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LESSONS FROM BOSNIA AND HERZEGOVINA: Human Rights Protection at the National and International Level

by Nils Rosemann (Jena)

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1. Introduction

Although I am using the terms ›democracy‹ and ›human rights‹ in my paper, I am not aiming to provide their absolute definition. However, whenever someone refers to contested concepts such as democracy or human rights in a particular context, an explanation has to be given as to what is to be understood by them. In recent years, the human rights discourse has gained currency in academic as well as popular usage. This must be differentiated from the substance of the human rights concept and its application.

In the following, I want to explore the interrelationship between human rights violations – such as in Bosnia and Herzegovina – and protection mechanisms at the international level as well as their underlying concepts. My main argument is that human rights abuses – caused by the failure of a state or nation to provide the protection of human rights within the borders of its sovereignty – elevates international human rights protection to a higher level.

To begin with, I will explain to what extent it is possible to discover the substance of concepts such as ›democracy‹ and ›human rights‹. Therefore, I will focus on some epistemological aspects in the context of human rights. Or to put it differently: What can we discover and by virtue of this, how does it determine our actions?

In the second part, I will come to my above-mentioned main thesis. Taking this as my point of departure I will focus on the war in Bosnia and Herzegovina and how it influenced the usage as well as the meaning of international human rights law; the extensive human rights abuses during the war and their concrete influence on international human rights protection mechanisms; the post-war society in Bosnia and Herzegovina, the evolution of the concept of democracy as put forth by the international community and the relationship between democracy and human rights; and the experiences of the reconciliation process in Bosnia and Herzegovina, linked to civil society. I will focus in particular on NGO's and their changing status under international law.

At the end of my paper, I will outline a few new unresolved cornerstones on the path the international community should follow since its engagement in Bosnia and Herzegovina; this concerns specifically the relationship of sovereignty and human rights protection or the role of regional military alliances in a world where a United Nations still exist.

2. Human Rights, Democracy and Epistemological Limits

Let me start with the assumption that our understanding of human rights is based on communication and discourse. To illustrate this, I would like to refer to one of the earliest explanations given by Plato with his parable of the cave: What we are able to recognize is not the real world, but its shadows reflected onto the opposite wall by the fire behind us. Human rights are nothing else than such shadows on the wall! What we understand under human rights is what the fire is illuminating. But I want to add two new arguments to the old Platonic theory: We influence the fire and we do not realize directly what we see.

If you remember, in the parable we are not allowed to turn back and see what is between the fire and the wall. But we are able to feed the fire. So what does the parable tell us about the impact of human rights abuses in Bosnia and Herzegovina? The answer I want to give is: We poured oil on the fire and discovered a lot about what human rights are or have to be. The discovery was a discourse about the pictures on the wall and it took us a long time to understand and interpret them.

3. Human Rights Abuses and Their Influence on Protection Mechanisms

Richard Rorty proposed a discourse of »telling sad stories« in order to recognize and understand the pictures on the wall. He argued that feelings are stronger than reasons[1]. It will not be a rational and reasonable state, but a civil society and its individuals, who are able to feel who will finally implement human rights and demand their protection by the state.

1 Rorty R.: Menschenrechte, Rationalität und Gefühl. In: Stephen Shute, Susan Hurly (Ed.): Die Idee der Menschenrechte. Frankfur/M.: Fischer 1996, p. 144 (p. 161) [Orig.l: On Human Rights. The Oxford Amnesty Lectures 1993. New York: Basic Books 1993.

As Ernst-Wolfgang Böckenförde – a former judge at the German Constitutional Court – formulated: The modern state transfers the mechanism of its own existence to civil society[2]. Therefore, it depends on civil society to encourage the government, the police and the politicians to act in conjunction with a »common sense« of humanity. To bring this anonymous mass of people called »civil society« to act in favour of the abolishment of human rights abuses, someone has to tell these sad stories. Someone must point to the pictures on the wall, to relive the parable of the cave.

Hence, the evolution of human rights is an ongoing process of practice and realisation. All human rights have the same common ground: human dignity. Nobody can create a human right; you can only grasp what human dignity means and because humans are forgetful, they codify these experiences as rights. Therefore, human rights are postulated only after elemental experiences of injustice[3]: The calls for freedom and the right to property manifested themselves because of their absence and unjust distribution in the feudalistic and absolutistic state. Demands for social justice as well as cultural and economic human rights arose from the undervaluation of labour, nature and culture under conditions of »free« competition and market powers. The requirement to grant human rights (for example, the right of development or peace) are just recent recognitions of colonial exploitation or the failure of the national and international community to prevent war[4].

