic Law

The years 1948–1949 marked the common beginning of the German protection of fundamental rights and the international protection of those rights, in which precisely the connection between human dignity and human rights played a central role.[3] In the Parliamentary Council in 1948, it was the drafts of the Universal Declaration of Human Rights, which was negotiated simultaneously with the German Basic Law, that inspired the originators of the German Basic Law to anchor a commitment to human dignity at the top of the constitution.[4] As the protocols show, the "Committee Dealing with Basic Issues" of the Parliamentary Council closely followed the proceedings of the UN Commission on Human Rights.[5] The agreement during the negotiations in New York to include references to human dignity in a prominent place of the Universal Declaration of Human Rights also brought about a breakthrough in negotiations regarding Article 1 of the German Basic Law.[6]

The Universal Declaration of Human Rights states at the beginning of the preamble[7]:

> Whereas recognition of the inherent *dignity* and of the equal and *inalienable* rights of *all* members of the human family is the foundation of freedom, *justice* and *peace* in the world, […].

3 This was carved out by Wolfgang Vögele, *Menschenwürde zwischen Recht und Theologie* (Gütersloh: Gütersloher Verlagshaus, 2000), 295ff. and Thilo Rensmann, *Wertordnung und Verfassung. Das Grundgesetz im Kontext grenzüberschreitender Konstitutionalisierung* (Tübingen: Mohr Siebeck Verlag, 2007), 25ff.

4 Rensmann, *Wertordnung und Verfassung*, 25–33.

5 Vögele, *Menschenwürde zwischen Recht und Theologie*, 295ff.; Rensmann, *Wertordnung und Verfassung*.

6 See Hermann von Mangoldt, "I am of the opinion one should not leave out these sentences. One also does not need to leave them out. We find them also in that declaration of human rights, which has been developed by the most comprehensive corporation, (...). But if they can do it, we should actually do it as well." Statement von Mangoldt, 22nd Session of the Basic Committee of the Parliamentary Council (18.11.1948), Bd. 5/11, 586 (author's translation).

7 Emphasis added.

and Article 1 Universal Declaration of Human Rights starts with the following sentence:

> "*All* human beings are born *free* and equal in *dignity* and rights."

Comparing this wording with those at the first two paragraphs of Article 1 German Basic Law, it clearly shows that the simultaneous start of the German protection of fundamental rights and the international protection of human rights by reference to human dignity at the top of the catalogues also was a of a common kind:

> "(1) *Human dignity* shall be inviolable. To respect and protect it shall be the duty of all state authority.
> (2) The German people therefore acknowledge inviolable and *inalienable* human rights as the basis of every community, of *peace* and of *justice* in the world."

But was this really something new? Did the texts not just build on the tradition of the great European civil rights declarations? Undoubtedly, the concept of human dignity stood in a long and intertwined conceptual tradition, which of course was known to the main stakeholders in New York and Bonn. The tradition of the concept of human dignity includes such diverse understandings of dignity as that of the Stoics and Cicero, the medieval status-dignity, the scholastic and late-scholastic Imago Dei doctrines, the renaissance individualism of a Pico della Mirandola right up to Samuel von Pufendorf's natural law conception of humans as "morally free persons."[8] With his understanding of equal dignity, Immanuel Kant further develops Pufendorf's approach. In the course of this he secularizes the conception of dignity as he sees the grounds for dignity solely in the ability of the individual to reason.[9] Additionally, he substantiates the ethical implications of the concept of equal dignity, as he lifts humans due to their dignity into the kingdom of ends. Thus the second version of the categorical imperative states:

> Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.[10]

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8 Tine Stein, *Himmlische Quellen und irdisches Recht* (Frankfurt a.M.: Campus Verlag, 2007), 235ff.

9 Ibid., 249ff.

10 Immanuel Kant, *Grundlegung der Metaphysik der Sitten* (Berlin: L. Heimann, 1785), 61, Immanuel Kant, *Grounding for the Metaphysics of Morals*, 3rd ed., trans. James W. Ellington (Cambridge, Mass.: Hackett Publishing, 1993), 30ff.

As being ends in themselves, men are imponderable. They are of absolute value and as persons have "dignity."[11] What this states for Kant's legal theory is by no means uncontroversial.[12]

Interestingly, in the nineteenth century Kant's dignity conception was hardly acknowledged. In fact, the dignity term plays virtually no role during the revolutionary and restorative battles of that century—it does not belong to the conceptual framework of the great western civil rights declarations. The negotiations leading to the "Paulskirchenverfassung" mention human dignity only en passant.[13] However, what then explains the new connection between the dignity term and human rights[14] that in 1948 leads to the incorporation of the concept in Article 1 Universal Declaration of Human Rights and German Basic Law? In the 1940s, the conceptual link between dignity and rights all of the sudden is ubiquitous[15] and hardly questioned. It seems to be evident to the contemporaries, though it is new in this form.

Philosopher Arndt Pollmann plausibly examined this novelty from a philosophical point of view in a recently published article.[16] According to Pollman, it is the millions of cases of individual suffering caused by the totalitarian excesses of technically upgraded modernity and two world wars that allow the new conceptual linkage to appear so evident for the contemporaries. Ex negativo, that is, out of universally communicated experiences of fundamental injustice,[17] the dignity concept and the idea of universal hu-

11 Stein, *Himmlische Quellen und irdisches Recht*, 251.

12 Jeremy Waldron, "Dignity and Rank: In Memory of Gregory Vlastos (1907–1991)," *European Journal of Sociology* 48 (2007): 211–14, with further references.

13 Negotiations regarding § 139 Paulskirchenverfassung, "A free public even has to respect the dignity of the perpetrator," cited in Juergen Habermas, *Zur Verfassung Europas* (Frankfurt a.M.: Suhrkamp, 2011), 15.

14 Arnd Pollmann, "Menschenwürde nach der Barbarei: zu den Folgen eines gewaltsamen Umbruchs in der Geschichte der Menschenrechte," *Zeitschrift für Menschenrechte* 4 (2010): 32ff.

15 For the emergence of the debate about universal rights of man contemporaneous with the United States and Great Britain entering the war at the end of 1930s, see Jan Herman Burgers, "The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century," *Human Rights Quarterly* 14 (1992): 447ff.

16 Pollmann, "Menschenwürde nach der Barbarei," 32.

17 "Experiences of impoverishment, injustice, and unfreedom." See Johannes Schwartländer, "Staatsbürgerliche und sittlich-institutionelle Menschenrechte. Aspekte zur Begründung und Bestimmung der Menschenrechte," in *Menschenrechte: Aspekte ihrer Begründung und Verwirklichung* (Tübingen: Tübinger Universitätsschriften, 1978), 86; "Experiences of structural injustice" with regard to Schwartländer at Bielefeldt, "Menschenrechtlicher Universalismus ohne eurozen-

man rights are conceptually consolidated.[18] However, it would be shortsighted to trace the new connection only back to the Holocaust. Although the Nazi terror clearly was a central point of reference in New York and the Parliamentary Council in 1948, the connection between human dignity and human rights had become a powerful *topos* already in the late 1930s, at a time when the future extent of the unprecedented Nazi crimes against humanity was not yet foreseeable.[19]

The collective memory of the contemporaries was already in the thirties affected by global experiences with state and military violence, discrimination, humiliation, and social exclusion, which were directed against the "others," that is foreigners and minorities as well as against disobedient citizens. From a long series of shocking incidents one might, for instance, think of the genocidal deportations of the Armenians in the Ottoman Empire, the massacre of civilians during World War I, Stalin's political and ethnic "cleansing policy," or the Japanese mass executions in the war against China. But also systemic violence and injustice soaked into the general consciousness through experiences like the occasionally excessive tyranny of European colonialists, impoverishment and famine in Asia and Africa, millions of starvation deaths during the *Holomodor* in Ukraine at the beginning of the 1930s, the racist "lynchings" in the United States, or the systematic racial discrimination in South Africa. In the first years of the war, but no later than the opening of the concentration camps, the call for respect and protection of human rights and human dignity seemed to many contemporaries to be

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trische Verkürzung," in *Gelten Menschenrechte universal?* ed. Günter Nooke, Georg Lohmann, et al. (Freiburg: Verlag Herder, 2008), 98, 126; "elementary experiences of injustice," in Markus Kotzur, "Theorieelemente des internationalen Menschenrechtsschutzes: Das Beispiel der Präambel des Internationalen Paktes über bürgerliche und politische Rechte," doctoral dissertation, 2001, 330; "Universalism out of common experience" in H. Hofmann, "Geschichtlicher Universalitätsanspruch des Rechtsstaats," *Der Staat* 34 (1995): 1, 27; interpreted as a specific European access, Klaus Günther, "The Legacies of Injustice and Fear: A European Approach to Human Rights and Their Effects on Political Culture, in *The EU and Human Rights*, ed. P. Alston (Oxford: Oxford University Press, 1999), 117ff. (author's translation).

18 Pollmann, "Menschenwürde nach der Barbarei," 32ff.

19 For the emergence of the debate contemporaneous with the United States and Great Britain entering the war at the in 1941 and 1939, respectively, see Burgers, "The Road to San Francisco," 447ff.

the evident answer to such fundamental experiences of injustice.[20] As it says in the preamble to the Universal Declaration of Human Rights:

> Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind […].

B. Explanation Discourses as Ex-Post Validation

The theoretical foundation of human dignity itself and its connection with the postulated human rights appeared to play only a minor role in the 1930 and 1940s. Depending on the intellectual character, authors at this time look at their own tradition, seemingly as an ex-post validation, for precursors of the now ubiquitous concept of human dignity; for example, as powerful catholic intellectuals like Jacques Maritain did with Thomas Aquinas. With his personalistic concepts, he sought to find a third way between fascism and radical market liberalism and confessed to a neo-scholastic natural law.[21] With the dignity term Maritain stressed the relationship between individual freedom and community-embedment of the individual. Through the renaissance of the Catholic natural law, this personalistic stream inspired the understanding of Article 1 German Basic Law of influential German post-war scholars such as Günter Dürig, Josef Wintrich, as well as the Protestant

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20 Hans Joas, *Die Sakralität der Person* (Frakfurt a.M.: Suhrkampf, 2011), 108–115; Morsink shows for the negotiation process of the Universal Declaration of Human Rights several global injustices, which had a shaping impact on the text, among them World War II and the Holocaust (including rights to bodily integrity, legal ability, asylum), the colonial experience, and ethnic and racial discrimination (prohibition of discrimination), impoverishment experiences (social human rights to an adequate standard of living, housing, food, education), and the oppression of women (equality rights), Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

21 Jaques Maritain, *Les Droits de L'Homme et la Loi Naturelle* (1942), 19; with regard to Maritain see Samuel Moyn, "Personalismus, Gemeinschaft und die Ursprünge der Menschenrechte," in *Moralpolitik: Geschichte der Menschenrechte im 20. Jahrhundert*, ed. Stefan-Ludwig Hoffmann (Göttingen: Wallstein, 2010), 63ff.; with regard to Maritain, Broch and their time in Princeton see Wolfgang Vitzthum, "L'homme ne doit pas faire de l'homme un esclave!: Les droits de l'homme dans les débats des intellectuels européens émigrés aux Etats-Unis," in *Der Staat im Recht: Festschrift für Eckart Klein zum 70. Geburtstag*, ed. Marten Breuer et al. (Berlin: Duncker & Humblot, 2013), 1345ff.

Gerhard Leibholz.[22] Also, it was the politically agile Maritain, who, as a close friend of the pope, aligned the Vatican to the human dignity concept during the world war.[23] Other authors were seeking explanations for the connection of dignity with human rights in Confucius, the Koran, or in Buddhism.[24] Interestingly, during the war Kant does not play a dominant role in the debate around dignity and rights.[25] This genealogical sketch of the linkage between human rights and human dignity resonates with the recent endorsement of these concepts by the "Global Ethic" (*Weltethos*) project, which explicitly insists on the pluralistic religious and cultural foundations of the aspired to global ethical standards.[26]

In this context it is important to note that neither in Bonn nor in New York was there agreement on a specific and exclusive intellectual tradition.[27] Both documents lack an explanation for the prominent position of human dignity. Human dignity is neither derived from religion nor from law of reason or nature. Carlo Schmid criticized the blank reference to natural law as being too vague in the Parliamentary Council. He drew the attention in the "Committee Dealing with Basic Issues" to the fact that National Socialist legal theory had also been based on natural law, namely on a natural law variation

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22 Dürig stresses that "consciously or unconsciously the Christian concept of personality was absorbed into the German Basic Law," "Die Menschenauffassung des Grundgesetzes," in Günther Dürig, *Gesammelte Schriften 1952–1983*, ed. Schmitt Glaeser und Peter Häberle (Berlin: Duncker & Humblot, 1984), 31 (author's translation); he also emphasizes at this place, that the notion of man of the German Basic Law is not one of an isolated individual, but of a community-bound person (p. 32). For the proximity of constitutional scholars towards personalism à la Maritain, who was absorbed by Catholic doctrine of natural law, see Moyn, "Personalismus, Gemeinschaft und die Ursprünge der Menschenrechte," 88–89; Edward M. Andries, "On the German Constitution's Fiftieth Anniversary: Jaques Maritain and the 1949 Basic Law," *Emory International Law Review* 13 (1999): 53; Frieder Günther, *Denken vom Staat her: Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration 1949–1970* (Berlin: Oldenbourg Wissenschaftsverlag, 2004), 192.

23 Moyn, "Personalismus, Gemeinschaft und die Ursprünge der Menschenrechte," 70–74.

24 See the diverse contributions represented by different world cultures at a UNESCO symposium in 1947; Maritain, "Um die Erklärung der Menschenrechte—Ein Symposium," 1951.

25 Moyn, "Personalismus, Gemeinschaft und die Ursprünge der Menschenrechte," 89–91.

26 Küng, *Handbuch Weltethos*, 26–27.

27 Morsink, *The Universal Declaration of Human Rights*, 282–95; Rensmann, *Wertordnung und Verfassung*, 29–30.

of Social-Darwinism.[28] Instead, in Bonn and in New York the fundamental experiences of injustice by the contemporaries from the first half of the twentieth century serve as an unwritten justification for the inviolable dignity in 1948.[29] The reason for human dignity and universal human rights is the abysses of the "age of extremes."

In his impressive book on the genealogy of the human rights discourse, Hans Joas, with recourse to Emile Durkheim, has spoken of a global awareness of the "sacredness of the person." Accordingly, this "sanctification of the individual"—as Durkheim puts it and to whom Joas refers—became at the end of the nineteenth century the civil "religion" of modern society.[30] With the reference to Durkheim, Joas is in line with the younger historical thesis by Lynn Hunt that sees the birth of human rights in the new awareness of the European public for the suffered harm of the other in the eighteenth and nineteenth centuries.[31] Joas's and Hunt's observations are illuminating, especially where they call into question that there is a simple connection from the European Enlightenment to the idea of universal human rights in the second half of the twentieth century.[32] The human rights movement of the twentieth century is not simply a resumption of a temporarily forgotten portfolio of enlightened traditions. Indeed, our contemporaries could not rely on tradition—be it Christianity or European Enlightenment—alone during the 1940s. The dark side of European modernity overshadowed the brighter side of the Enlightenment and it was during this time that Theodor Adorno and Max Horkheimer wrote on the dialectic of Enlightenment while in exile in the United States.

It seems, however, that Joas and Hunt are missing a crucial point of the human rights movement of the 1940s, since this movement demonstrates a veritable historic caesura through its insistence on a global juridification project. The global movement for a universal catalogue of rights, which was formed in the late 1930s, aimed at a positive codification of the absolute limits of what states and governments "can do" to people through the con-

28 Vierte Sitzung des Grundsatzausschusses (23.9.1948), Akten und Protokolle, Bd. 5/1, 642ff.
29 Cf Pollmann, "Menschenwürde nach der Barbarei," 32.
30 Joas, *Die Sakralität der Person*, 81–98.
31 Ibid., 99–101; Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton, 2007), 102ff.
32 Joas, *Die Sakralität der Person*, 102ff.; Hunt, *Inventing Human Rights*, 176ff.

nection of human dignity with human rights.[33] The movement received its dynamism from the universally communicable experiences of the vulnerability of the individual by the technologically advanced modernity. So it is not only a civil-religious confession, but also a new secular departure driven by the courage of being horrified—a departure with the purpose to lead the unleashed forces of modernity back behind absolute legal limits. Hence there was great disappointment that the Universal Declaration at the United Nations was—under the pressure from the victorious powers of World War II—initially only negotiated and adopted as a non-binding declaration. A binding human rights convention, as demanded by civil society movements, was postponed and the ambitious juridification project initially failed at a universal level.[34]

C. The Importance of the New Connection Between Human Dignity and Human Rights for the Claim to Absoluteness of the Human Dignity Guarantee

In Bonn the Parliamentary Council went significantly further than the UN General Assembly by not just explicitly declaring the dignity of man as "inviolable," but by also stipulating in Article 1(3) of the German Basic Law fundamental rights as directly applicable law, binding all three branches of government. The connection of the absolute protection of human dignity and legally secured individual rights, however, makes it not simply a German *Sonderweg* but a consistent national implementation of a new universal project, which only occurs in this period. Not coincidentally, two branches of explanation played a major role in the Parliamentary Council for the decision to incorporate Article 1 of the German Basic Law:

First, the assumption that the respect for dignity should be a constitutive element of the new order—that is, that state and social power should be limited by this from the outset. This explains the term "inviolability," which the Center Party politician and former minister of justice of Württemberg

33 Pollmann, "Menschenwürde nach der Barbarei," 32, 43.

34 Jochen von Bernstorff, "The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law," *European Journal of International Law* 19 (2008): 903ff.

Joseph Beyerle introduced to the negotiations at Herrenchiemsee.[35] The reference to "inviolable" and "inalienable" human rights in Article 1(2) of the German Basic Law, which the German people "profess," also belongs in this context. Human rights are the universal legal institutions that are recognized as requirements for a decent existence.

The second element is the concept of legally binding and specific fundamental rights, whose recognition should be judicially controlled by a strong constitutional court. In short, the vulnerability of dignity requires absolutely protected claims to respect, which—according to a formulation by Jürgen Habermas—are converted into the "robust shape" of legally guaranteed fundamental rights;[36] and this is not because we are all Catholics, Personalists, or Kantians, but because we as the people "profess" through the constitution the "inviolability" of dignity and "inviolable" and "inalienable" human rights. It is the juridification of a "promise"—to pick up a term used by Hasso Hofmann in this context.[37] It is a new legal commitment to mutual respect for the other in an order that defines itself through ultimate limits for state and social powers of disposal over the individual. This commitment is submitted and standardized by the constituent power of the people.

D. The Vulnerability of Human Beings

Historically, this project is explained by the universal experience of the fragility of dignity.[38] One should therefore understand "inviolable" dignity as the potential of every human being to live a life of self-respect and respect for the other.[39] We have this potential by being humans. Particularly inten-

35 For proof regarding Herrenchiemsee, see Franz Josef Wetz, *Illusion Menschenwürde: Aufstieg und Fall eines Grundwerts* (Stuttgart: Klett-Cotta, 2005), 80ff.

36 Habermas, *Zur Verfassung Europas*, 22.

37 Hasso Hofmann, "Die versprochene Menschenwürde," *Anstalt des öffentlichen Rechts* 118 (1993): 353, 369.

38 Pollmann, "Menschenwürde nach der Barbarei," 32; for a social-psychological perspective deriving from the concept of trauma see Joas, *Die Sakralität der Person*, 108–132.

39 For the understanding of dignity as the ability to develop personality, which plays a central role in the debate in the bioethical field, Robert Spaemann, *Das Natürliche und das Vernünftige* (Munich: Piper, 1987), 93–95; Wetz, *Illusion Menschenwürde*, 233ff.; Pollmann, "Menschenwürde nach der Barbarei," 32, 39; Martin Nettesheim, "Die Menschenwürde zwischen transzendentaler Überhöhung und bloßem Abwägungstopos," *Anstalt des öffentlichen Rechts* 130 (2005): 93–96.

sive interventions in individual spheres of freedom, however, can make it impossible for us to live such a decent life. Examples are profound impairments of physical or psychological integrity, but also communicative and social exclusion practices. Thus, the imperative of "do not violate" prohibits an order that in its actual impact on the individual disregards this potential. Post-war German scholarship and the early German Federal Constitutional Court—somewhat overambitiously—attempted to derive a comprehensive "objective order of values"[40] and a comprehensive "system of values"[41] from the dignity term. As it has been frequently noted, seeing through this approach would amount to an overstretching of state obligations to protect and ensure dignity and—with a strong constitutional jurisdiction—ultimately would result in a gradual disempowerment of the legislator.

Nevertheless, the imperative of "do not violate" is the codified step toward an order that through fundamental rights constitutes boundaries for certain areas of life, whose transgression renders a life of both self-respect and respect for others impossible. That order thus makes the actual definition of these boundaries a societal task for the future. In this understanding, fundamental and human rights are institutionalized requirements for a decent life.[42] The necessity to insist on such boundaries is by no means limited to totalitarian state excesses.[43] In modern societies, systemic threats and exclusion practices can also be caused by unregulated levels of freedom in certain social subsystems such as the economic system, violent religious fanaticism, or even science.[44] As the U.S. "torture memos" and their imple-

40 *Bundesverfassungsgericht* 7, 198 [Lüth] (author's translation).

41 Dürig, *Der Grundrechtssatz von der Menschenwürde. Entwurf eines praktikablen Wertsystems der Grundrechte* aus Art. 1 Abs. 1 i.V.m. Art 19 Abs. II des Grundgesetzes, in *Gesammelte Schriften*, 127 (author's translation).

42 Pollmann, "Menschenwürde nach der Barbarei," 32, 39.

43 But see Matthias Herdegen, who holds the absolute understanding only to be relevant for totalitarian excesses, Herdegen, "Kommentar zu Artikel1 Abs. 1 Grundgesetz," in Theodor Maunz and Günter Dürig, *Grundgesetz: Kommentar*, Art. 1 GG, 2013, para. 47.

44 See Gunther Teubner, "Die anonyme Matrix. Zu Menschenrechtsverletzungen durch 'private' transnationale Akteure," in *Rechtsphilosophie im 21. Jahrhundert*, ed. Winfried Brugger, Ulfrid Neumann, and Stephan Kirste (Frankfurt a.M.: Suhrkamp, 2008), 440ff.; examples of such "negative externalities" of self-contained social subsystems are in the words of Teubner "killing by chain of command, sweatshops as a consequence of anonymous market forces, martyrs as a result of religious communication, political or military torture as an identity destruction," especially p. 452 (author's translation).

mentation after the September 11 attacks show, even in established democracies, an excessive use of force by public officials against individuals is not utterly out of the question. This points to the importance of insisting on absolute limits prescribed by the human dignity concept. For what it's worth, this is primarily a concern of the legislator and only secondarily of the German Federal Constitutional Court with its controlling function.

E. Consequences of an Alterity-Centered Concept of Human Dignity

In summary, the understanding of human dignity proposed here can be referred to as *alterity-centered*. It is alterity-centered insofar as it is based on Dürig's emphasis of the embeddedness of the human dignity concept in interpersonal basic experiences.[45] In accordance with Emmanuel Lévinas, this understanding of dignity and rights foregrounds the responsibility for the other. As an ethical postulate, human dignity arises out of the mutual (not-reciprocal) recognition of the irreducible uniqueness and vulnerability of the other, his "defenceless nakedness," and his "exposure" to death.[46] Following Lévinas, out of this presocietal event of sociality arises a responsibility for the other, which underlies human rights: "*The human right, absolute and original*, only stands to reason within the particular other, as a right of the other."[47] The alterity-centered understanding of human dignity shows a certain proximity to other dignity conceptions focusing on the vulnerability of the individual.[48] However, neither the above-outlined Kantian nor the Christian *Imago Dei* conceptions of dignity sufficiently capture this perspective.

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45 Dürig stresses the "self-through-reference" in his paradigmatic commentary of Art. 1(1) German Basic Law, in Maunz and Dürig, *Grundgesetz*: *Kommentar*, previous edition, Art. 1 I para. 2 (author's translation).

46 Emmanuel Lévinas, *Verletzlichkeit und Frieden. Schriften über Politik und das Politische*, ed. Pascal Delhom und Alfred Hirsch (Zürich: Diaphanes, 2007), 119.

47 Ibid., 120.

48 See evidence at Wetz, *Illusion Menschenwürde*, Spaemann, *Das Natürliche und das Vernünftige*, and Pollmann, "Menschenwürde nach der Barbarei"; also see Matthias Herdegen's reference on "anthropological basic assumptions" in "Thomas Aquinas: Matthias Herdegen," in Maunz and Dürig, eds., *Grundgesetz*: *Kommentar*, Art. 1 para. 19; with regard to the problems of final justification due to theories of anthropological need see Eibe H. Riedel, *Theorie der Menschenrechtsstandards* (Berlin: Duncker & Humblot, 1986), 183ff.

Among the natural law authors, only Pufendorf highlights the fragility (*imbecillitas*) of man in particular.[49]

Overall, the understanding of human dignity proposed here expands common autonomy conceptions of human rights. Focussing on the vulnerability of the individual thereby gains plausibility not only through the genealogy of human rights discourse in the twentieth century, but also allows a better understanding of the dignity relevance of questions regarding needy individuals, such as dementia patients or people with intellectual disabilities, without hereby denying these groups their capacity for autonomy. However, the concept of dignity is not completely absorbed in conceptions of autonomy, as current discursive uses of the term show.[50]

The understanding of the concept of human dignity proposed here can insofar not be accommodated by the hitherto represented jurisprudential theories of dignity. The recourse on the presocietal experience of the encounter with the vulnerable other differs from the "Dowry-theories"[51]—somewhat simplified—as the inherent ability of men to reason or their being images of god is at least not central to this theory. On the other hand, this understanding is also distinguished from the so called "Achievement-theories," of human dignity [52] since a life in dignity is in fact understood as a result of processes of self-respect and respect for the other, but the focus, however, is not on individual achievement but on the social preconditions for a decent life (respect and responsibility for the other). In this respect, the proposed understanding shows a certain resemblance to the so-called "communication-theories" of human rights, as developed by Hofmann, which by the term "solidarity recognition" refer to an interpersonal dimension of hu-

49 Samuelis Pufendorf, *De iure naturae et gentium* (1744); De officio hominis et civis secundum legem naturalem, 1753; cited in Wetz, *Illusion Menschenwürde*, 218f.

50 Art. 3(a) Convention on the Rights of Persons with Disabilities also mentions dignity as a fundamental principle of the convention on equal footing with the principle of autonomy: "Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons."

51 Ottmann, "Die Würde des Menschen, " in *Rationalität und Prärationalität. Festschrift für Alfred Schöpf*, ed. Jan Beaufort and Peter Prechtl (Würzburg: Königshausen und Neumann, 1998), 16; Hofmann, "Die versprochene Menschenwürde," 353; Dreier in *Grundgesetz Kommentar*, ed. H. Dreier, 2004, para. 55.

52 Luhmann, "Grundrechte als Institution," 1965, S. 68 ff.; Dreier, *Grundgesetz Kommentar*, para. 56.

man dignity.[53] However, this approach lacks emphasis on the aspect of vulnerability of the other man as an ethical basic experience, and hence the universal applicability of the concept of human dignity.[54]

The proposed understanding of the rise and meaning of the dignity notion, which resonates with Lévinas's concept of the vulnerability of the other is, however, not able to serve as a thick foundation of universal human rights. In its historical and phenomenological approach, this (re)-discription of the linkage between human dignity and rights is not aimed at providing a "foundation" at all. Instead, it interprets the emergence of this conceptual link as a politico-legal project of the 1940s reacting to the dark side of European modernity and contents itself with pointing to the universal experiences of human vulnerability out of which an ethic of responsibility vis-à-vis the other can arise.

53 Hofmann, "Die versprochene Menschenwürde," 353; with approval and further development, Günter Frankenberg, "Die Würde des Klons und die Krise des Rechts," in *Kritische Justiz* (2000): 325, 328ff.

54 This would also be an anchor for a presocial or universalist understanding of human dignity and human rights, which cannot readily be justified with Hofmann's approach since the latter is insofar to narrow as dignity is just "promised."

Religions, Religious Conflicts, and the Dynamics of Global Law

Markus Kotzur

A. Summary

Modern public international law is, in general, perceived as a secular legal system having the very purpose of shaping, regardless of its fragmentations, a secular global order. However, religion and religious conflicts still challenge that order and give rise of manifold contestations. After briefly dealing with the terms/concepts "religion," "global law," and "conflict," the chapter turns to identify different forms of religious conflicts and their relevance for the decision-making processes among transnational actors (either private or public). Religious freedom and, corrspondingly, religious tolerance, are the obvious but difficult to be reached answers to religious tensions in a (culturally) fragmented world. Therefore, the chapter goes on to introduce relevant legal texts stemming from international and regional treaty law. The so described "textbook" provides the material for the following discussion on how to universalize guarantees of religious freedom and how to universally advance religious tolerance. Universality itself is seen as a process reacting to universal human needs rather than a pre-exsistent Platonic ideal. Consequently, universality has to be realized in a discursive way—reacting to real world experiences and, most importantly, needs. Core principles of a global ethos (such as freedom from want, freedom from fear, concerns of humanity) function as the guiding directives of this global dialogue.

B. Introduction

Modern public international law is, in general, perceived as a secular legal system. This is at least true since 1648, when the Peace of Westphalia was concluded, the Thirty Years' War finally came to an end, and the pope, the leader of the Roman Catholic Church, definitively lost his influence as a

secular power.[1] Consequently, public international law was more and more conceived as an instrument normatively shaping a secular global order,[2] which is to say an order of reason (the Age of Enlightenment's great "discovery"), an order of balancing interests (not necessarily balancing powers), and an order aimed at distinct policy orientation.[3] However, the current "Return of the Sacred"[4]—used as a synonym for manifold so called "post-secular" trends on the national, regional, and international planes—sheds new light on the fact that religion has never been "completely exiled from international law."[5] If not the religious moment as such, at least the awareness of religious influences continues to play a significant role in the evolution of a transnational legal scheme and the manifold *processes of contestation*[6] upon which it is being built. History can be invoked as a reliable witness. Up until the sixteenth century, the pre-modern paradigm of a *res*

1 See J. Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), 5.

2 M.A. Baderin, "Religion and International Law: Friend or Foes," *European Human Rights Law Review* (2009): 637; J.D. Haskell, "Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial," *Emory International Law Review* (2011): 269, 271; for a broader context see A. Giddens, *The Consequences of Modernity* (Stanford, Calif.: Stanford University Press, 1990); A.-M. Slaughter, *New World Order* (Princeton, N.J.: Princeton University Press, 2004); Ch. Taylor, *A Secular Age* (Cambridge, Mass.: Harvard University Press, 2007).

3 See M. Koskenniemi, "Occupied Zone—A Zone of Reasonableness," *Israel Law Review* 41 (2008): 25. "International Law in International relations Theory" is dealt with by J. Klabbers, *International Law* 14; Klabbers again refers to M. Byres, "International Law," in *The Oxford Handbook of International Relations*, ed. C. Reus-Smit and D. Snidal (Oxford: Oxford University Press, 2008), 612.

4 D. Bell, "The Return of the Sacred? The Argument on the Future of Religion," *British Journal of Sociology* 28 (1977): 419; H. De Vries, *Philosophy and the Turn to Religion* (Baltimore: Johns Hopkins University Press, 1999), 1; P.L. Berger, "The Desecularization of the World: A Global Overview," in *The Desecularization of the World: Resurgent Religion and World Politics*, ed. P.L. Berger (Grand Rapids, Mich.: William B. Eerdmans Publishing Company, 1999), 2.

5 See Baderin, "Religion and International Law: Friend or Foes," 637; D. Smock, *Religion in World Affairs: Its Role in Conflict and Peace*, Special Report, United States Institute of Peace, February 1, 2008.

6 A. Wiener, *The Invisible Constitution of Politics. Contested Norms and International Encounters* (Cambridge: Cambridge University Press, 2008); A. Wiener, *A Theory of Contestation* (Heidelberg, Berlin: Springer, 2014).

publica Christiana[7] with its *veritas una* (one truth) had determined the mutual relations of political entities and political powers according to a universal notion of Catholicism under the guidance of the Roman Catholic Church. This, however, was fundamentally challenged by the Protestant reformation and subsequent religious wars.[8] Regardless of whether or not the aforementioned Peace of Westphalia can be qualified as *the* beginning of modern statehood and, in parallel, modern public international law,[9] it clearly organized a "ground of coexistence for Christians of different confessional persuasions."[10] If one replaces the term "ground" by "institution," the *sovereign territorial state* enters the stage of public international law and becomes its leading actor until today (see Article 2 Number 1 of the UN Charter). As Martti Koskenniemi put it in a 2008 article, "Sovereignty did not arise as a philosophical invention but out of Europe's exhaustion from religious conflict."[11] The most important paradigm of public international law, "sovereignty" (see Article 2 Number 1 of the UN Charter) undoubtedly is influenced by a *religious* heritage.

The origin of modern, that is to say post-1648 public international law, thus can be described following different religion-related narratives. The seemingly most obvious is the (negative) narrative of conflicts and clashes,

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7 Spanish scholastics such as F. de Vitoria and F. Suarez are eminent representatives of this concept; see H.A. Winkler, *Geschichte des Westens: Von den Anfängen in der Antike bis zum 20. Jahrhundert*, 2nd ed. (Munich: C.H. Beck, 2010), 131; M. Kotzur, *Theorieelemente des internationalen Menschenrechtsschutzes* (Berlin: Duncker & Humblot, 2001), 147.

8 H.J. Berman, *Law and Revolution*, vol. II: *The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 2003), 61ff. Volume I of Berman's work, published in 1983, deals with the "Formation of Western Legal Tradition" in general.

9 For a classic see F. v. Liszt, *Völkerrecht*, 12th ed., revised by M. Fleischmann (Berlin: Springer, 1925), 21. Public international law scholarship very often speaks of a "Westphalian system of international law" and emphasizes: "Westphalia evolved a new image of coordinated states within its territorial sphere." See R.A. Falk, "The Interplay of Westphalia and Charter Conceptions of International Legal Order," in *The Future of the International Legal Order*, vol. I: *Trends and Patterns*, ed. R.A. Falk and C.E. Black (Princeton, N.J.: Princeton University Press, 1969), 43; a critical perspective is taken by D. Kennedy, "A New Stream of International Law Scholarship," *Wisconsin International Law Journal* 7 (1988): 1, 12–28.

10 Taylor, *A Secular Age*, 32.

11 See Koskenniemi, "Occupied Zone—A Zone of Reasonableness," 33.

of contentions and contestations.[12] One has to be aware, however, that this narrative is not necessarily driven by religious commands as such but rather by the reading of those who are in power and (mis-)use religion (divine revelations and transcendental legitimacy "by the grace of God") as a simple power tool. Another narrative, the progressive secular one, tells the story of overcoming religious determination in order to clear the way for an *enlightened modernity*—the Age of Reason—of which public international law forms a part. It thus is a law under the "rule of reason" not the "rule of God." A third narrative aims at a *new arrangement* of religious identity and political community.[13] According to this "narrative of tolerance," religious pluralism (and thus the notion of religion itself)—at the beginning only referring to different Christian confessions, and later also to different religions—is held to be constitutive for the international legal system. After 1945, such a notion also became a guiding theme of the United Nations—enshrined already in its Charter's Preamble: "to practice tolerance and live together in peace with one another as good neighbours." When Israeli president Shimon Peres and Palestinian leader Mahmoud Abbas called for peace on June 8, 2014, invited by Pope Francis to an unprecedented common prayer in the Vatican, they filled the Preamble's *leitmotiv* with some life of its own. Religion indeed has never been "completely exiled" from public international law, international affairs, and international politics.

C. *More than Preliminary Questions: Religions, Religious Conflicts, and Global Law*

A legal definition of what constitutes a religion has to take into account the relevance of the social and the cultural contexts. Religion depends on how "the religious" (the "believers") conceive it: whether in a "protectionist impulse to claim religious monopoly over national and civilizational territories" or as the "particular [...] response to universal needs of global human-

12 Most prominent as well as controversially discussed is S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Simon and Schuster, 1996); see also Wiener, *A Theory of Contestation*.