The realisation and formulation of human rights require a secure environment, financial means and shared experiences.[5] Unfortunately, experiences world-wide are different, the national or international environment is far from being secure, money is always lacking and the discourse is under constant time pressure.[6]

Due to the available technology and the ever-increasing accessibility of mass media, ordinary citizens across the globe witnessed within their very own living rooms the massive extent of the human rights violations that occurred during the Bosnian war. Although the *Human Rights Conference* of Teheran[7] shifted the intellectual discourse from the period of formulation of human rights to the period of enforcement, it was only after the experiences in Bosnia that we realised what enforcement exactly implies: concrete action.

4. The Focus on Bosnia and Herzegovina

4.1. The War in Bosnia and Herzegovina and How it Influenced the Use and Meaning of International Human Rights Law

After Somalia the Bosnian case verified human rights violations as a precondition of »peace enforcement« under Chapter VII of the UN Charter. Therefore, the UN was obliged to act. Due to a lack of political will the enforcement was confined to disarmed observers in demilitarised and so-called »safe areas«. Since the enforcement measures were totally inadequate, the conquest of Srebrenica was pre-programmed. It discredited the UN and legitimised NATO involvement. This, however, had important consequences on the balance of power in terms of human rights protection between certain states and international organisations.

4.2. The extensive human rights violations in the war and their influence on the international human rights protection mechanisms

Until the early 1990's international law was understood as the law between states. Until then, international accountability related to human rights violations under international jurisdiction – or quasi-juridical procedures – had only been created by treaties, such as for example the *International Convention on the Elimination of All Forms of Racial Discrimination*[8] from 1966 or the *International Covenant on Civil and Political Rights*[9].

Irrespective of whether human rights have a wider ground in nature law, the protection had in the past been purely positivistic. What Jellinek stated a hundred years ago remained valid until recently: Obligations among states as well as their duties towards their own people were sovereign decisions of self-constraint (»Selbstverpflichtung«)[10]. The establishment of an International Criminal Tribunal for the former Yugoslavia under Chapter VII UN-Charter[11] was a fundamental change of thinking and practice towards protection mechanisms.

The other important change refers to the responsibility of individuals under international law. Indeed, in previous years individuals were more and more recognized under international human rights law. This recognition, however, proceeded from the opposite perspective: Indi-

2 Böckenförde, E.-W.: Die Entstehung des Staates als Vorgang der Säkularisation. In: Recht, Staat, Freiheit. Frankfurt/M.: Suhrkamp 1991.

3 Cf. Brugger, W.: Stufen der Begründung von Menschenrechten. In: Der Staat, Bd. 31 (1991), p. 20.

4 On third dimension rights cf. Riedel, Eibe: Menschenrechte der Dritten Dimension. In: Europäische Grundrechte-Zeitschrift (1989), p. 9ff.

5 Spaemann, R.: Glück und Wohlwollen. Versuch über Ethik. Stuttgart: Klett-Cotta 1989, p. 182.

6 Brieskorn, N.: Menschenrechte. Eine historisch-philosophische Grundlegung. Stuttgart, Berlin, Köln: Kohlhammer 1997, p. 157.

7 Proclaimed by the *Intern. Conference on Human Rights* at Teheran on May 13, 1968 (*Intern. Conference on Human Rights*, Tehran, April 12 - May 13, 1968) final act: A/CONF.32/41 (68.XIV.2).

8 Adopted and opened for signature and ratification by *General Assembly Resolution* 2106 (XX) of December 21, 1965, entry into force January 4, 1969, in accordance with Article 19.

9 Adopted and opened for signature, ratification and accession by *General Assembly Resolution* 2200A (XXI) of December 16, 1966, entry into force March 23, 1976, in accordance with Article 49 ICCPR.

10 Jelllinek, Georg: Die rechtliche Natur der Staatenverträge. Ein Beitrag zur juristischen Construction des Völkerrechts. Wien: Alfred Hodler 1880; Die Erklärung der Menschen- und Bürgerrechte. Ein Beitrag zur modernen Verfassungsgeschichte, Leipzig: Duncker u. Humblot 1895.

viduals as victims. For example, the *International Convention on the Elimination of All Forms of Racial Discrimination*[12] and the *Optional Protocol to the International Covenant on Civil and Political Rights* from 1966 granted a right to individual claim. But with regards to responsibility, the *International Criminal Tribunal for the former Yugoslavia* is the first institution since Nuremberg and Tokyo to prosecute individual perpetrators. Although there were cases under national law – like United States v. Calley[13] – almost all states refused to investigate war crimes. Instead they granted impunity.