13 H. Goerlich, *Zur zugewandten Säkularität. Beiträge auf dem Weg dahin* (Berlin: Duncker & Humblot, 2014).

ity."[14] In the latter sense, aiming at universalism and cosmopolitanism, religion and a needs based human rights theory (right to life, to water, to food, to liberty, to security, and so on) might go hand in hand. In the first, the more protectionist sense, human rights might amount to an infringement of religious particularities (gender equality and LGBT rights being the most significant but not the only example). Notwithstanding these all too well known tensions, religion in the broader sense can be seen as a set of beliefs—beliefs that are embedded in and shaped by society, culture, and other extra-legal factors. When trying to define the term religion in the German constitution, the Federal Constitutional Court was very well aware of this dimension beyond the law. The judges tried to describe religion in a way that was sensitive to the "larger context" it is socially and culturally embedded in: "[...] religion and belief determine the goals of the human being, touch the human being in his or her core, and explain in an all-encompassing way the meaning of the world and of human life."[15] If there is a reference to transcendence, the court speaks of a religion, if there is no such reference, the court speaks of *Weltanschauung*—philosophical beliefs. Both religious and philosophical beliefs have one thing in common: the human being appears to be integrated in a larger context regarding her or his existence as such: the origin, the end, and the very sense of human life.[16]

Beyond belief, religion also encompasses faith. Of further importance is the *self-understanding*, respectively *self-conception*, of the human beings concerned. The believer her- or himself takes part in the development of what a religion is.[17] Next to the individual one has also to consider the *institutional dimension* of organized religions, various religious communities, and traditional churches. Given this background, why then do religions give rise to so many individual as well as collective and institutional conflicts? As David Smock holds: "Throughout the world, no major religion is exempt from complicity in violent conflicts."[18] Beliefs and even more so faith are about the one and only truth. They create inclusion and exclusion.

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14 J. Casanova, "Public Religions Revisited," in *Religion: Beyond the Concept*, ed. H. de Vries et al. (New York: Fordham University Press, 2008), 101.

15 BVerfGE [Decisions of the Federal Constitutional Court of Germany], 105, 279 (293); BVerwGE [Decisions of the Federal Administrative Court of Germany], 90, 112 (115); translation provided by G. Robbers, *Religion and Law in Germany* (Alphen aan den Rijn: Wolters Kluwer, 2010), 98.

16 Ibid.

17 Ibid.

18 Smock, *Religion in World Affairs*.

They shape a very specific matrix of belongingness. Using an often cited phrase, "religion is something that one believes or does not believe, something whose propositions are true or are not true, something whose locus is in the realm of the intelligible, is up for inspection by the speculative mind."[19]

D. Identifying Religious Conflicts

Since religion, as just described, "is formative not only for individual lifestyles but also for social structures and collective identities," freedom of religion, in its individual as well as in its corporative dimension, "has turned out to be the legal instrument for dealing with social conflicts in religiously and culturally diverse societies."[20] Consequently, public international law has taken a close look at religious freedom and tried to "universalize" the relevant guarantees. Whether a strict *laïcité*—a "wall of separation" between the state and religious communities—or rather a more cooperative model (as introduced by Article 140 of the German Basic Law and the incorporated articles of the Weimar Constitution)[21] might be more suitable for this "universalization," is indeed as debatable[22] as the overall question of which "formation of the secular" might be the most adequate one.[23]

19 W. Cantwell Smith, *The Meaning and End of Religion: A New Approach to the Religious Traditions of Mankind* (New York: Macmillan, 1963), 40.

20 Ch. Walter, "Religionsfreiheit in säkularen im Vergleich zu nicht-säkularen Staaten: Bausteine für ein integratives internationales Religionsrecht," in *Pluralistische Gesellschaften und internationales Recht. Berichte der Deutschen Gesellschaft für Völkerrecht*, vol. 43, ed. G. Nolte, H. Keller, A. v. Bogdandy, H.-P. Mansel, A. Büchler, and Ch. Walter (Heidelberg: C.F. Müller, 2008), 253, 291 (English summary, thesis 1).

21 H. Hofmann, in *Grundgesetz*, 12th ed., ed. B. Schmidt-Bleibtreu, F. Klein, H. Hofmann, and A. Hopfauf (Cologne: Carl Heymanns Verlag, 2011), Art. 140 para 1ff. with further reference to the German literature.

22 See T.J. Gunn, "Religious Freedom and Laïcité: A Comparison of the United States and France," *BYU Law Review* (2004): 419.

23 T. Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, Calif.: Stanford University Press, 2003).

Whatever model is chosen, religious conflicts will not disappear—neither from the national nor the international plane.[24] The term "religious conflict" is, however, ambiguous in itself. It might refer to conflicts between different religions or religious communities; to conflicts between different confessions within one religion—for example, Roman Catholics versus Protestants; to intrinsic conflicts within one religion or confession—for example, liberal versus conservative, orthodox versus reform-oriented protagonists. These types of religious conflicts might address religious dogmas, traditions, practices, and the like—all in all: *the religious claims to truth*. Equally often, however, religion is only a motive behind social, societal, and political conflicts: *religious truth* is (mis-)used to establish *claims to power*. On the national plane, arguments about the influence of a religion on the policies of the state can give rise to intense social upheavals if not civil wars. On the global plane, religious wars from the past to the present give striking examples for rather mundane power struggles in the name of God.[25] Beyond doubt, religious convictions can be seen as one of the driving forces behind the 9/11 attacks. The religious tensions between the Jewish majority and the Arab minority are directly related to the Middle East conflict. Muslim extremists launch violent attacks in Iraq, Afghanistan, or Pakistan. Some of Iran's radical leaders deny Israel's right of existence. Christians fought against Muslims in the Balkan wars after the disintegration of the former Yugoslavia. The "Arab Spring" was religiously influenced, too.[26] A group of Buddhist monks demands an exclusively Buddhist identity for Sri Lanka. The so-called "war on terrorism" has an obvious religious underpinning.[27]

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24 All the more so, when and where religions—rightfully—demand public visibility and presence in the public space, see J.R. Bowen, *Why the French Don't Like Headscarves: Islam, the State and Public Space* (Princeton, N.J.: Princeton University Press, 2007).

25 P. Herrmann, ed., *Glaubenskriege in Vergangenheit und Gegenwart* (Göttingen: Vandenhoeck & Ruprecht, 1996); P. Partner, *God of Battles: Holy Wars of Christianity and Islam* (London: HarperCollins, 1997). For the following examples see Smock, *Religion in World Affairs*, 2.

26 P. Häberle, *Der kooperative Verfassungsstaat—aus Kultur und als Kultur. Vorstudien zu einer universalen Verfassungslehre* (Berlin: Duncker & Humblot, 2013), 760.

27 M. Kotzur, "'Krieg gegen den Terrorismus'—politische Rhetorik oder neue Konturen des 'Kriegsbegriffs' im Völkerrecht?" *Archiv des Völkerrechts* 40 (2002): 454ff. with further reference; J. Howorth, "The European Security Conundrum: Prospects for ESDP after September 11, 2001," Groupement D'etudes de Reserches Notre Europe, Policy Paper no. 1, 2002.

From ancient times to present-day scenarios, from Iraq to Sudan, from Ireland to Syria, religious identities have often been used to mobilize one political group against another. And populations often tend to aggressively respond when called to defend their relevant and identity-shaping "communities of faith."[28] To describe conflicts of this kind as exclusively "rooted in religious differences or to imply that theological or doctrinal differences are the principal causes of conflict, is to seriously oversimplify and misinterpret a complex situation."[29] Very often religion, culture, ethnicity, economic interests, territorial claims, and the like build an amalgam giving rise to national or international (armed) conflicts; today, "wars of ideology" have replaced "wars of territory" in the modern international system.[30] This is the true challenge for a *global legal order* trying to overcome ideological particularities in favor of universal values. Here, the notion of "global law" comes into play.

E. Aiming at Global Solutions: Global Law

Using "global" instead of "public international law" as a matrix—others refer to "world law,"[31] "transnational law" or, more emphatically, a "common law of all mankind,"[32] respectively a "law of humanity"—marks a crucial step away from the formerly sharp distinction between the domestic and the international sphere. The ongoing globalization of life conditions does not find a sufficient normative infrastructure in either traditional state law or traditional international law. The *global legal space*, itself being an emerging pattern of global governance, provides for an infrastructural model trying to redress these shortcomings. It is based upon global legal paradigms such as human dignity, universal human rights standards such as the freedom

28 Ibid.
29 Ibid.
30 E. Luard, *Conflict and Peace in the Modern International System*, 2nd ed. (Basingstoke: Macmillan, 1988), 45.
31 A. Emmerich-Fritsche, *Vom Völkerrecht zum Weltrecht* (Berlin: Duncker & Humblot, 2007); M. Schulte, R. Stichweh, eds., *Weltrecht, Rechtstheorie* 39 (2008), 143.
32 C.W. Jenks, *The Common Law of Mankind* (London: Stevens and Sons, 1958).

of religion,[33] or an international rule of law.[34] It furthermore displays a multi-layered structure of not necessarily state-centered transboundary regulatory schemes[35] ("unbound constitutionalism" in terms of, for example, Antje Wiener and Stefan Oeter)[36] including global constitutional law, global administrative law,[37] a transnational *lex mercatoria*, and, last but not least, manifold non-binding instruments, for example, codes of conduct or compliance standards ("complicity" is the new keyword[38]). Consequently, the concept of global law aims to create a common legal scheme, which addresses the *needs* of humanity as such.[39] Not only semantically, the context to a Hegelian *Weltgeist*, a Kantian *Weltbürgertum* (cosmopolitan citizenship), to "world politics," or to "world order" is obvious. In the introductory part, history has been invoked as witness. Here, this can be done again.

As early as in the eighteenth Century, Emerich de Vattel had framed his "humankind-focused" concept of a *société des nations*. Even before that, Francisco Súarez (1548–1617), a famous representative of the Spanish School, had put an emphasis on the *bonum commune humanitatis*. Humanity itself or, expressed in classical Latin terms, the *societas humana*, became an indispensable cornerstone of rationalistic natural justice; the Ciceronian notions of *res publica* and *salus publica* survived the end of the Roman empire and persist today. Today, references to community interests are frequent in public international law documents, decisions of international courts and

33 See, for example, N. Bobbio, *The Age of Rights* (Cambridge: Polity Press, 1996); M. Kotzur, "Universality—A Principle of European and Global Constitutionalism," *Historia Constitucional* (June 2005): 201.

34 S. Chesterman, "Rule of Law," in *Max Planck Encyclopedia of International Law* (2012).

35 G. Teubner, ed., *Global Law without a State* (Aldershot: Dartmouth, 1997); J. Habermas, *The Postnational Constellation*, trans. Max Pensky (Cambridge: Polity, 2001); A. Griffiths, "Legal Pluralism," in *An Introduction to Law and Social Theory*, ed. R. Banakar and M. Travers (Oxford: Hart, 2002), 289; H.P. Glenn, "A Transnational Concept of Law," in *The Oxford Handbook of Legal Studies*, ed. D. Cane and M. Tushnet (Oxford: Oxford University Press, 2003), 839.

36 A. Wiener, *Constitutionalism Unbound. A Practice Approach to Normativity*, available at http://millenniumjournal.files.wordpress.com/2011/10/lse2011wiener.pdf.

37 B. Kingsbury, "The Concept of 'Law' in Global Administrative Law," *European Journal of International Law* 20 (2009): 23.

38 H.Ph. Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011).

39 R. Falk, "The World Order between Inter-State Law and the Law of Humanity," in *Cosmopolitan Democracy. An Agenda for a New World Order* (Cambridge: Polity Press, 1995), 163.

tribunals, as well as scholarly writings. It was, for example, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia which, in its Tadic decision of October 2, 1995, dismissed the "traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands."[40] Even the International Court of Justice, in his landmark "Barcelona Traction" decision, identified "common interests of all mankind" and referred to "interests of the international community as such."[41] Consequently, the international arena might very well be described as a "society of communities in formation"[42]—a formation, however, that causes lines of conflicts, in particular religious conflicts.

F. *In A Globalized World: Religious Conflicts as Problems of Legal Pluralism*

Modern legal systems are pluralistic in nature.[43] National laws, supranational rules, and international norms merge. Within the same social order and within the same social or geographical space "more than one body of

40 Prosecutor v. Dusko Tadic a/k/a "Dule," Decision of October 2, 1995, *Human Rights Law Journal* 16 (1995): 437, 457 (no. 96 at the very end).

41 Case concerning the Barcelona Traction, Light and Power Co. Ltd, New Application: 1962, Belgium v. Spain, Second Phase [1970] ICJ Rep 3.

42 G. McGhee, *International Community* (Lanham, Md.: University Press of America, 1992), 39; concerning the conditions of development of the international legal community see also G. Schwarzenberger, *Über die Machtpolitik hinaus?* (Hamburg: Heitmann, 1968), 43 et sequentes; on the first approaches of an "International Law of Co-Ordination" see G. Schwarzenberger, *Machtpolitik* (Tübingen: Mohr Siebeck, 1955), 136ff., as well as G. Schwarzenberger, *The Frontiers of International Law*, (London: Stevens & Sons, 1962), 34ff. From a comparative perspective, see Jenks, *The Common Law of Mankind*, 169ff., 414: "International law is in process of development from the law of an unorganised society into that of an organised community." See also W. Hertel, *Supranationalität als Verfassungsprinzip* (Berlin: Duncker & Humblot, 1998), 87.

43 J. Vanderlinden, "Le pluralisme juridique: essai de synthèse," in *Le Pluralisme Juridique*, ed. J. Gillissen (Brussels: Éditions de l'Université, 1971), 19; J. Vanderlinden, "Return to Legal Pluralism: Twenty Years Later," *Journal of Legal Pluralism* 28 (1989): 149; A. Griffiths, "Legal Pluralism," in *An Introduction to Law and Social Theory*, 289.

law, pertaining to more or less the same set of activities, may co-exist."[44] The nation state, regional political entities such as the EU, and the international community are based upon a huge variety of sometimes contradictory legal foundations, each of them requesting allegiance. Aptly one might refer to a "multi-layered amalgam of United Nations resolutions, national law and local categories and customs"[45] and accordingly to the intrinsic conflicts of this amalgam. Can religious rules be integrated in state-centered or treaty-based judicial decisions? It caused a very controversial discussion when Archbishop Rowan Williams in 2008 acknowledged that "the adoption of certain aspects of Sharia law in the UK 'seemed unavoidable' to him."[46] An answer to that question not least depends on the underpinning concept of pluralism.

Pluralism qualifies as an *essential structure* of modern democracies.[47] This is true for *political pluralism*, meaning an anti-totalitarian system of government that is on the one hand deep-rooted in a free and open society[48] and that on the other hand is secured by all the relevant constitutional provisions making a society free and open. This is also true for *cultural pluralism* providing for diversity within a free and open society—despite a necessary minimum standard of homogeneity. Given these two dimensions, pluralism in general can be described as a concept of *creating political unity in diversity*. Having reached such an abstract level, the concept obviously is not limited to the democratic state and relevant civil society but can be translated into a broader scheme of forming transnational political entities

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44 F. and K. von Benda-Beckmann, "The Dynamics of Change and Continuity in Plural Legal Orders," *Journal of Legal Pluralism and Unofficial Law* 53 (2006): 14, 17.

45 S.E. Merry, "Legal Pluralism and Transnational Culture," in *Human Rights, Culture and Context—Anthropological Perspectives*, ed. R. Wilson (London: Pluto Press, 1997), 29.

46 "Sharia Law in UK Is 'Unavoidable,'" BBC News, February 7, 2008, http://news.bbc.co.uk/2/hi/uk_news/7232661.stm.

47 R. Lhotta, "Pluralism," in *Evangelisches Staatslexikon*, new edition (Stuttgart: Kohlhammer, 2006), 1793; in general see E. Fraenkel, *Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie, Verhadlungen des 45. Deutschen Juristentags*, vol. 2B (Munich: C.H. Beck, 1964); P. Häberle, *Die Verfassung des Pluralismus. Studien zur Verfassungstheorie der offenen Gesellschaft* (Königstein im Taunus: Athenäum-Verlag, 1980); P. Häberle, *Verfassungslehre als Kulturwissenschaft*, 2nd ed. (Berlin: Duncker & Humblot, 1998), 134; G. McLennan, *Pluralism* (Buckingham: Open University Press, 1995).

48 K. Popper, *The Open Society and its Enemies*, vol. 2, reprint of the 5th ed. (London: Routledge, 2008).

or even applied to the social as well as the legal interactions within the international community. Abstractness and ambiguity, however, are very close to each other.

Some use the term "pluralism" in a rather *de*scriptive way, while others use it in a *pre*scriptive way. For some, pluralism is a normative category, for others a value coming along with tolerance.[49] Some apply pluralism and multiculturalism synonymously, while others are afraid that indifferent multiculturalism will result in the very end of pluralism "that makes a difference." Some speak of culture, others of cultures. Different values might make their valuable contributions to the political process within open societies; deviant behavior might terminate the *contrat sociale* that these open societies are based upon. Diverse, for sure, is not simply diverse. The diversity resembled by the very federation of independent republics that Immanuel Kant endorsed as the only valid basis of international law[50] is indeed very different from the complex diversity (or diverse complexity?) of twenty-first century globalization.[51] In the human rights debate about universality and cultural relativity (or rather particularity), the notion of cultural pluralism very often is exploited for merely political purposes. However, universality and diversity to some extent are dichotomous paradigms. The "universality of diversity" might be a challenge for modern constitutionalism, a hope for regional political integration such as the EU, and a paradox

49 As to tolerance see M. Mahlmann, "Religiöse Toleranz und praktische Vernunft," *Archiv für Rechts- und Sozialphilosophie* 91 (2005): 1; in general see G. Püttner, *Toleranz als Verfassungsprinzip* (Berlin: Duncker & Humblot, 1977).

50 I. Kant, *Zum ewigen Frieden*, ed. R. Malter (Stuttgart: Reclam, 2008), 10: "Die bürgerliche Verfassung in jedem Staate soll republikanisch sein," and 16: "Das Völkerrecht soll auf einen Föderalismus freier Staaten gegründet sein." See M. Sellers, "Republican Principles in International Law," *Connecticut Journal of International Law* 11 (1996): 403.

51 R. Dahrendorf, "Anmerkungen zur Globalisierung," in *Perspektiven der Weltgesellschaft*, ed. U. Beck (Frankfurt a.M.: Suhrkamp, 1998); 31; L. Friedmann, *The Lexus and the Olive Tree. Understanding Globalization* (New York: Farrar, Straus, and Giroux, 1999). Furthermore, see A.-B.S. Preis, "Human Rights as Cultural Practice: An Anthropological Critique," *Human Rights Quarterly* 19 (1996): 289: "The contemporary globalization of economic, political and social life has resulted in cultural penetration and overlapping, the coexistence in a given social space of several cultural traditions, and in a more vivid interpenetration of cultural experience and practice due to media and transportation technologies, travel, and tourism. In order to capture this more fluid character of present-day relationships between centre and peripheries and the realization that cultural flows are no longer territorially bounded [...] cultural complexity."

for public international law. This is especially true as far as the freedom of religion is concerned. That still does not answer the question raised by the archbishop's statement. A clear limit as to where religious rules are to be disregarded by a secular political community might only be the *ordre public*.[52] Apart from that, *religious choices* can and will have an impact on political decision-making. And so will *religious conflicts*.

G. *Of Conflicts and Choices: Religious Conflicts as Problems of Decision-Making*

Religious beliefs doubtlessly have a mind-shaping influence on believers and, conversely, believers, through their practice of religion, also re-shape religious beliefs. Religious beliefs, moreover, also are to an important extent determinative for the culture of a political community in the broader sense; they form a part of the cultural heritage, they live on in present day culture, and they influence future cultural developments. Thus, religious beliefs also influence these who strictly oppose these beliefs. To put it in a nutshell—they *shape the cultural identities* of believers as well as non-believers. Consequently, they also shape, whether directly or indirectly, the minds of all those who are in some way affiliated to the relevant culture. When the "affiliated ones," especially as political actors, talk about politics, when they interpret the law, when they try to accomplish what is in their interest, and when the try to guide a polity's further progress, they do—some consciously, some subconsciously—rely on anticipations, preconceptions, or inherent understandings (*Vorverständnis*).[53] That results in a not to be underestimated discursive power of the religious argument. It is a safe guess that the actors within transnational arenas, in particular within international organizations (courts and tribunals),[54] make use, whether directly or indirectly, whether consciously or subconsciously, of this discursive power. To provide empir-

52 Ch. Völker, *Zur Dogmatik des ordre public. Die Vorbehaltsklauseln bei der Anerkennung fremder gerichtlicher Entscheidungen und ihr Verhältnis zum ordre public des Kollisionsrechts* (Berlin: Duncker & Humblot, 1998).

53 A "German classic" in that—hermeneutical—regard is J. Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung* (Frankfurt a.M.: Athenäum-Fischer-Taschenbuch-Verlag, 1972).

54 With regard to the United States, see M.C. Modak-Truran, "The Religious Dimension of Judicial Decision Making and the De Facto Disestablishment," *Marquette Law Review* 81 (1998): 255.

ical proof, however, is another story. The demand for sociology of international organizations remains—not only often given the diplomatic silence of their protagonists—a most difficult task and a still open invitation to the scholarship of international law.[55]

To what extent religion is present in the meetings of the UN Security Council, in the debates of the UN General Assembly, or in the work of the International Law Commission—to name only the maybe most prominent examples—is anything but clear. *That* religion is present can be taken for granted; that religiously motivated contestation takes place, too. Consequently, global governance must not be conceived as *governance in a naive secular sense* or from the perspective of unreflected secularism.[56] Those who govern are influenced by religion. Moreover, they are influenced by the way others conceive religion (as particular or universal, as tolerant or fundamentalist, as relevant or irrelevant for society, as something to be fought for or something to be fought against). To put it in another nutshell: The religious mind-set is present when global law is made, is interpreted, is adhered to or violated, is praised or condemned.

H. Living with Religious Conflicts: Global Law and a Global Ethos of Tolerance among Religions

I. A Global Textbook on Religious Freedom and Tolerance

Tolerance among religions is the obvious although idealistic answer to religious conflicts[57] and the prerequisite for humane global governance.[58] It is surprising, however, that such idealism cannot only be found in the writings of political philosophers such as John Locke, with his famous "Letter Con-

55 M. Hirsch, "The Sociology of International Law: Invitation to Study International Rules in Their Social Contexts," *Toronto University Law Journal* 55 (2005): 891.

56 See also Goerlich, *Zur zugewandten Säkularität. Beiträge auf dem Weg dahin*.

57 A very important German study on "Tolerance in Conflict" is provided by R. Forst, "Toleranz im Konflikt," 3rd ed. (Berlin: Suhrkamp, 2003); R. Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton, N.J.: Princeton University Press, 2008) argues that a tolerant secular state was superior to a "tolerant religious state."

58 R. Falk, *Religion and Humane Global Governance* (New York: Palgrave, 2001).

cerning Toleration" (first published in 1689)[59] or literates such as Gotthold Ephraim Lessing (*Nathan the Wise* in 1779),[60] but also in international Treaty Law.[61] Qualifying the Edict of Milan (313) or the Edict of Nantes (1598) as historical prototypes would surely go too far.[62] These documents nevertheless anticipated much later developments. Today, a variety of public international law treaties and declarations, in particular human rights treaties, resembles something like a *textbook of global*, that is to say *universal ethical standards* related to religious tolerance.

The UN Charter's Preamble, reaffirming its "faith in fundamental human rights, in the dignity and worth of the human person," requests all members "to practice tolerance and live together in peace with one another as good neighbours." The "Friendly Relations Declarations"[63] re-emphasizes this very aim, also in its Preamble. The Universal Declaration on Human Rights,[64] a very early declaration of the General Assembly, states in Article 26 Section 2 on education: "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance, and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace." The con-

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59 J. Ebbinghaus, "Einleitung," in J. Locke, *Ein Brief über die Toleranz* (Hamburg: Meiner, 1957), XVIIIff.; M. Kahlo, "John Locke's Philosophie der Toleranz," in *Toleranz als Ordnungsprinzip? Die moderne Bürgergesellschaft zwischen Offenheit und Selbstaufgabe*, ed. Ch. Enders and M. Kahlo (Paderborn: Mentis, 2007), 145.

60 Referred to by N. Bobbio, *Das Zeitalter der Menschenrechte. Ist Toleranz durchsetzbar?* (Berlin: Wagenbach, 1998), 87.

61 For details see M.J. Roca, "Der Toleranzbegriff im internationalen Recht," in *Die Ordnung der Freheit: Festschrift für Christian Starck zum siebzigsten Geburtstag*, ed. R. Grothe, I. Härtel, K.-E. Hain, T.I. Schmidt, T. Schmitz, G.F. Schuppert, and Ch. Winterhoff (Tübingen: Mohr Siebeck, 2007), 905ff.

62 F. Rottmann, "Toleranz als Verfassungsprinzip?" in *Festschrift der Juristenfakultät zum 600jährigen Bestehen der Universität Leipzig*, ed. Leipziger Juristenfakultät (Berlin: Duncker & Humblot, 2009), 551, 562ff.

63 UN General Assembly Resoultion 2625 (XXV), October 24, 1970.

64 B. Fassbender, "Die Menschenrechtserklärung der Vereinten Nationen von 1948—eine Einführung in ihre Entstehung, Bedeutung und Wirkung," in *Menschenrechtserklärung. Neuübersetzung, Synopse, Erläuterung, Materialien*, ed. B. Fassbender (Munich: Sellier, 2009), 1ff.; M. Kotzur, "60 Jahre Allgemeine Erklärung der Menschenrechte—Reflexionen zur Entstehungsgeschichte, Ideengeschichte und Wirkungsgeschichte," *MenschenRechtsMagazin* 13 (Potsdam: Potsdamer Universitätsverlag, 2008), 184ff.

textualization plays an important role: religious freedom is linked to the maintenance of peace.

In the form of binding law, Article 13 Number 1 of the International Covenant on Economic, Social and Cultural Rights repeats the request:

> The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

Most interesting again is the systematical nexus: religious tolerance appears as nothing less than a prerequisite for international peace. When it comes to the practice of religion, the freedom of religion has also to be mentioned. On the international plane, it is enshrined in Article 18 Section 1 of the International Covenant on Civil and Political Rights. It reads as follows: "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Another significant text can be found in the 1959 Declaration of the Rights of the Child.[65] Principle 10 states: "The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men." A "spirit of tolerance" is also pointed out in the Preamble of the Convention on the Rights of the Child.[66] The UN General Assembly's "Declaration on the Elimination of All Forms of Intolerance and of Discrimination

65 UN General Assembly Resolution 1386 (XIV), 14 UN General Assembly Official Record Supp. (no. 16) at 19, UN Doc. A/4354.

66 Adopted and opened for signature, ratification, and accession by General Assembly Resolution 44/25 (November 20, 1989). The Convention entered into force on September 2, 1990.

Based on Religion or Belief"[67] obviously qualifies as one of the most important international law documents on religious tolerance. Already in the opening lines, the General Assembly expresses its conviction "that freedom of religion and belief should also contribute to the attainment of the goals of world peace, social justice and friendship among peoples and to the elimination of ideologies or practices of colonialism and racial discrimination." The text then goes on with the consideration "that it is essential to promote understanding, tolerance and respect in matters relating to freedom of religion and belief and to ensure that the use of religion or belief for ends inconsistent with the Charter of the United Nations, other relevant instruments of the United Nations and the purposes and principles of the present Declaration is inadmissible."

II. Religious Freedom and Tolerance as Resembled by Regional Law

Many guarantees of religious freedom, pluralism, and tolerance can be found in regional law. This is not only true for the Jewish and Christian West but also, to a lesser extent, for Islamic countries. The 2004 Arab Charter on Human Rights[68] develops its human rights scheme "pursuant to the eternal principles of brotherhood, equality and tolerance among all human beings which were firmly established by the Islamic Sharia and other divinely-revealed religions." If the promise of tolerance is taken seriously, its limitation to Sharia has to be questioned.

Turning to Europe: After a controversial debate, the Preamble of the Treaty on European Union emphasizes not explicitly Judeo-Christian Europe[69] but "the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of

67 Proclaimed by General Assembly Resolution 36/55 of November 25, 1981. For further important details see M.J. Roca, "Der Toleranzbegriff im internationalen Recht," 908.

68 "Arab Charter on Human Rights 2004," *Boston University International Law Journal* 24 (2006): 147, trans. Mohammed Amin Al-Midani and Mathilde Cabanettes, revised by Professor Susan M. Akram.

69 H. Goerlich, W. Huber, K. Lehmann, *Verfassung ohne Gottesbezug? Zu einer aktuellen europäischen Kontroverse* (Leipzig: Evangelische Verlagsanstalt, 2004).

law."[70] Following that "inspiration"—an inspiration that will be guiding the overall European integration process—Article 10 of the Treaty on the Functioning of the European Union (TFEU) requests that the Union, when "defining and implementing its policies and activities," shall "aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."[71] Religion is of major importance in manifold different fields of Union policies. This is made more than clear by Article 13 of the TFEU:

> In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to *religious rites*, cultural traditions and regional heritage" (emphasis added).[72]

Moreover, the fight against *religious discrimination* ranks among the most relevant aims and purposes of the whole integration process (see Article 19 Section 1 of the TFEU):

> Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The institutional dimension of religion and the collective exercise thereof is present in Article 17 of the TFEU: "The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States."[73]

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70 See, for example, P. Häberle, *Europäische Rechtskultur* (Baden-Baden: Nomos Verlagsgesellschaft, 1994); M. Stolleis, *Europa—Seine historischen Wurzeln und seine künftige Verfassung* (Tartu: Tartu Ülikooli Kirjastus, 1997).

71 In general, S. Baer, "Recht gegen Fremdenfeindlichkeit und andere Ausgrenzungen," *Zeitschrift für Rechtspolitik* (2001): 500.

72 M. Kotzur, in R. Geiger, D.-E. Khan, and M. Kotzur, eds., *EUV/AEUV Kommentar*, 5th ed. (Munich: C.H. Beck, 2010), Art. 10 TFEU, paras. 1 and 2.

73 Ch. Walter, *Religionsverfassungsrecht* (Tübingen: Mohr Siebeck, 2006); P. Häberle, *Europäische Verfassungslehre*, 7th ed. (Baden-Baden: Nomos Verlagsgesellschaft, 2011), 513.

The Charter of Fundamental Rights of the European Union guarantees manifold but intertwined dimensions of religious freedom and religious equality, respectively, as a human right.[74] The classic guarantee can be found in Article 10 of the Charter contextualizing the freedom of thought, conscience, and religion. Section 1 states that "[e]veryone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance." Article 14 Section 3 of the Charter enshrines the parental right of religious education: "The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right." Corresponding to Article 10 of the TFEU, Article 21 of the Charter forbids religious discrimination, see its Section 1 which reads as follows: "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited." Finally, the "united in diversity" motto of the EU is re-emphasized by Article 22: "The Union shall respect cultural, religious and linguistic diversity."

Beyond the European Union, all member states of the Council of Europe are bound by the European Convention on Human Rights—the oldest and so far most effective instrument of regional human rights protection.[75] Article 9 of the Convention—as later on Article 10 of the EU-Charter—combines the Freedom of thought, conscience and religion. Article 9 Section 1 ensures everyone's "right to freedom of thought, conscience and religion," which includes the freedom to change her/his religion or belief and furthermore the freedom to, "either alone or in community with others and in public or private," manifest her/his religion or belief, "in worship, teaching, practice and observance." Religious discrimination is prohibited by Article 14 of the

74 For the following, see M. Kotzur, in *EUV/AEUV Kommentar*, 5th ed., ed. R. Geiger, D.-E. Khan, and M. Kotzur (Munich: C.H. Beck, 2010), Appendix, 985ff.

75 In general, S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006); Ch. Grabenwarter and K. Pabel, *Europäische Menschenrechtskonvention*, 5th ed. (Munich: C.H. Beck, 2012).

Convention: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status."[76] All these guarantees on the regional European plane are to some extent culturally particular concretizations of universal human rights standards. To some other extent they themselves gave (and give) rise to universalized religious freedom on the global plane. A strict relativist-universalist polarity surely does not have the last word.

III. Universalizing Religious Freedom and Tolerance

The aforementioned clauses on religious freedom and tolerance refer to a set of universal values (a global ethos)[77] and they do imply the notion of unalienable, indivisible, and universal human standards beyond all political, socioeconomic, and cultural particularities.[78] Such a notion, however, brings about the question of whether or not rights and values can be universal at all. The thesis is: They can, if they correspond basic human needs (*needs based approach*) and if they are shaped in a discursive manner (*discourse*

76 Of course, many guarantees of religious freedom, pluralism, and tolerance can also be found in regional law beyond Europe. This is not only true for the Jewish and Christian West but also, of course to a lesser extent, for Islamic countries. The 2004 Arab Charter on Human Rights develops its human rights scheme "pursuant to the eternal principles of brotherhood, equality and tolerance among all human beings which were firmly established by the Islamic Shari'a and other divinely-revealed religions." A translation (as well as introduction) provided by M. Amin Al-Midani and M. Cabanettes (revised by S. M. Akram) can be found in the *Boston University International Law Journal*, 147. If the promise of tolerance is taken seriously, the limitation to the "the Islamic Shari'a" has to be questioned.

77 H. Küng, *Projekt Weltethos*, 13th ed. (Munich: Piper, 1990); H. Küng, *Weltethos für Weltpolitik und Weltwirtschaft*, 3rd ed. (Darmstadt: Wissenschaftliche Buchgesellschaft, 1998); furthermore Ch. Hasselmann, *Die Weltreligionen entdecken ihr gemeinsames Ethos. Der Weg zur Weltethoserklärung* (Mainz: Matthias-Grünewald-Verlag, 2002); J. Rehm, *Weltethos praktisch* (Mainz: Matthias-Grünewald-Verlag, 2004).

78 U. Fastenrath, "Einheit der Menschenrechte: Universalität und Unteilbarkeit," in *Völkerrecht als Weltordnung: Festschrift für Christian Tomuschat*, ed. P.M. Dupuy, M.N. Shaw, and K.P. Sommermann (Kehl am Rhein: N.P. Engel, 2006), 153.

based approach).[79] In some detail: What is literally held universal exists and prevails everywhere. It has a certain relation, extension, and applicability to more or less everything. Therefore, a strictly Platonic approach to specific virtues, the good, justice, or (human) rights would result in a shortcoming. Universality rather "should be looked for, not in abstract theoretical 'principles' or other a-historical judgment or vision, but in concrete experience," which is to say: "normative authority, in so far as it exists for man, resides in historical particularity."[80] Platonic philosophy itself has a historically particular momentum as expression of its time. Vividly debating with the Pre-Socratic or Pre-Platonic achievements of Greek philosophy and thus very well aware of history, Plato could create his world of ideas associating the universal "with ascent from the world of change and particularity."[81] For Plato, the universal highest good is ontologically given. It will last and never change. Others followed Plato: Aristotle, Seneca, and Cicero—at least to some extent—in the Christian Tradition Thomas Aquinas. The Christian religion put a special emphasis on the universal—with obvious consequences for the law. At its beginnings, modern public international law was, as shown above, deeply rooted in the idea of a Christian-European "family of peoples."[82]

Here the introductory remarks should be recalled again. Public international law was created as universal in its very nature. More or less at the same time, this notion of universality faced fundamental challenges by the discovery of a "New World"—America, the Reformation, and religious wars in Europe. On the one side, a strong belief in humanity itself prevailed. The universal *societas humana,* without any doubt a cornerstone of rationalistic natural justice,[83] had become the nucleus for a truly global legal community.[84] Emerich de Vattel had framed his "humankind-oriented" concept of a

79 G. Picco, H. Küng, R. v. Weizsäcker, et al., eds., *Crossing the Divide. Dialogue among Civilizations* (South Orange, N.J.: Seton Hall University, 2001).