Although a tribunal seeking for individual responsibility was regarded as important for the healing process within a post-war society its establishment under Chapter VII UN Charter was contested[14]. Therefore, the references in the Tribunal's statute to the principles of Nuremberg and Tokyo[15] served as a further justification on moral grounds.

To sum up the argument I have made so far: It was especially the lack of individual responsibility for human rights violations under national as well as international law that brought the international community to establish the ad-hoc tribunals for Rwanda and former Yugoslavia. The individualisation of guilt was a fundamental change within international law and practice.

Another link between Bosnia and international law is visible in the influence of the human rights abuses to the creation of the *International Criminal Court*. The genocide of Srebrenica led to the International Criminal Tribunal for the former Yugoslavia (ICTY) and this again accelerated the establishment of a permanent International Criminal Court under the Statute of Rome[16]. Although the idea of an *International Criminal Court* is not new as such, its final breakthrough came only with the tragedies in Bosnia and the work of the ad-hoc Tribunal. For those not familiar with the history, I will briefly delineate some facts:

The *UN General Assembly* in its *Resolution 95* (I) December 11, 1946, confirmed the principles of Nuremberg and Tokyo and instructed the *International Law Commission* (ILC) to draft an *International Criminal Code* and a *Statute of an International Criminal Court*.[17] The *Special Committee* represented the first outline of a Statute[18] in 1953 and the ILC drafted the *International Criminal Code* in 1954. The *General Assembly*, however, took notice without a decision. The ensuing dispute about the definition of aggression was so controversial that the whole process came to nothing. In 1991 – a springtime for international relations – the ILC drafted a new version of the *International Criminal Code*[19], and in 1994 it came to the second reading of the statute[20]. It is impossible to conceive of the creation of a *Permanent International Criminal Court* by the *Statute of Rome* without the experiences in Yugoslavia, Rwanda and within the ICTY.

4.3. The Post-War Society in Bosnia and Herzegovina, the Evolution of the Concept of Democracy as Put Forth by the International Community and the Relationship Between Democracy and Human Rights

Democracy is still a contested concept within international relations. The same is true for the definition of democracy under international law. Article 21 of the *Universal Declaration of Human Rights* from 1948 reads:

> The will of the people shall be basis for the authority of government, this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting.[21]

By this the count of ballots constitutes a democratic society and Article 25 of the *International Covenant* followed this concept on *Civil and Political Rights*[22]. This was convenient in a bipolar world, where fuzzy definitions opened the door for any »Realpolitiker«. The world was segregated into good and bad, free societies and dictatorships, capitalist and communist countries. And by definition they were labelled as democratic or undemocratic. But the cold war is over, gone are the Titos and Stalins (with some exceptions). Today we are dealing with Milosovics, Putins or Fujimoris – all more or less freely elected statesmen, who have committed crimes against humanity and still continue to do so.

In order to accommodate these new demands, the UN changed its understanding of democracy. The first shift to deepen the meaning of democracy to a matter of state structure and representation of the public will by sovereign people came by the *Reconstruction of Haitian Democracy* by the *Security Council* in 1994[23]. As resolutions by the *Security Council* are binding, further steps are taken by the *General Assembly* and the *Economic and Social Council*, the

11 GA Res. 827 (1993).

12 Adopted and opened for signature and ratification by *General Assembly Resolution* 2106 (XX) of December 21, 1965, entry into force January 4, 1969, in accordance with Article 19.

13 United States v. Calley, 46 CMR 1131, aff'd 22 CM 534 (1973). The American officer responsible for the May Lai massacre in Vietnam was condemned by an American court-martial.

14 Cf. Goldstone, Richard: 50 Jahre nach Nürnberg – Die internationalen Strafgerichtshöfe zum ehemaligen Jugoslawien und zu Ruanda. In: Nürnberger Menschenrechtszentrum (Ed.): Von Nürnberg nach Den Haag – Menschenrechtsverbrechen vor Gericht. Hamburg 1996, p. 57ff., here p. 59.

15 Such as: international, criminal responsibility; limited sovereignty and impunity; crime of aggression, genocide, partly annulations of the rule *nulla crimen sine lege*, necessity of a international Court for war crimes. – Cf. further Tomuschat, Ch.: Von Nürnberg nach Den Haag. In: Nürnberger Menschenrechtszentrum 1996, p. 93ff., here p. 94f.

16 A/CONF.183/9.

17 Cf. United Nations (Ed.): The Work of the International Law Commission. 4 1988, p. 140ff.

18 Cf. Report of the 1953 Committee on International Criminal Jurisdiction. General Assembly Official Records. Ninth Session, Suppl. 12 (A2654) 1954, p. 23.