80 C.G. Ryn, "Universality and History: The Concrete as Normative," *Humanitas* VI, no. 1 (Fall 1992/Winter 1993).

81 Ibid.

82 A. Verdross, "Die Wertgrundlagen des Völkerrechts," *Archiv des Völkerrechts* 4 (1953): 129 et sequentes, describes public international law as a product of Western and Christian culture.

83 See R. Pound, "The Revival of Comparative Law," *Tulane Law Review* V (1930): 1 et sequentes, 9, 11 ("comparative law as declaratory of natural law").

84 W. Grewe, *Epochen der Völkerrechtsgeschichte*, 2nd ed. (Baden-Baden: Nomos Verlagsgesellschaft, 1988), 689.

société des nations.[85] On the other side, an emerging focus on the human being *as an individual*—per definitionem different from the others—put into question whether a universally conceived "humanity" could function as the ethical source of legal normativity. The fundamental dichotomies, which emerged from the universal-individual model, are well known until today: universality versus particularity, universality of values versus relativity of values, universality as such versus diversity as such. The "as such," however, is the problem. The world can easily be divided into the idealism if not utopianism of "the universal" and the hard facts realism of "the particular," "the diverse," and "the fragmented." Scholarly writings on this division are plenty and display an impressive intellectual level of the philosophical universality-particularity debate. At the end of the day, however, they show that no clear cut between the two sides would be able to explain today's theory and practice of transnational human rights protection.[86] Human rights are both universal and individual in nature. They are based upon the *universal* notion of human dignity and the *particular* realization thereof in a particular legal culture at a particular moment in time.[87] They demand *a global ethos of human needs* (as *universal* prerequisite) and are to be concretized via a global dialogue (as mode of *particular* realization). For the lawyer, *law comparison* is an important mean to engage her or himself in that dialogue. The discursive character also makes quite clear that the comparative method

85 Ibid, 686; C.W. Jenks, *The Common Law of Mankind*, 19 et passim.

86 See L. Kühnhardt, *Die Universalität der Menschenrechte* (Munich: Olzog, 1987); Ch. Tomuschat, "Is Universality of Human Rights Standards an Outdated and Utopian Concept?" in *Das Europa der zweiten Generation: Gedächtnisschrift für Christoph Sasse*, vol. 2, ed. R. Bieber, A. Bleckmann, F. Capotori (Kehl am Rhein: N.P. Engel, 1981), 585; W. v. Simson, "Überstaatliche Menschenrechte: Prinzip und Wirklichkeit," in *Des Menschen Recht zwischen Freiheit und Verantwortung: Festschrift für Karl Josef Partsch*, ed. J. Jekewitz, K.H. Klein, J.D. Kühne, H. Petersmann, and R. Wolfrum (Berlin: Duncker & Humblot, 1989), 47; A.B. Fields, and W.-D. Narr, "Human Rights as a Holistic Concept," *Human Rights Quarterly* 14 (1992): 1; Ph. Alston, "The UN's Human Rights Record: From San Francisco to Vienna and Beyond," *Human Rights Quarterly* 16 (1994): 375; H. Maier, *Wie universal sind die Menschenrechte?* (Freiburg: Herder, 1997).

87 See in this context UN Doc. A/Conf. 157/22 of July 6, 1993: "The World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance of, all human rights and fundamental freedoms for all in accordance with the Charter of the United Nations, other instruments relating to human rights, and international law. The universal nature of these rights and freedoms is beyond question."

must not be limited to the narrow comparison of legal texts, but has to be extended to a broader cultural, economic, political setting—the setting or "atmosphere" in which religion is practiced and in which religious conflicts are dealt with.[88]

Universal standards of religious freedom and tolerance thus can be qualified as results of an (overly) complex comparative process.[89] The same holds true for universality itself: It is rather a process than an ahistoric idea(l), rather a cultural product of real world interaction—political, scientific, philosophical, and most importantly communicative interaction—than *Platonic* heritage. Universality can be negotiated on the basis that its very core, basic human needs, cannot be negotiated. Keeping that in mind, universal ethical principles, as answers to basic human needs, give the directives for discourse and negotiation: "freedom from want and fear" (Franklin Delano Roosevelt) and the "principle of humanity" (Hans Küng) rank highest among these directives, which, in a non-technical sense, serve as material sources for general principles of global law.[90] In a technical sense, Article 38 Section 1 lit. (c) Statute of the International Court of Justice holds "the general principles of law recognized by civilized nations" to be a formal source of public international law. The relevance of a principle-oriented approach is even present in the written law of the international community. It presupposes that universal (legal) principles manifest themselves in particular legal cultures

88 P. Häberle, *Rechtsvergleich im Kraftfeld des Verfassungsstaates* (Berlin: Duncker & Humblot, 1992); P. Häberle, *Verfassungslehre als Kulturwissenschaft*, 1st ed. (Berlin: Duncker & Humblot, 1982), 33, 2nd ed., 463 et sequens; R. Wahl, "Verfassungsvergleichung als Kulturvergleichung," in *Staat—Souveränität—Verfassung: Festschrift für Helmut Quaritsch*, ed. D. Murswiek, U. Storost, and H.A. Wolff (Berlin: Duncker & Humblot, 2000), 163; M. Kotzur, *Theorieelemente des internationalen Menschenrechtsschutzes*, 47.

89 Ideally, one has to look for legal standards of religious freedom and tolerance being common to a vast majority of the legal systems and cultures all over the world. Realistically, one has—taking the risk of arbitrariness—to make a rational and sufficiently diverse—thus minimizing the risk of arbitrariness—selection. A self-centered Eurocentric view would not live up to these standards. See, for example, O. Sandrock, "Das Privatrecht am Ausgang des 20. Jahrhunderts: Deutschland—Europa—und die Welt," *Juristenzeitung* (1996): 1; A. Bleckmann, "Die wertende Rechtsvergleichung bei der Entwicklung europäischer Grundrechte," in *Europarecht, Energierecht, Wirtschaftsrecht: Festschrift für Bodo Börner*, ed. J.F. Baur (Cologne: Carl Heymanns Verlag, 1992), 29ff.

90 H. Küng, *Handbuch Weltethos: Eine Vision und ihre Umsetzung* (Munich: Piper, 2012).

("civilized nations") and might find significant expression in particular legal texts as well as in particular customs ("recognized"). These universal (legal) principles are the outcome of (legal) reflections about human action, about human needs, about the most existential threats and dangers, the individual human being is facing all over the world and last but not least about the ever-present danger to abuse power.[91] These universal (legal) principles are, in summary, the outcome of reflections about *humanity*.

I. Conclusion

Religious pluralism does not only qualify as an *essential structure* of secular statehood and modern democracies in particular.[92] Beyond the state (unbound from statehood) and notwithstanding its form of government, religious pluralism can be described as an indispensable concept for "creating political unities in diversity." It influences the understanding and interpretation of the law in the context of crucial ethical questions.[93] Beyond interpretative rules and context-related demands, an integrative international law on religion could give the normative answer to that pluralistic demand.[94] It had to be based on an essential distinction: here the power of the (secular) state and there the power of religions/religious laws/religious communities. The integrative law's core area would have to be composed of minimum guarantees of religious freedom. The *forum internum* would have to be

91 H. Bielefeldt, "Menschenrechte und Menschenrechtsverständnis im Islam," *Europäische Grundrechte-Zeitschrift* (1989): 489ff., 491; W. Brugger, "Stufen der Begründung von Menschenrechten," *Der Staat* 31 (1992): 19ff., 21; W. Huber, *Die tägliche Gewalt. Gegen den Ausverkauf der Menschenwürde*, 2nd ed. (Freiburg: Herder, 1993), 7ff.; H. Hofmann, "Geschichtlichkeit und Universalitätsanspruch des Rechtsstaates," *Der Staat* 34 (1995): 1ff., 27.

92 R. Lhotta, "Pluralism," in *Evangelisches Staatslexikon*,1793; in general E. Fraenkel, *Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie, Verhandlungen des 45. Deutschen Juristentags*; P. Häberle, *Die Verfassung des Pluralismus. Studien zur Verfassungstheorie der offenen Gesellschaft*; P. Häberle, *Verfassungslehre als Kulturwissenschaft*, 134; W. Steffani, *Pluralistische Demokratie* (Opladen: Leske u. Budrich, 1980); G. McLennan, *Pluralism*.

93 M. Rosenfeld, *Just Interpretations: Law between Ethics and Politics* (Berkeley, Calif.: University of California Press, 1998).

94 Ch. Walter, "Religionsfreiheit in säkularen im Vergleich zu nicht-säkularen Staaten: Bausteine für ein integratives internationales Religionsrecht," 253, 282ff., 292 (English summary, thesis 6).

granted without any restrictions. The free exercise of religion would have to be restricted to some extent (taking into account not only state and public interests but also the rights of the others). Within a certain margin of appreciation—to rephrase the scrutiny standard of the European Court of Human Rights—public authorities would have to exercise their power of discretion. All normative measures, however, will create no sustainable effects if they are not supported by a global dialog of the religions (including a global dialog among believers and non-believers). The normative measures will also fail if not strengthened and effectuated by a global "mobilization of shame"[95] whenever and wherever the religious motive is abused for power politics.[96] And one thing is beyond question: Wars cannot be just, they can only be justified, and they never can be holy.

95 R.F. Drinan, *The Mobilization of Shame: A World View of Human Rights* (New Haven: Yale University Press, 2001).

96 See, for a U.S.-perspective, M.J. Perry, *Religion in Politics: Constitutional and Moral Perspectives* (Oxford: Oxford University Press, 1997).

A Case Study in Consilience: Law, Regulation, and the Global Ethic in the Struggle for Biosecurity

Timothy L. Fort and Joshua E. Perry

A. Introduction

Writing at the conclusion of the twentieth century, Soviet dissident, author, and human rights advocate Lev Kopelev[1] observed that "unless the old and new daydreams of a global ethic become an everyday reality in the spiritual and social life of all peoples," nothing less than the destiny of humankind is in jeopardy.[2] Kopelev worried about short-term and long-term variations of humanity's ultimate demise. He predicted that "either in a few years all living creatures will be destroyed by nuclear catastrophes, by poison gases used in war, or by pestilences directed by science, or before many centuries are past all human beings, animals, and plants will die a tormenting death on polluted soil, in poisoned rivers and lakes in a damaged atmosphere."[3] Ominously, he advocated for the urgent necessity of the global ethic and warned "[t]here are no other prospects."[4]

As we move more fully into the twenty-first century, Kopelev's concerns about nuclear catastrophe and poison gas remain relevant, as tribal conflict and geopolitical instability seem to be ever present in some corner of the globe. But it is the specter of pestilence and specifically threats to individual and public health in the forms of pandemics and bioterrorism that have triggered global alarms in recent years. The potential cost in terms of lives lost is difficult to fathom. Moreover, given the interdependence of global commercial markets, the economic destabilization and social disruption (even for those left untouched by physical disease) threatened by both pandemics and bioterrorism demand a cooperative, multi-government response. Inter-

1 Craig R. Whitney, "Lev Kopelev, Soviet Writer in Prison 10 Years, Dies at 85," *New York Times*, June 20, 1997.
2 Lev Kopelev, "The Destiny of Humankind Is at Stake," in *Yes to a Global Ethic*, ed. Hans Küng (New York: Continuum, 1996), 40.
3 Ibid.
4 Ibid.

national law and regulation will, of course, be necessary to coordinate efforts toward achieving a sustainable global peace, or at least combating the destabilizing elements of threats to global public health. In concert with legal efforts, Hans Küng's global ethic, with its emphasis on "minimal basic consensus relating to binding values, irrevocable standards and moral attitudes"[5] articulates a vision for specific common rights and shared responsibilities that constitute a "fabric of international norms."[6] Effective global governance in the face of devastating health threats will require international cooperation, which, to be effective, will require trust. This trust, however, will also require the force of law and regulation, as well as a more aspirational notion of the common good.

Some basic principles of that common good can be found in the Global Ethic. Articulated by the World Parliament of Religions in 1993, the Global Ethic lays out four key principles: a commitment to a culture of nonviolence and respect for life; a commitment to a culture of solidarity and just economic order; a commitment to a culture of tolerance and a life of truthfulness; and a commitment to a culture of equal rights and partnership between men and women.[7] Public health issues—particularly in the globalized economy—are enmeshed with all of these key principles.

This chapter will begin with a discussion of the public health threats facing the twenty-first century global community. We will then explore the variety of legal and regulatory mechanisms necessary to cope with these threats and support the aspirational ideals of Küng's Global Ethic.

B. Pandemics and Bioterrorism

I. Threats to Peace and Public Safety

The World Health Organization (WHO) has identified three twentieth century influenza pandemics: the 1918–1919 Spanish flu, the 1957–1958 Asian

5 InterAction Council, "In Search of Global Ethical Standards," Vancouver, Canada, 1996.

6 Hans Küng, "A Global Ethic in an Age of Globalization," *Business Ethics Quarterly* 7 no. 3 (1997): 19.

7 Parliament of the World's Religions, "Declaration Toward a Global Ethic," Chicago, Illinois, 1993.

flu, and the 1968–1969 Hong Kong flu.[8] The 1918 outbreak may have killed as many as 50 million people worldwide, over six times the number of military deaths during World War I.[9] The twenty-first century has seen outbreaks of avian influenza (H5N1), swine influenza (H1N1), and severe acute respiratory syndrome (SARS).[10] While thus far relatively benign, modeling of worst-case scenarios for global pandemics in the twenty-first century predicts as many as 70 million deaths and economic losses of between $2 and $3 trillion.[11]

Additional public health concerns are raised by the threat of bioterrorism. In the history of the United States, there have only been two successful bioterrorist attacks.[12] The first occurred in September 1984, when the Rajneeshee religious sect contaminated salad bars throughout Western Oregon with salmonella. Approximately 750 people became ill, with twenty-eight requiring hospitalization. Then, in the fall of 2001, still reeling from the attack on the World Trade Center, the U.S. postal system was infiltrated with anthrax spores.[13] Five contaminated letters containing a weaponized form of anthrax resulted in twenty-two cases of pulmonary and cutaneous anthrax and five deaths. Other acts of biologically based terrorism have been documented in other parts of the world.

While incidents have been few and causalities relatively minor, policymakers and public health officials have nonetheless called for cooperative

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8 Harvey Kayman and Angela Ablorh-Odjidja, "Revisiting Public Health Preparedness: Incorporating Social Justice Principles Into Pandemic Preparedness Planning for Influenza," *Journal of Public Health Management Practice* 12 no. 4 (2006): 373–80.

9 Belinda Bennett and Terry Carney, "Law, Ethics and Pandemic Preparedness: The Importance of Cross-Jurisdictional and Cross-Cultural Perspectives," *Australian and New Zealand Journal of Public Health* 34 (2010): 106–112.

10 Ibid. See also Peter A. Singer et al., "Ethics and SARS: Lessons from Toronto," *British Medical Journal* 327 (2003): 1342–44.

11 Bennett and Carney, "Law, Ethics and Pandemic Preparedness," 107. Projections, of course, vary and are dependent on a number of dynamic factors. A 2004 model created by the U.S. Department of Health and Human Services forecast U.S. deaths from an influenza pandemic at 80,000 to 300,000, with economic losses from 71 to 166 billion dollars. Jaro Kotalik, "Preparing for an Influenza Pandemic: Ethical Issues," *Bioethics* 19 no. 4 (2005): 423.

12 Nicholas B. King, "The Ethics of Biodefense," *Bioethics* 19 no. 4 (2005): 432–46, 433.

13 L.M. Bush et al., "Index Case of Fatal Inhalational Anthrax Due to Bioterrorism in the United States," *New England Journal of Medicine* (November 29, 2001): 1607–1611.

biodefense programs exploring the hazards of ongoing scientific research, the development of new technologies, and their implications for public safety and global peace.[14]

Regardless of whether the threat is a naturally occurring pandemic or a nefarious bioterrorist attack, many similar issues will be raised. Bioethicist/epidemiologist Nicholas B. King notes that

> [C]linicians will need to treat infected patients and the "worried well," often with drugs that might cause significant adverse effects; health workers will need to obtain and manage sensitive information from patients, in order to perform case-tracing and determined the progress of the disease through the population; and public health authorities will need to ascertain the extent of the outbreak, efficiently distribute resources, communicate with the public, and determine whether state interventions such as quarantine or mandatory treatment are necessary to slow the spread of disease.[15]

The cross-border implications of these issues will require a cooperative effort by national governments and international partnerships that integrates legal and regulatory efforts within ethical constraints. Küng's Global Ethic offers a framework for considering these ethical contours around which consensus will be critical to the success of any multi-national coordinated efforts.

II. Specific Ethical Concerns

In 2005 the World Health Organization issued a "Checklist for Influenza Pandemic Preparedness Planning" that included a variety of recommended actions raising important ethical concerns.[16] Echoing King, the WHO's recommendations for state action included restricting freedom of movement (for example, quarantine and border control), commandeering private premises for the provision of emergency medical care, mandating actions by health care workers, authorizing off-label use of pharmaceuticals, and compelling and/or prioritizing vaccinations. While the scope and uniqueness of

14 See generally, King, "The Ethics of Biodefense," 433. But note, V.W Sidel, R.M. Gould, and H.W. Cohen, "Bioterrorism Preparedness: Cooperation of Public Health?" *Medicine and Global Survival* 7 (2002): 82–89 (arguing that the threat of bioterrorism has been exaggerated).

15 Ibid., 440.

16 World Health Organization, "WHO Checklist for Influenza Pandemic Preparedness Planning," 2005.

the threats posed by pandemics and bioterrorism may ultimately justify such exceptional state action, consideration of the ethical issues triggered by biosecurity plans will be "essential to maintain public trust, promote compliance, and minimize social disruption and economic loss."[17]

1. Privacy concerns

Fundamental to both public health and biodefense is epidemiological surveillance.[18] In the event of either a naturally occurring or criminally orchestrated outbreak, authorities (health care experts and/or law enforcement officials) will need to determine the identity, etiology, epicenter, and transmission pattern of the biological agent. Tracing the origination and spread of the disease will be essential to public safety and such action will require coordination and information sharing among those in both the health care and national security sectors.

Sharing individual health information, however, raises important concerns around privacy and the protection of patient confidentiality. Physicians have professional responsibilities and legal prohibitions when it comes to maintaining patient privacy, and yet, in the context of a biodefense emergency, the public health imperative would seem to trump the confidentiality protections generally afforded individuals. The parameters around which patient data might be shared, with whom, and the scope of specific details shared would need to be finely tailored to the narrow epidemiological necessities. While biosecurity priorities would ultimately justify a violation of privacy—on the basis of protecting the well-being of the greatest number of individuals—that private information should only be released if no less intrusive methods of protecting public health are available.

2. Autonomy/liberty concerns

Several potentially effective biodefense strategies restricting the exercise of one's liberty also raise ethical concerns about how best to balance individual and community goods. Each of these approaches to biodefense should be

17 World Health Organization, "Ethical Considerations in Developing a Public Health Response to Pandemic Influenza," 2007.

18 King, "The Ethics of Biodefense," 442.

exercised by public authorities with care, transparency, and "in a way that is relevant, legitimate, and necessary."[19]

a) Social separation

One way to slow the spread of communicable disease is to reduce contacts between individuals. As Georgetown Law Professor Larry Gostin notes, responses to past pandemics have been marked by social separation and community restrictions, including closures of schools, child care facilities, and workplaces, as well as the cancelation of public events.[20] Such policies can create the unintended adverse consequences of alienation, emotional detachment, and economic disruption. Moreover, restricting individual liberties in these ways can infringe upon religious practices, family gatherings, and care for vulnerable neighbors. Such interactions are constitutive of what it means to be a social, human animal and such "civic or spiritual settings afford comfort in a time of crisis."[21]

b) Border controls

Similar to restrictions at the local level, transnational measures can broadly interfere with international travel, trade, and tourism. Far-reaching international health regulations issued by the WHO as well as the Centers for Disease Control and Prevention, can include entry or exit screening, collection and dissemination of passenger information, travel restrictions, inspection, and destruction of infected or contaminated animals or goods.[22]

19 Singer et al., "Ethics and SARS: Lessons from Toronto," 1343.
20 Lawrence O. Gostin, "Public Health Strategies for Pandemic Influenza," *Journal of the American Medical Association* 295 no. 14 (2006): 1700–1704.
21 Ibid., 1702.
22 Department of Health and Human Services Control of Communicable Diseases, 42 CFR 70, 71; World Health Organization, "SARS Risk Assessment and Preparedness Framework," 2004.

c) Isolation and Quarantine

When SARS threatened Asia and Canada in 2003, both quarantine and isolation were widely used in an attempt to control the spread of the pathogen. Isolation typically refers to separation and/or restrictions on movements of persons with a contagious disease, while quarantine is both a separation and a restriction on movements of persons carrying or suspected to be carrying a contagious disease. Schools, workplaces, prisons, military bases, and stadiums each served as locations for these extreme and restrictive measures. Such tactics raise critical questions about the fairness and due process of procedures, the habitability of temporary living conditions, access to communication technologies, and provision of essentials such as food and water. Isolation and quarantine both demand a delicate balance between individual liberties and the public good. As Gostin notes, containment schemes require "public trust and acceptance in accordance with the principles of justice."[23]

IV. Küng's Global Ethic

Discussion of an individual's loss of liberty as well as an individual's compromised privacy interests illustrates why Küng's Global Ethic is so essential. In short, "collaboration between people of different cultures and interests could be made easier and their conflicts diminished and limited if all peoples and groups saw themselves as 'bound and motivated' by 'shared commitments.'"[24] The essence of the Global Ethic is its emphasis on what is common rather than what is different among individuals. Those concerns, values, and principles around which individuals can unify assume prime importance in Küng's vision of the global neighborhood.[25]

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23 Gostin, "Public Health Strategies for Pandemic Influenza," 1703.

24 Küng, "A Global Ethic in an Age of Globalization," 17–31, 20.

25 Appropriating Küng's Global Ethic in an effort to navigate the contours of individual rights and public health concerns is reminiscent of the population-based ethical paradigm described by Gostin and Gostin. See generally Lawrence O. Gostin and Kieran G. Gostin, "A Broader Liberty: J.S. Mill, Paternalism, and the Public's Health," *Public Health* 123 (2009): 214–21 (arguing that a public health paternalism is justified by the benefits to the collective).

C. Law and Regulation

As discussed above, the state action prompted by a desire to maintain biosecurity necessarily triggers ethical debate around a variety of competing interests and multi-national stakeholders. Küng's Global Ethic sets forth a practical paradigm for navigating the dangerous and perhaps undetected undercurrents of these streams of concern. We recognize explicitly the role that law and regulation would necessarily be required to play in the event of a threat to national or international biosecurity[26] and we will show that there is a consilience among both legal supports and the global ethic that will be required to preserve peace and public health if the world's biosecurity is compromised.

More specifically, we want to suggest that a way to marry Küng's Global Ethic with law and regulation is to consider any effort as one that is based on trust. That is, if there is to be a coordinated, collaborative effort at addressing issues of pandemics and bioterrorism, as well as issues pertaining to environmental sustainability, peace, and other public health issues, participants will have to have a high degree of trust to overcome natural barriers to partnership.

I. Hard Trust, Real Trust, and Good Trust

In particular, we frame our proposal in terms of three types of trust: Hard Trust, Real Trust, and Good Trust.[27] Each performs a crucial task in building a productive organizational climate and energizing a public partnership. Hard Trust pertains to issues of accountability. One places trust in another person or entity because there is a third party that will enforce noncompliance. That third party may well be some kind of legal mechanism for enforcement and it could also be the coercive pressure of public opinion. Real Trust considers how partnerships are mutually beneficial. One creates reliability and dependability because each party recognizes that the other performs, not simply on the basis of altruistic motives, but because there is a

26 Australian law professors Belinda Bennett and Terry Carney argue that "law is an essential ingredient in the construction of sound national policies for managing a flu or other pandemic." Bennett and Carney, "Law, Ethics and Pandemic Preparedness."

27 Timothy L. Fort, *Business, Integrity, and Peace: Beyond Geopolitical and Disciplinary Boundaries* (New York: Cambridge University Press, 2007).

tangible benefit. Good Trust connects actions to the aesthetic and aspirational; indeed, even to the spiritual. Here one trusts another because one is aware of the other party's deep commitment to a spiritual good that is difficult, if not impossible to corrupt.[28]

This triumvirate of trust has been applied previously to provide a guide for creating a more holistic approach to organizational culture building in health care institutions struggling with how best to implement mandatory employee vaccination programs for seasonal influenza.[29] Such mandates could similarly be required in more dire situations involving biological threats. In the context of systematic delivery of medicines and health care, mandating action on the part of health care employees can be a destabilizing threat to an organizational climate of trust and integrity—marked by a culture of employee self-governance and a commitment to shared and cooperative values among multiple stakeholders.[30] As noted above and discussed below, in this context, Hard Trust refers to the compelled accountability prompted by omnipresent penalties and punishments that flow from the violation of rules, laws, and regulations. Hard Trust flows from these enforcement dynamics, creating an important space for laws and regulations to support the goals of the global ethic.

The additional overlapping constructions of Real Trust and Good Trust are necessary to foster an environment in which all of these varied internal (for example, health care providers, hospital employees) and external (for example, patients, communities, regulators, insurers) stakeholders can have a deeper confidence in the health care organization. Generated when both management and employees follow-through on promises, Good Trust is characterized by honesty and fairness, and "engag[ment with] human quests for moral excellence and spiritual identity."[31] Ultimately, Good Trust is what permeates an environment where the common good is prioritized before individual self-interest.

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28 Ibid.

29 Joshua E. Perry, "Before the Mandate: Cultivating an Organizational Culture of Trust and Integrity," *American Journal of Bioethics* 13 no. 3 (2013): 42–44 (arguing that organizations committed to the care of patients and the advancement of public health should be exemplars in terms of cultivating cultures of trust and integrity).

30 See J.A. Gallagher and J. Goodstein, "Fulfilling Institutional Responsibilities in Health Care: Organizational Ethics and the Role of Mission Discernment," *Business Ethics Quarterly* 12 no. 4 (2002): 433–50.

31 Fort, *Business, Integrity, and Peace*.

Beyond improvements to the internal cultural dynamics of health care organizations, this model suggests many ways in which multiple parties might collaboratively engage in public partnership that addresses public health issues. It also helps us to see specific contributions the law can make to such partnerships.

II. Rhetorical Supports for the Good

Though tempting to think of legal supports in terms of regulation, court cases, and enforcement procedures, the government—as the duly constituted legal entity for society—also articulates standards and objectives to achieve. In a sea of debate over thousands of potential issues that can be debated at any one time, the rhetoric of government leaders can focus public attention on a smaller number of issues of particular importance. For example, when U.S. President John F. Kennedy announced that the United States would seek to place an astronaut on the moon by the end of the 1960s, he not only set into motion the project management resources to accomplish the mission, but he also captivated national and even global enthusiasm for the project and for a public consciousness that sought public achievement without war.

Such "bully pulpit" pronouncements are easiest to accept from presidents, but the statements of elected representatives can make important differences too. When the U.S. Senate debated the 1964 Civil Rights Act, Democratic President Lyndon Johnson awkwardly faced a filibuster from members of his own party. To pass the legislation, Johnson turned to the Republican Leader of the Senate, Everett Dirksen, himself known as a staunch conservative, who in delivering sufficient Republic votes to end the filibuster said, "I am involved in mankind, and, whatever the skin, we are all included in mankind."[32]

These acts of vision and courage move more than legislation. They are government or legal actions that change perceptions and customs. They are a step in building trust exactly because they articulate a quest for something bigger, purer, and more inspiring than what has come before. Without endowing government leaders with the responsibility for the cultural and moral aspects of citizens' lives, the fact remains that such leaders have ready access

32 Stan Mendendall, "Everett Dirksen and the 1964 Civil Rights Act," available at www.lib.niu.edu/1996/iht319648.html (last accessed April 26, 2014).

to a persuasive and pervasive means of public dissemination of ideas. When leaders use that capability to articulate such Good Trust notions, they have a significant opportunity for the advancement of moral causes.

Thus, in a variety of ways, government has access to the levers of actions that can create public awareness and support for the steps necessary to address issues of bioterrorism, disease, and even war. These actions could take the form of articulating the need, willingness, and commitment to engage in necessary research and in sharing information so that public health issues are guided by principles of truthfulness, collaboration, and partnership. Indeed, the notion of partnerships becomes crucial to any global functioning system that seeks to address issues of pandemics and bioterrorism. And insistence on the accurate accounting, reporting, and transparency of such efforts becomes the glue that allows partners to trust each other in their ongoing collaboration.

III. Reflexive Models

Over the past twenty-five years, governments have increasingly realized that regulatory structures and judicial enforcement cannot cope with the number of potential issues that can arise. At the same time, the number of corporate scandals provide ample evidence that companies do a relatively poor job at self-regulating. As a result, legislatures have enacted laws that provide incentives for companies to regulate themselves in a serious way with such self-regulation then subject to legal oversight.

The U.S. Federal Sentencing Guidelines stand as a good example of this. The guidelines were first adopted in 1984 as a set of recommendations to federal judges concerning the severity and uniformity of sentences imposed on persons convicted of federal crimes.[33] In 1991, the guidelines were amended with provisions aimed at organizations themselves. These amendments provided a bargain for companies. If companies implemented "effective" programs that addressed legal (and through later amendments, ethical) compliance in their organization, then even the company would receive reductions in a penalty should the company still run afoul of the law. For example, if companies adopted a mission statement with a code of conduct,

33 United States Sentencing Commission, "Organizational Guidelines: Chapter 8," 2013.

appointed a high-level executive to oversee the program, established a safe place for employees with complaints to report them, and self-reported violations, the company could demonstrate good faith efforts in operating an effective program.[34] Other examples of such reflexive programs include those pertaining to sexual harassment[35] and financial reporting.[36]

Reflexive programs provide a mechanism for the law to support the Global Ethic, especially as it pertains to issues of public health. The very nature of public health issues requires a significant degree of national and international coordination and focus. At the same time, the implementation of the practices needed to effectuate action requires the cooperation of many entities. Reflexivity stands as a legal tool that can achieve the necessary coordination along with the particular actions of companies.

It is certainly possible that a public health partnership may recognize its own self-interest in the success of the partnership itself. Indeed, this is true of most contracts. Few business people enter into a contract with a conscious strategy of suing their contracting partner. The contract works best when both sides adhere to their promises, are honest with each other, and seek to complete the contract. Few contracts ever see the courtroom; they are performed because both parties see the benefit of the contract itself. That is especially true of long-term contracts. In such relational contracts, the parties benefit from the continued satisfaction and success of the other party in dealing with them.

The same, of course, holds true with public health partnership. But to the extent that there are temptations to not adhere to high legal and ethical standards, the more indirect touch of reflexive governance regimes stands as a way to encourage continued promise keeping and truth-telling with a minimum of legal intrusion. This further enhances Real Trust.

IV. The Role of Regulation and Rules

Finally, of course, governments do regulate. Moreover, as the World Health Organization has noted, a legal framework is necessary to ensure transparent assessment and justification of protective measures and coherence with in-

34 Ibid.
35 *Burlington Industries v Ellerth*, 524 U.S. 742 (1998).
36 *Sarbanes–Oxley Act of 2002* (Pub.L. 107–204, 116 Stat. 745, enacted July 30, 2002).

ternational legislation.[37] In other words, regulations specify the rules that companies and individuals engaged in public health issues must abide by. Typically, this occurs on a state or national level, but it can also proceed through international treaties.

1. Health security regulations at the individual state level

Following the 2001 anthrax attacks, concerns regarding the adequacy of U.S. state bioterrorism laws prompted development of the Model State Emergency Health Powers Act.[38] Written to take effect in the context of an imminent threat of bioterrorism, epidemic, pandemic disease, or [a] novel and highly fatal infectious agent or biological toxin posing a substantial risk of a significant number of human fatalities or incidents of permanent or long-term disability, such a public health emergency would be subject to determination by one individual—the state's governor—who would be immune from liability for his or her actions.[39] Granting the state sweeping powers, certain provisions of the Model Act would empower state public health officials with the authority to commandeer all state health facilities, compel physician actions, and order citizens to undergo examinations and treatments—with refusal resulting in quarantine or criminal punishment (by the least restrictive means necessary).

Indeed, one might imagine the nightmare scenarios described by Kopelev and conclude that such sweeping state police powers could potentially be justified. Authoritarian actions such as these, however—at least in the United States—would surely fail to secure a sustainable peace and favorable public health situation if such legal powers were exercised without an ethical approach marked by Good Trust. Indeed, any laws born of fear and frenzy that result in the treatment of Americans and their doctors as the enemy and grant broad and arguably arbitrary powers to public health officials or government

37 World Health Organization, "Ethical Considerations in Developing a Public Health Response to Pandemic Influenza," Geneva, Switzerland: 2007.

38 Kumanan Wilson et al., "The New International Health Regulations and the Federalism Dilemma," *PLoS Medicine* 3, no. 1 (2006): 30–34.

39 Lawrence O. Gostin, et al., "The Model State Emergency Health Powers Act: Planning for Response to Bioterrorism and Naturally Occurring Infectious Diseases," *Journal of the American Medical Association* 288 (2002): 622.

executives could threaten basic civil liberties in ways that not even ethics could remedy.[40]

2. Health security regulations at the international level

Infectious agents do not respect territorial boundaries, thus the need for international rules and regulations arises. In May 2005, the World Health Assembly adopted a revised version of the International Health Regulations (IHR) that is binding on all member states of the World Health Organization.[41] These 2005 revisions were the culmination of a decade-long process that United Nations Secretary-General Kofi Annan characterized as "a priority for moving humanity toward 'larger freedom.'"[42]

The IHR 2005 revisions reflect the critical importance of public health and biosecurity to twenty-first century globalized markets where "every major global governance issue, ranging from national and international security, trade, and economic development, to environmental protection and human rights" is connected.[43] Respect for human rights, in fact, is one of the express aims of IHR 2005. The Regulations specifically mandate that any restrictions on human freedom, such as quarantines, be no more restrictive than is required, be proportionate to a legitimate aim, and respect the inherent dignity of the human person.[44] In fact, the IHR mandates state treatment of quarantined or isolated travelers that is sensitive to gender, socio-cultural, ethnic, or religious concerns.[45] Privacy is specifically identified as an individual good to be safeguarded.

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40 George J. Annas, "Bioterrorism, Public Health, and Civil Liberties," *New England Journal of Medicine* 346, no. 17 (2002): 1337–42. See generally, Lawrence O. Gostin, "Public Health Law in an Age of Terrorism: Rethinking Individual Rights and Common Goods," *Health Affairs* 2, no. 6 (2002): 79–93.

41 Rebecca Katz, "Use of Revised International Health Regulations During Influenza A (H1N1) Epidemic, 2009," *Emerging Infectious Diseases* 15, no. 8 (2009): 1165–70.

42 David P. Fidler and Lawrence O. Gostin, "The New International Health Regulations: An Historic Development for International Law and Public Health," *Journal of Law, Medicine and Ethics* 34, no. 1 (2006): 85–94.

43 Ibid., 86.

44 International Covenant on Civil and Political Rights (ICCPR), Articles 2.1, 10.1, and 26.

45 Ibid., Article 32.

The international health law norms reflected in the IHR are deeply interwoven with the Global Ethic's commitment to a culture of non-violence, respect for life, solidarity, just economic order, equal rights and partnership, and tolerance for the other.[46] These ethical commitments, in addition to a robust fostering of Good Trust, will be essential to the preservation of global biosecurity. For example, the IHR reflects a Hard Trust where it mandates state reporting of suspected intentional release of biological, chemical, and radiological agents, as well as any public health information that poses a public health emergency of international concern. Such transparency among nation states must be balanced against national security issues and fears that economically damaging trade or travel restrictions will be imposed. The more aspirational Good Trust, with its emphasis on the common good—literally the good of the global commons—will be required if Kopelev's worst fears are ever realized.