19 Yerabook of International Law Commission 1991. Vol. II, Part. 2, p. 94

20 Report of the International Law Commission on the Work of its forty-sixth session, 2 May - 22 July 1994, General Assembly Official Records. Forty-ninth Session, Suppl. 10 (A/49/10), p. 43.

21 Adopted and proclaimed by *General Assembly Resolution* 217 A (III) of December 10, 1948.

22 Adopted and openedfor signature, ratification and accession by *General Assembly Resolution* 2200A (XXI) of December 16, 1966, entry into force March 23, 1976, in accordance with Article 49 ICCPR.

23 SC/Res. 940/1994.

Commission on Human Rights and the *World Conference on Human Rights* in Vienna 1993. Even if contested, these resolutions are made by a declaration of an already existing principle of democracy and are therefore binding. We might concisely state that we already have state practices of these principles, thus that even if they are only recommendations, we have to keep them in mind when defining a state or society as democratic.

As stated in Article 8 of the *Vienna Declaration* of the *World Conference on Human Rights*[24],

> Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutual reinforcing.

A resolution entitled *Promotion of the Right of Democracy*[25] from April 28, 1999 defined democracy as the right to choose its own form of governance, avoiding prescriptions and simplistic formulas. Governance, however, can only be democratic if it is based on human rights. The second resolution, entitled *Promoting and Consolidation of Democracy*[26] from April 25, 2000 discharged the newly invented definition of »democratic governance« and called for the consolidation of democracy by promoting pluralism, protecting human rights, maximizing the participation of individuals in decision making processes and so forth.

Therefore, a system can be called »democratic«, if there is a proper participation of people in the decision-making processes on those political, economic, social and cultural matters that concern them – whether they take place on local, regional, national, or international level.

To return to Bosnia: The experiences of the peace process and the ambiguous results of »multi-ethnic« elections in Bosnia as well as the participation of people in local communities are clearly a litmus test to and a demand of this enlarged concept of democracy. The constitution as laid out in Annex 4 of the *Dayton Peace Agreement* emphasised human rights as a precondition of a democratic state, even though the constitution was not appointed and legitimised by the people of Bosnia and Herzegovina. A »re-legitimisation« of the constitution will be followed by proper participation and empowerment to participate in public affairs.

4.4. The Experiences of the Reconciliation Process in Bosnia and Herzegovina and its Linkage to Civil Society

4.4.1. The Emerging Role of Non-Governmental Organisations

Due to the fact that the Bosnian and Herzegovinian civil society is deeply divided and does not legitimate existing institutions, the role assigned to non-governmental organisations (NGOs) had been newly defined. Within international law, there are only a few noteworthy provisions. One of these is Article 71 of the UN Charter, which recognises NGOs. The other refers to the consultative status of NGOs within the UN Economic and Social Council (ECOSOC)[27] and their role within the human rights commission under Resolution 1235 (XLII) from 1967[28].

The democratisation processes in Bosnia and in various other countries have taught us that the protection of human rights affords more than law and institutions. Human rights have to be implemented within and they have to evolve out of civil society. To match this concept with that of democracy, the role of NGOs needed to be strengthened. Hence, in weak and powerless states with an inhomogeneous society, human rights and NGOs may enable the implementation of democracy.

The same holds true at the international level. By strengthening the role of NGOs within the system of the UN, deficits of democracy may potentially diminish. The ECOSOC and the International *NGO Task Group on Legal and Institutional Matters* proposed a draft resolution about participation in the *General Assembly* that would grant consultative status to NGOs in almost all UN-bodies to the *United Nations General Assembly* at the end of June 2000. However, this process of legitimatisation by participation – nowadays called »governance« – takes the power-shift from governmental decisions to participation into account by new processes and rules, new institutions and regimes as well as new informal arrangements. Thus governance is the sum of many ways in which individuals and institutions, public and private, manage their common affairs, control resources and exercise power to achieve public purposes.

Nevertheless, civil society as a new-old actor and participant at the local, regional, national and international level has to be judged like the other legitimate actors. While the first sector – the state and its system of political, parliamentary representation – is accountable to their electorate and the business-leaders to their shareholders, civil society is accountable to their

24 A/CONF.157/24 (Part I) at 20 (1993).

25 E/CN.4/RES/1999/57.

26 E/CN.4/RES/2000/47.

27 Res. 1996/31: *Consultative Relationship between the United Nations and Non-Governmental Organizations* from July 25, 1996.

28 ECOSOC Res. 1235 (XLII) from June 6, 1967.

»stakeholders« – individuals – by transparency, high standards of performance and sustainability as well by a mediation of shared values with other interest groups.