D. Final Thoughts

We recognize that while this chapter has attended to the role of the law in advancing Küng's Global Ethic, we have just called for the centrality of Good Trust—a decidedly non-legal factor—to address the earth-threatening concerns of pandemics and bioterrorism. A key reason for this conclusion is that, while the authors are both lawyers, they also have advanced degrees in theology and religious studies. Even as we write about the importance of the law, the centrality of the spiritual is never far away. This idiosyncratic aspect of our authorship, however, merely reflects the greater necessity for the partnership that needs to take place between spirituality and the law. The relationship between law and religion, church and state, personal spirituality, and public regulation is, of course, a massive and contentious topic. Nevertheless, if these two social drivers do not work together, one wonders just how effective the human race will be in confronting the issues before it.

Dialogue among religious institutions—exactly of the kind by the World Parliament of Religions—that produce statements of principles such as the Global Ethic are crucial in this regard. If nothing else, such dialogue demonstrates to wider audiences the capability of different religious institutions to work together respectfully, a sorely needed message today generally, in

46 Parliament of World's Religions, "Declaration Toward a Global Ethic."

seeking ways to craft laws and principles that allow us to confront the complex, global issues before us. We also wish to propose other ways that help to create a platform for the integration of Good Trust with Hard Trust.

In his massive book, *The Better Angels of Our Nature*, Steven Pinker argued that human beings are much more peaceful than they were centuries ago. Wary of organized religion himself, Pinker attributes our increasingly non-violent behavior (which is not to say that human beings do not remain violent) to a general civilizing process, much of which is drawn from governmental regulation along the lines we have already noted. In addition, he notes the importance of other dimensions of civil society, such as improved education, as well as the arts, especially in the form of satire, humor, and literature that allow us to reflect on our behaviors and institutions in a way that more gently encourages us to change.[47]

Another factor that Pinker notes—gentle commerce—also resonates with us.[48] As professors of business ethics, we both respect the capabilities that business brings to the table to allow people to work together while also insisting upon a kind of business conduct that embodies not only Küng's Global Ethic, but also has been demonstrated to align well with peace. That is, ethical business behavior correlates strongly with anthropologically determined behaviors of relatively non-violent societies.[49]

To be sure, businesses can be greedy and insensitive. Yet, business also provides opportunities to bring people of different religions, nationalities, ethnicities, and ways of life together to work toward a common goal. While we would advocate for a common goal more noble than simply making money, the fact is that business provides a mechanism for trust building as well as the Global Ethic. Moreover, without the engagement of global business, we see little likelihood of the Global Ethic taking firm root.

There are many ways in which the law can support and advance the Global Ethic by building trustworthy partnerships. As we seek to find ways to more thoroughly advance these crucial efforts, we should not shy away from integrating Good Trust and Hard Trust by encouraging further dialogue among institutional religion, by looking to civil society and the arts to create platforms for civilizing ideas, and by partnering with business.

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47 Steven Pinker, *The Better Angels of Our Nature* (New York: Penguin Press, 2011).
48 Ibid.
49 Timothy L Fort, *Diplomat in the Corner Office: Corporate Foreign Policy* (Palo Alto, Calif.: Stanford University Press, forthcoming).

In Lieu of a Conclusion

Bradley Shingleton

The preceding chapters illustrate a diversity of intersections between law and the Global Ethic. They include aspects of the jurisprudential foundations of municipal and international law, the practical challenges of global health policy, and the articulation of theories of human rights. Obviously, other themes could also be addressed, such as those involving criminal law, property law, torts, the law of contracts, international economic law,[1] constitutional rights and duties such as the freedom of religious expression, and the role of religion in public life. Virtually every field of law has ethical ramifications, leading to the question of how the Global Ethic and law may impinge productively on each other. This concluding chapter does not attempt any kind of definitive answer this question. Nor does it seek to summarize the preceding chapters. Instead, it will limit itself first to identifying three themes that appear with frequency in the foregoing contributions, and second, to suggest areas for future work in exploring the reciprocal engagement of law and the Global Ethic.

A. Three Themes

Certain themes regarding the relation of law and the Global Ethic recur in the chapters in this volume: 1) the critically constructive role of ethical perspectives in the articulation and interpretation of legal norms, 2) the availability of the Global Ethic as a conceptual resource for law in its encounter with globalization, and 3) its mediation between pluralism and universality by means of commonality. I suggest here some ways each of these themes might be explored further.

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1 For an instructive example, see Hans-Dieter Assmann, "Weltethos und die rechtliche Ordnung der Weltwirtschaft" in *Wissenschaft und Weltethos*, ed. Hans Küng and Karl-Josef Kuschel (Munich: Piper, 2001), 84–126.

I. Ethical Norms and Legal Norms

Much contemporary reflection on law and ethics views their relation as contested. This is neither new nor surprising. As a social-political institution, law is subject to the division and conflict that marks political life in many countries. And ethical consensus on many fundamental matters, particularly in Atlantic societies,[2] is difficult to achieve and sustain. While aspects of law will be perceived as ethically salient—among them, the role of coercion with law, law's connection to justice, the nature of legal obligation—the conceptual relation between law and ethics continue to pose knotty problems.[3] Dworkinian interpretism, the most novel jurisprudential theory of the last decades, is as concerned with those problems as jurisprudential theories of previous centuries. Nonetheless, continuing attempts at interpretation and justification of the role of ethics in law (and vice versa) help to refine, incrementally, definitions and expose assumptions and insufficiencies of previous accounts. In that sense, accounts of the ethical dimension of law have a evolutionary quality.

The essays in this volume generally share a conviction that positivist theories of law neglect some of the essential dimensions of law, such as the nature of legal obligation and ethical obligation. Coercion alone is insufficient to justify legal obligation. This is particularly true in the international context in which coercive means of enforcement are absent or limited, and reliance for securing compliance is placed primarily on persuasion and censure.

In the view of most if not all of the authors, law is inherently normative.[4] Even varieties of positivism acknowledge this, though they may de-

2 The notion of "Atlantic societies" comes from Charles Taylor and refers to the post-industrial secularized countries on both sides of the North Atlantic. Charles Taylor, *A Secular Age* (Cambridge Mass.: Harvard University Press, 2007).

3 In his last major book, Ronald Dworkin refers to the positivist separation of law and morality as a "dead-end." Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press. 2011), 411.

4 In the view of Patrick Glenn, "law is perhaps the most normative of human endeavors." Patrick Glenn, *Legal Traditions of the World*, 3rd ed. (Oxford: Oxford University Press, 2007), 348. Theorizations of law reflect its normativity. According to Ronald Dworkin, " A general theory of law must be normative as well as conceptual." Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), vii.

scribe its normativity in modest or oblique ways.[5] If normativity is an intrinsic aspect of law, then analysis of norms is unavoidable. Robert Alexy has suggested that legal norms may be viewed in reductionist or non-reductionist terms. The former reduces norms to "nothing more than social and psychological facts such as regular patterns of behavior, expressions of will, compulsory measures, fear of sanctions, and feelings of guilt."[6] For Alexy, a non-reductionist account of legal norms rejects the claim that empirical considerations exhaustively account for their normativity.[7] Instead, it views norms as containing express obligations. Fundamental, primary norms contain more than declarative content; they "express directly what law is ultimately about."[8] In contrast, secondary norms are those norms that are "specifically juridical" and refer to primary norms.

While Alexy is referring to legal norms, a parallel distinction might be made with respect to ethical norms, especially as they relate to, and bear upon, law. Some ethical norms affect legal norms internally and relate to them more or less directly. These include norms like those described by Lon Fuller as constituting the "inner morality of the law."[9] Other ethical norms are more externally situated; they are operative in various non-legal spheres and exert indirect normative pressure on legal norms.[10] Though external, such norms are not arbitrarily imposed on law, rather they relate to the fundamental role of law as an aspirational institution. Several essays in this volume propose candidates for such external, primary norms. In their chapter, Fort and Perry contend that trust is fundamental in dealing with threats to global human health. (The parallels to environmental threats are evident.) Jochen von Bernstorff discusses the significance of dignity as an emergent element in human rights theory, and Brian Lepard proposes a notion of consensus grounded in diversity as a suitable criterion for the identification of

5 According to Andrei Marmor, "The general idea that the content of law cannot be detached from moral truth has gained considerable support even within the legal positivist tradition." Andrei Marmor, *Philosophy of Law* (Princeton, N.J.: Princeton University Press, 2011), 92.

6 Robert Alexy, "Norms-Law" in *Religion Past & Present,* ed. Hans Dieter Betz et al. (Leiden: Brill, 2010), v. 8, 206.

7 Ibid., 207.

8 Ibid.

9 Lon Fuller, *The Morality of Law* (New Haven, Conn.: Yale University Press, 1965), 41ff.

10 In my chapter above, Law, Principle and the Global Ethic, I attempt to account for these primary, external norms as "metaprinciples."

customary international law. Peter Kirchschlaeger indentifies philosophically based "subjective human rights" as an ethical component of legal reflection on human rights. These proposed primary norms are not fixed and definite but fluid and evolutionary. New candidate norms are and will continue to be generated by historical and cultural circumstances; recognized ones may require re-interpretation to remain viable. In both cases, the elaboration of norms draws upon a variety of analytical perspectives—historical, semantic, political, and ethical.

II. Interpretation and Paradigm Analysis

Law is intrinsically interpretive.[11] While the legal and the ethical are separate domains, they are related through the activity of interpretation. Interpretation inescapably involves value-laden determinations.[12] Values are ethically salient; in axiological theories of ethics, values characteristically possess normative status.[13] While legal interpretation traditionally delimits and circumscribes the sorts of values and norms that may be appropriately considered in a legal context, it is questionable whether a thoroughly consistent delimitation of this kind is, in fact, feasible. The primary objects of interpretation are words, and they are used in various contexts, including extra-legal ones. Words with an exclusively legal definition, without any non-legal application or meaning, would seem to be limited to technical terms. Instead, a word will normally contain overtones of usages in other semantic contexts. Many of these words are polysemous, and possess meanings that vary according to context, but are bound by some degree of commonality.

Obviously, how interpretation may be properly conceived and practiced is a complex matter. Without presuming to give an adequate account of it here, one can at a minimum plausibly contend that legal interpretation should not be indifferent to the ethical dimensions of the legal enterprise. These dimensions include the grounding of legal obligation, the meaning of sub-

11 As Kent Greenawalt writes: "Any legal system needs interpretation." Kent Greenawalt, *Legal Interpretation* (Oxford: Oxford University Press 2010), 113.

12 See generally, Richard Fallon, "Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And The Irreducible Roles of Values and Judgment within Both," *Cornell Law Review*, 99 (2014): 688.

13 J.N. Findlay notes that values stand in relation to imperatives "most readily expressed by some case of the auxiliary verb 'ought' or 'should.'" J.N. Findlay, *Axiological Ethics* (London: Macmillan, 1970), 9.

stantive and procedural fairness, the nature of basic rights, access to judicial systems, the potentially conflicting obligations of lawyers to advocacy and truth seeking. How these dimensions are defined and configured involves consultation of ethical norms.

Given the pluralistic circumstances of many societies and the impact of globalizing forces on residually homogeneous societies, some kind of transcultural and cross-traditional account of ethical norms is useful. Although textually minimalist and methodologically open-ended, the Global Ethic can nevertheless figure in that interpretive enterprise. It can contribute to deeper and richer notions of ethically salient legal concepts, such as good faith, trust, equality, and agency.

The fundamental elements of the Global Ethic—humanity, reciprocity, fairness, and truthfulness—are contained in the 1993 Declaration, but their meaning and application can and should be further developed. How? One answer to this involves conceiving the Global Ethic not only as a foundational text adopted by the 1993 Parliament of World Religions but also as a continuing comparative process. To be sure, comparative analysis is surrounded by a host of methodological questions, and Hans Küng's comparative research into the various "rivers" of religious traditions is not immune from them. Nevertheless, his efforts, based on paradigm analysis, suggests a possible approach.[14] It is essentially historical, yet also thematic and structural. It seeks to order vast complexes of thought and practice into evolutionary stages with distinctive characteristics.[15] It is applicable across traditions. His paradigm-oriented hermeneutic identifies certain essential ideas and practices of individual religious traditions in their evolution through various historical-cultural epochs, such as the Renaissance, Enlightenment, modernity, and post-modernity. This encounter gives rise to distinctive paradigms, which Küng, following Kuhn, defines as "total constellation of convictions, values and patterns of behavior."[16] Paradigms may overlap and coexist; they may conflict with each other within a given tradition, and they

14 The efforts are primarily documented in his trilogy on the Abrahamic religions carried out under the title "The Religious Situation of Our Time, as well as in earlier comparative works on Asian religions in Hans Küng, *Christianity and World Religions* (New York: Doubleday, 1987) and Chinese religion in Hans Küng and Julia Ching, *Chinese Religion* (New York: Doubleday, 1993).

15 Küng discusses theoretical aspects of paradigm theory in *Global Responsibility* (New York: Crossroad, 1991), 120–27; and in *Theology for The Third Millennium* (New York: Doubleday, 1988), 123–69; 209–226.

16 Ibid., 211. Küng here quotes Thomas S. Kuhn's definition of a paradigm.

dissolve. They have a "circular relation" to broader cultural factors: political, social, and economic; they influence, and are influenced by, religious tradition.[17] Of course, his analyses deal with religious traditions, not with law or ethics. But law and religion are both complex, socially conditioned phenomenon with normative dimensions. Indeed, Küng notes that the paradigms he uses encompass more than religion alone, but also law as well as other forms of social activity.[18]

A paradigm-oriented hermeneutic is certainly open to challenge on various grounds. Its implicit essentialism, even if based on the foundational texts of a tradition, will seem inherently dubious to some. Its understanding of the interaction between tradition and cultural context may be deficient for others. These and other reservations notwithstanding, a paradigm-centered methodology has its heuristic uses, as Küng's work has demonstrated. There is no inherent reason why paradigm analysis could not be applied to legal and jurisprudential materials. A paradigm-based schematic of jurisprudence could conceivably be developed that illuminates law's encounter with secularity, modernity, and pluralism. Two potential benefits for law and legal theory may result: 1) paradigm analysis would facilitate comparative analysis across legal traditions, providing a ordering structure for it, and, pertinent to the particular suggestions made above, 2) would furnish a framework for identifying and scrutinizing the constants and variables in the meaning of legally significant words and concepts.

Such an adaptation of Küng's paradigm theory could potentially give concepts such as dignity enhanced cross-cultural/inter-traditional dimensionality. While Küng has not, to my knowledge, done so, such an approach could also include non-religious, secular traditions.[19] That undertaking could help to illustrate the periodic and structural elements within a concept, and hopefully lead to broadened understandings that are more responsive to the challenge of pluralism than either relativism or fundamentalism.[20] While the

17 On Küng's paradigm method, see generally Hermann Häring, *Hans Küng: Breaking Through* (New York: Continuum, 1998), 279–323.

18 Küng describes his approach as being based on macroparadigms that "carry far beyond religion and have a determining influence on economics, law and politics, science, art and culture, all of society." Küng, *Theology for the Third Millennium*, 211.

19 See David Bederman, *Globalization and International Law* (New York: Palgrave Macmillan, 2008).

20 On the relation of relativism and fundamentalism to pluralism in connection with the Global Ethic, see Wilhelm Lütterfelds, "Viele religiöse Wahrheiten und ein Weltethos?" in Küng and Kuschel, *Wissenschaft und Weltethos*, 415–37.

results of such comparative analyses would not be directly applicable to judicial and legislative activities, they could be relevant to the interpretative processes involved in them. Moreover, comparative material of this kind is relatively scarce in jurisprudence, so thoughtful efforts to produce should be welcome. This notion of comparative research bears certain similarities to the enterprise of comparative law. As Markus Kotzur notes in his chapter, comparative analyses have a role to play in the articulation of legal norms that apply across traditions.

This kind of comparative analysis would ideally contribute to broader understanding of concepts shared by the legal and ethical domains, benefitting both. Further, comparative efforts of this kind should lead, reciprocally, to further articulation of the Global Ethic. It is in certain ways similar to a constitution, containing general norms and needed interpretation and application. It embraces many of the same concerns of law and justice: a just economic order, humane treatment of each person, and gender equality. The Global Ethic derives these values not from the constitutional commitments of a political community, but from the trans-communal, trans-national streams of diverse religious traditions. Like constitutional principle, they may also conflict. In that case, mediation and adjustment is necessary.[21] The Global Ethic, in short, should find in jurisprudence an exemplar of such an elaborative/developmental activity.

III. Interpretation and the Global Ethic

While paradigm analysis of this kind may or may not be forthcoming in the future, the Global Ethic, as it stands now, may contribute to the material available for use in the process of legal interpretation. Taken together, the

21 For example, Paul Hedges criticizes the Global Ethic for its unresolved tension between vagueness and specificity. In his view, it fails to solve the problem of mediating between principles and specifics. See Paul Hedges, "Concerns About the Global Ethic," *Studies In Interreligious Dialogue*, 18 (2008): 158. Of course, this is a challenge for any written constitution as well. Quite frequently, constitutions contain very broad conceptual language, such as references to dignity and personal development. Such language is not, per se problematic. Rather, it creates an abiding challenge of identifying and applying appropriate interpretive modalities. See generally, Philip Bobbitt, "Constitutional Law and Interpretation" in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Patterson (Cambridge, Mass.: Blackwell, 1998), 126–38.

foregoing chapters illustrate how the Global Ethic can serve to refine and enrich understandings of legally significant concepts. As a field of normative social-political activity, law is suited to consider and employ perspectives from the Global Ethic. Among other things, the Global Ethic emphasizes the interdependence of rights and duties. Hans Küng has stressed this from the outset of the Global Ethic project. It connects entitlement with obligation, and affirms their fundamentally reciprocal character. This contributes to a more rounded and adequate account of rights or obligations than free-standing conceptions of either of them. This complementarity is manifested in an array of legally significant concepts such as dignity (as explored by von Bernstorff), trust (analyzed by Fort and Perry) and consultation (examined in Lepard's chapter). This aspect is important and underappreciated in more rights-oriented versions of a global ethic. For example, Michael Ignatieff suggests that only a rights-centric concept of the Global Ethic is useful.[22] This is certainly true in that there is a vital connection between utility and enforceability. But rights are not free-standing and ungrounded. They are more adequately anchored when related, reciprocally, with duties. Of course, this should not dilute the autonomous dignity of rights.[23]

The utility of the Global Ethic as an interpretive reference is illustrated in several of the preceding chapters. As Fort and Perry demonstrate, trust has both legal and ethical aspects. While it has long-standing legal significance, trust also has an ethical resonance that is important, indeed indispensable, for the viability of legal measures taken to address threats to physical health that, like environmental threats, are oblivious to political boundaries. They afflict the human genus as a whole, and legal responses operative within conventional strictures of state sovereignty are conspicuously inadequate to confront them, while international organizations lack the reach of resources of nation-states. As the authors show, adequate responses to threats to health must and will have a legal dimension. But ethical imperatives will also be needed to underpin legal prescriptions. The perspective of national interest, just as that of self-interest of any limited group, must be complemented by concern for the community at large.

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22 Michael Ignatieff, "Reimaging a Global Ethic," *Ethics & International Affairs* 26 (2012): 7–19.

23 On this point, see Stefan Hammer, "Menscherechte–Weltethos–Menschepflichte," in *Weltethos und Recht*, ed. Anton Pelinka (Vienna: Lit Verlag, 2011), 35–48, who argues for the independent autonomy of rights, while not denying the relevance of duties.

Dignity as another ethical-legal construct that can be viewed in light of its evolution in meaning and significance. Jochen von Bernstorff provides an illuminating account of its development within the context of human rights theory. Of particular interest is how dignity became invested with expanded meaning and significance in the post-war era. But dignity is far from univocal in meaning and content. One commentator has noted the cultural variability of the substance of dignity, concluding that, "historical and cultural circumstances in distinct parts of the world decisively affect the meaning and scope of human dignity."[24] A recent empirical study confirms that dignity has increasingly appeared in constitutional texts worldwide, and is attained considerable recognition as a constitutional principle. The authors of the study nevertheless caution: "If its functions and applications become inconsistent and open to conflicting interpretations, it [dignity] runs the risk of losing its unifying force."[25] It would seem the thematic contents of the concept of dignity concept are not fixed but, to some extent, culturally contingent. Through its emphasis on the *humanum*, the Global Ethic is concerned with the specification of dignity's meanings. These are multiple and reflective of divergent contexts, but the Global Ethic's affirmation of the *humanum* and its implicate of dignity indicates the presence of a core connotation with interpretational significance, particularly for constitutional law.

IV. Globalizing Law

In addition to the theoretical concerns of jurisprudence, considerable attention is devoted in this book to the implications of the Global Ethic for international law and for human rights theory—both in its historical provenance and thematic contents. Both of these fields reflect the significant impact of globalization and pluralism on law. Of course, they are also deeply

24 Luis Roberto Barroso, "Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse," *Boston College International and Comparative Law Review 35* (2012): 391.

25 Doron Schulzinter and Guy Carmi, "Human Dignity in National Constitutions: Functions, Promises And Dangers," *American Journal of Comparative Law* 62 (2014): 490.

consequential for the Global Ethic.[26] Each is manifestly complex and multifaceted, and no adequate account of them can be attempted here. But given their significance within contemporary society and the Global Ethic, some observations are in order.

Globalization, a multifaceted, multidimensional aggregation of phenomena involving the transnational dispersion of economic, cultural, technical, informational and commercial activities, is indifferent to national boundaries.[27] It eludes the control of individual states and social units. While the permeable, diffuse quality of globalization enables greater human interaction, generates economic efficiencies, and creates cultural and educational possibilities, it also produces economic dislocation, environmental degradation, and the manipulation and evasion of national political and regulatory oversight, among other things.[28]

Globalization transcends nationally defined law and identity, rights, and responsibilities without wholly displacing them. It creates common areas of activity and responsibility, in effect, a transnational public sphere(s). It has had considerable effect on law, especially international law, by qualifying the traditional preeminence of national sovereignty and states as the principal actors and bearers of international law. Individuals, corporate entities, and non-governmental organizations increasingly have a role to play in proposing and developing international ethical and legal norms. Consequently,

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26 See generally, Hans Küng, *A Global Ethic for Global Politics and Economics* (New York: Oxford University Press, 1998), 157–68 (on globalization); and Küng, *Global Responsibility*, 19–2 (on pluralism).

27 Definitions of globalization abound. David Bederman identifies its crucial characteristic as consisting in the "widespread movement of people, ideas, money, goods and services across political frontiers, across oceans and other physical barriers and across linguistic, ethnic and social divides." Bederman, *Globalization and International Law*, 55. According to Horatia Muir Watt, globalization is a narrative, projecting a worldview, interpretable as reflecting neo-liberal policy choices and western modes of rationality. Horatia Muir Watt, "Globalization and Comparative Law," in *Oxford Handbook of Comparative Law*, ed. Mathias Riemann and Reinhard Zimmerman (New York: Oxford University Press, 2008), 580. According to John Witte Jr., globalization "is the process of compressing cultural time and space, of bringing persons and peoples of the world into increasingly regular interaction." John Witte, Jr. "The Spirit of the Laws, the Laws of the Spirit: Religion and Human Rights in a Global Era" in *The Spirit and the Modern Authorities*, ed. Max Stackhouse and Don Browning (Harrisburg, Pa.: Trinity Press International, 2001), 76.

28 For Küng's view of the ambiguous effects of globalization, see Hans Küng, *Wozu Weltethos* (Freiburg: Herder, 2002), 123ff.

there are impulses toward a broader understanding of identity and citizenship away from exclusively political notions defined by nation-states to more inclusive and universal ones ("overlapping identities"). This allows and indeed invites the development of incipiently universal norms governing both the responsibilities and rights of globally engaged actors. In short, by challenging the prevailing assumptions of international law, globalization has facilitated the introduction of new norms and modalities for the formation of international law.

These are broad and encompassing trends. One implication of them is an abiding tension between global and contextually specific legal norms. Some norms, such as those relating to fundamental human rights, are viewed as universally cognizable and transposable into existing legal regimes, both international and municipal. The rapid acceptance of human rights-related norms exemplifies this. Those norms, many promulgated in the post-WWII era, extended into new legal terrain. Other substantive areas of law were harmonized by international convention and similar mechanisms. One commentator has described these various kinds of "norm migration" into international legal space by means of the metaphors of harmonization, transplantation, and viral propagation.[29] At the same time, there has been residual resistance to such universalizing developments. This is rooted in an emphasis on the importance of localized contexts and circumstances. From this perspective, the universal transposability of legal norms is premised on the fallacy that the universal trumps the local.[30]

It would seem more accurate, however, to see both dimensions—the universal and local—as implicated in the development of legal norms reflective of, and responsive to, a globalizing era. Sovereign states remain a fundamental feature of international law.[31]

The Global Ethic instructively reflects a balance between the general/universal and the specific/circumstantial. It embraces the priority of tradition; its common elements are derivative of those traditions. But neither pole is dismissed; both are accorded significance in the formulation of the Global Ethic's criteria and directives.

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29 Roderick Macdonald, "Three Metaphors of Norm Migration in International Context," *Brooklyn Journal of International Law* 34 (2009): 603.

30 Ibid.

31 Bederman states: "I think the purported demise of the nation-State system is rather premature." Bederman, *Globalization and International Law*, 147.

In the face of globalization, the need for common ethical ground rules seems apparent. While critics may think them impossible, the ongoing effort to articulate them need not be abandoned. One source of basic, in many cases cross-culturally viable, orientating principles is religious traditions. As vessels of ethical and spiritual wisdom and practice, they embody, implicitly or explicitly, universalistic elements. Indeed, religion is inescapably concerned with the whole and the absolute.[32] At the same time, religious traditions can be defensive and colored by ethnocentric and dogmatic intolerance, and may fiercely maintain their boundaries against external influences.[33] Globalization can exacerbate the parochialism of religious traditions by triggering defensive reactions to its destabilizing effects. Nevertheless, religious traditions, like law and ethical norms, will continue to be influential in human societies. Both religion and law are normative structures.[34] As such, they will continue to bear upon each other normatively, notwithstanding the plausibility of sociological interpretations of them as partial systems.[35]

The significance of this, at least in part, is that legal norms responsive to a globalizing era can take note of the Global Ethic as a potentially useful resource for enhancing their ethical consonance. International law has long expressed certain central values; these have diversified and evolved over time. Epochal trends such as globalization challenge law to re-interpret them.[36] This is not to suggest that the Global Ethic is some kind of definitive point of reference for international law, only that it can be useful in the

32 Cf. Reinhold Niebuhr: "Essentially religion is a sense of the absolute." Reinhold Niebuhr, *Moral Man and Immoral Society* (New York: Scribners, 1932), 52.

33 For an interpretation of religion as "circles of constraint," concerned with boundary maintenance, see John Bowker, *The Sacred Neuron* (London: I.B. Taurus, 2005). Bowker writes: "The tension within religious systems is between those who insist on nothing but coherence with the designated source of authority as the designating mark of belonging truly or legitimately to the system, and those who seek to relate that source of authority to the new worlds in which humans successively live, in a way that allows those worlds to be a legitimizing part of that which is truly the case…." Ibid., 149–50.

34 James Davison Hunter states: "The distinction between law and religion as separate spheres of discourse … is overstated because, by necessity, both are infused with normativity." James Davison Hunter, " Law, Religion and the Common Good," *Pepperdine Law Review* 39 (2013): 1073.

35 Niklas Luhmann developed the notion of law as a partial system ("Teilsystem"); for thoughtful remarks on the limits of such a theory, see Wolfhart Pannenberg, *Grundlagen der Ethik* (Göttingen: Vandenhoeck and Ruprecht, 2003), 16–17.

36 See Bederman, *Globalization and International Law*, 193.

continual process of the re-definition and refinement of legal norms in ways more adequate to prevailing circumstances. Peter Kirchschlaeger's contribution illustrates this with regard to human rights. The Global Ethic's criterion of the *humanum*, he points out, serves as an orienting value that exerts a universalistic influence on legalistic tendencies in process of deriving concrete legal norms.

There are those, however, who dismiss the possibility of any kind of universalistic response to globalization. This skepticism is often grounded in the phenomenon of pluralism, and it is seen as a fatal hindrance to any universalistic undertaking.

V. Pluralism and Commonality

Hans Küng has identified pluralism as one of the constitutive elements of the contemporary cultural landscape.[37] Virtually every chapter of this book can be interpreted as engaging, in some way, with the pluralist challenge: how to negotiate multiplicity, whether of worldview, of ethical orientation, of religious affiliation. The fact of diversity prompts questions about the viability and authority of any single perspective. While the causes of pluralization are complex, they are abetted by the intensification and expansion of globalized information flows.[38]

The effects of pluralism are also evident in the legal realm. As a movement within jurisprudence, legal pluralism seeks to assess the overlap of legal systems ("hybridity") and to prescribe means to mediate it. It begins with the practical fact that legal systems often coexist within a single community or territory.[39] This takes the form of a multi-layered legal environment, with federal or national law superimposed on local law, of religious codes existing alongside civil law, of international soft law developing in parallel to state-centric international law. Some scholars extend its scope to include non-legal elements as well, such as social norms, that coexist with established legal

37 "We live in a time of accelerated secularism, radicalized individualism and increasing plurality of world-views." Hans Küng, *Handbuch Weltethos* (Munich: Piper, 2013), 64 (my translation).

38 See generally, Peter Berger, Brigitte Berger, and Hansfried Kellner, *The Homeless Mind* (New York: Vintage, 1973), 66–67, describing the pluralistic impact of exposure to communicational media on individual identity.

39 Ibid., 1158.

ones.[40] While legal pluralism is specific to legal contexts, it shares with culturally oriented conceptualizations of pluralism a notion of an implicit competition among differing claims upon, or options available to, persons.

For the legal pluralist, the key question is management of hybridicity or conflictual diversity. It is posed both to the Global Ethic and law. For the Global Ethic, it is also a question of the possibility of some modicum of ethical commonality among competing and often conflicting worldviews, whether religious, ethical, or secular. For law, it is a question of creating spaces for the interaction of multiple legal systems.[41]

One scholar of legal pluralism has described a polarity of responses to it; specifically, the alternatives of state sovereignty and universalism.[42] In international law, this polarity is identified, on the one hand, with "sovreigntism." This is reflected in the realist school of international law theory, with its focus on the practice of states acting according to their self-interest, and its consequential emphasis on positive law embodied in formal treaties, conventions, and other official state acts. The, other, universalistic pole is embodied by the idealist perspective, typically associated with liberal internationalism. It affirms the theological/natural law provenance of international law and asserts an intrinsic connection between moral obligation, legal prescriptions, and prohibitions. The aspiration of the universalist strand in international law, in the view of one writer, is inherently ethical: "A planetary ethic is the very point of the tradition."[43] Paul Berman has advocated a third alternative: a "hybridist" approach that seeks to overcome perceived deficiencies of sovreigntism and universalism by mediating among overlapping legal systems, largely through procedural mechanisms.

The global ethicist would likely be unsatisfied with the polar alternatives of sovreigntism and universalism. Though they relate to the field of international law rather than ethics, they have implications for the Global Ethic project. She would likely acknowledge the continuing significance of

40 See Gunther Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism," *Cardozo Law Review* 13 (1992): 1443; also see Andreas Fischer-Lescano and Gunther Teubner, "Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law* 25 (2004).

41 Paul S. Berman, "Global Legal Pluralism," *University of Southern California Law Review* 80 (2007): 1161.

42 Ibid.

43 Daniel Philpott, "Global Ethics and the International Law Tradition:" in *The_Globalization of Ethics*, ed. William Sullivan and Will Kymlicka (New York: Cambridge University Press, 2007), 17.

sovereign state actors in the international arena, while questioning the skepticism about the possibilities of universalism. Admittedly, the autonomy of state actors, enforceability deficits, and political/social/cultural diversity tend to impede the achievement and maintenance of consensus in international law, even partial and provisional consensus. But authority in international law depends to a high degree on cooperation.[44] The moral thickness described by Michael Walzer need not necessarily render consensus impossible or unlikely, provided that begins with act of diversity and seeks commonality within it.

The contributions of Peter Kirchschlaeger, Markus Kotzur, and Brian Lepard suggest that the Global Ethic is a reflective and empirical resource for identified commonalities across religious and non-religious traditions.[45] Further, some of the principles and directives of the Global Ethic can be considered profitably within the discourse regarding international law. This may sound modest, but it is not meaningless. As a particular body of law, international law is dependent on other prescriptive processes than are applicable to municipal law. It must confront a plurality of international actors claiming a significant degree of autonomy in the form of sovereignty. So it must allow for diversity while seeking commonality. As Lepard contends, the formation process of customary international law includes a notion of unity in diversity. This suggests that certain fundamental rights and duties exist across diverse legal systems. Second, such commonalities tend to broaden the process of forming customary legal norms, such that traditionally privileged actors (sovereign states) are joined by other groupings (NGOs, corporate bodies, international interest groups) in the process.

In this respect, international law shares some of the same characteristics of the Global Ethic.[46] Both reflect a foundational diversity, yet seek some degree of commonality within that context. A commonality-based ethic differs from a universalistic one in that it does not aspire to parallelism in its values and principles (assuming that is even possible), rather consonance

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44 Bederman, *Globalization and International Law*, note xix, 199.

45 For an interpretation of the Global Ethic (and other global ethical programs) as based on reflective and empirical grounds, see Yersu Kim, "Philosophy and the Prospects for a Universal Ethics," in *Religion and the Powers of the Common Life*, ed. Max Stackhouse and Peter Paris (Harrisburg, Pa.: Trinity International Press, 2000), 69–104.

46 For a suggestive analysis of this, see William P. George, "Looking for a Global Ethic? Try International Law," *Journal of Religion* (1996): 359–83.

and consilience. It allows for culturally relative instantiations of them, while at the same time maintaining that tradition-specific values of humanity, reciprocity, and fairness are fundamentally compatible if not commensurate. This is not to say that commonality is not, in a sense, inherently universalistic. It is and must be if it is concerned with what is shared. But this universalism flows from difference, rather than any kind of disembodied transcendentals.

B. Looking to the Future

Globalism, pluralism, post-modernity: these (and other) multifarious phenomena mark contemporary ethical and legal existence. Traditional understandings of legality, sovereignty, and authority are being critically scrutinized and challenged. This is nothing new; every era has posed such questions, sometimes more urgently, other times more obliquely. This volume has sought to identify some specific challenges, both theoretical and practical, to received notions of law's ethical dimensions. It has sought to relate them to the Global Ethic and discern some ways that it may interrogate prevailing assumptions about the ethical aspect of law and bring new (and at the same time, old) perspectives to bear on them. The contributions in this volume suggest that the ethical dimensions of law deserve heightened consideration, and that consideration repays the effort by opening up provocative perspectives.

Future work in relating the Global Ethic and law could take various forms. One may be the detailed analysis of certain legal concepts or doctrines of particular substantive or procedural significance. For example, the doctrine of *jus cogens* in international law; the role of equity in municipal law, and the content of fundamental constitutional rights to expression and association are a few candidates. In addition, particular fields of law could also be studied with respect to their assimilation of universal and particular elements and ethical implications. These may include jurisprudence (for example, cosmopolitan theories of law), environmental law, law of the sea, space law, and comparative law. There are obviously others.

Another area of future activity could involve critical engagement with other efforts to imagine a Global Ethic. In the more than two decades since the initial Declaration, a number of efforts have been made to envision and

conceptualize a global ethic or common morality.[47] Collectively, these efforts respond to a felt need for basic orienting principles in an increasingly pluralistic global environment. It would be self-defeating for these various efforts to become competitive or proceed without reference to each other.

The engagement of the Global Ethic and law should be, therefore, an ongoing one. It will likely, and appropriately, move in various and unanticipated directions. There is good reason to believe that at least some of those directions will be prove to be productive avenues of exploration for both of them.

47 For example, the Carnegie Council for Ethics in International Affairs recently commenced a multi-year program on a global ethic.

Contributors

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