4.4.2. The Recognition of Individual Guilt

There is another link between international protection mechanisms and the sphere of civil society: Since the ICTY is dealing with individual fraud, it has opened the door to a reconciliation process within civil society[29]. The ICTY paves the way for forgiveness of collective faults by shifting blame from entire nations and ethnic groups to individuals. However, as the ongoing discussion about a *Truth and Reconciliation Commission* in Bosnia and Herzegovina shows, a shift of responsibilities requires forgiveness – it is the process, not the goal. Taking this into account, the United Nations Secretary General said in his *Message for Peace and Reconciliation in Bosnia and Herzegovina*:

> The most difficult challenge is recovery from the human trauma and suffering – from the deliberate and planned massacres and atrocities against civilians. What this calls for is the judgement of those accused of war crimes, so that this can encourage reconciliation, the fundamental requisite for peace. [30]

Thus, the international community became aware that it was not only treaties based on protection of human rights or criminal prosecution that avoid human rights violations. Ordinary people and not an abstract state committed the crimes against humanity. Since the focus has shifted to the individual, the mechanisms of human rights protection have been enlarged by yet another dimension: Human rights education. When the *General Assembly* proclaimed the *United Nations Decade for Human Rights Education* with its resolution 49/184[31] on December 23, 1994 it pointed to the interrelationship between implementation of human rights as well as education and sensitisation of all parts of civil society. Therefore, the scope of Article 26 of the *Universal Declaration of Human Rights* had been broadened from the right of basic or primary education to the right of life-long education that also contains human rights education.[32]

5. Lessons and Conclusions

The entire development of international law and international human rights protection is a movement and counter-movement between international actors such as the United Nations and individual states. The increasingly vocal proclamation of human rights, related to ongoing violations of these fundamental rights stands for a loss of national sovereignty and a shift to international actors. These actors draw on hidden and contested concepts. These in turn influence international law as well as national practice as in Bosnia and Herzegovina.

On the one hand, lacking legitimation of almost all international actors raises the recognition of NGOs as part of an emerging international civil society. And on the other hand, recent personal tragedies have put individuals – as victims or perpetrators – on the international agenda. Whether as a subject of human rights education or an object of international, criminal responsibility, individuals cannot hide behind states anymore.

So do we have to conclude, somewhat cynically, that we need the sad stories such as from Bosnia and Herzegovina in order to climb up the ladder of human rights protection? Before I answer with »Yes« or »No« I want to draw a parallel to the German history of gross violations of human dignity that finally gave rise to the imperative of »Never again« – or as we say in German: »Nie wieder.« On the one hand, we will still have to listen to sad stories, but on the other hand, we currently experience a dramatic change of international law and practice that may lead to more respect of human rights.

I also want to mention a contradiction that is part of this dramatic change: The UN system and its human rights provisions were put in place in order to outlaw war. The NATO intervention in Kosovo, however, instrumentalised human rights arguments in order to punish the outlaws by waging a war.[33] The old concepts of sovereignty and »internal affairs« have been seriously challenged by recent events. But what will fill the gap? Let me project a vision from an unashamedly idealist point of view. It is a vision stemming from an NGO-coalition that is able to foster international humanitarian and human rights law, accompanied by a broad civil society movement. On the banners you will read: »Fulfil the promises of Article 47, Chapter VII UN Charta«. This article reads:

29 Fatic, Aleksandar: Reconciliation via War Crimes Tribunal? Aldershot: Asgate 2000, p. 9.

30 Press Release SG/SM6168, February 26, 1997.

31 A/RES/49/184.

32 Preliminary report of the Special Rapporteur on the right to education from January 13, 1999, E/CN.4/1999/49.

33 Johnstone, Diana: Humanitarian War: Making the Crime Fit the Punishment. In: http//www.emperors-clothes.com/articles/Johnston/crim.htm

> There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.

Although this Article is 55 years old, it has never been implemented. Instead, states and military alliances – like NATO – are claiming a right to war. Civil society organisations should receive sufficient funding in order to organise and support the implementation of this article and further human rights codes as well as UN resolutions. The vision will be communicated in different languages and in different parts of the world. And the discourse has already started – in Konjic and elsewhere.

Nils Rosemann, b. 1969; Attorney of Law and former Research Associate for Human Rights Education at the German Inst. for Human Rights; PhD Candidate at the Dept. of Law of Friedrich-Schiller-Univ. Jena. Publications on water privatization in Manila, human rights education, ethnic prejudices, and racism.
Kontakt: human-rights@rosemann-online.de