

# Justice, Legitimacy and Supranational Institution-Building

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## A. Introduction

This article presents a normative theory of politics based on fundamental ethical-anthropological values that are united in the notion of justice. First, I will discuss a normative concept of private and public interests providing criteria for the distinction between morally legitimate and morally illegitimate interests involved in the process of political decision-making. Second, I will outline the consequences of this concept for supranational institution-building in the framework of globalization. This way I will elaborate the central point of my theory: the differentiation between democratic and moral legitimacy. I will address topics such as national autonomy and human rights, communitarianism and universalism, as well as economy and global government and I will relate these subjects to my concept of interests in order to provide a solution for the problems to which they refer.

## B. Justice and Public Interest<sup>1</sup>

My concept of interests is a hierarchical one. Ideally, interests can be conceived as a pyramid at the top of which stand the most fundamental interests of individuals, i.e. interests that emerge from basic needs and which all human beings have in common. Thus, these private interests can be derived from scientific anthropology. Close inspection makes it clear that the basic goods, which fundamental interests aim to achieve, are intrinsic values. Fundamental interests, such as the interest in private autonomy, in not falling victim to violence and suppression, getting adequate nutrition, clothing, housing and education, entered international law with the adoption in 1948 of the United Nations Universal Declaration of Human Rights<sup>2</sup>, which, over time, has been supplemented with several UN conventions and declarations.<sup>3</sup> Corresponding to fundamental interests, human rights include not only negative rights but also

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<sup>1</sup> I am grateful to Peter Koller and Christian Hiebaum (Institute of Philosophy of Law, University of Graz) for instructive comments on the definition of justice and public interest.

<sup>2</sup> See <http://www.un.org/Overview/rights.html>.

<sup>3</sup> See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/chapterIV.asp>.

positive rights, the so-called rights of subsistence. There are good reasons to connect these two kinds of rights. Requirements of subsistence are a logical consequence of – or even a prerequisite for – negative rights, which often are considered to be more fundamental and more important than positive rights. This observation is, however, wrong. For example, a person who starved to death can no longer exercise or demand any rights at all. From the perspective of interests it is evident that the interest not to starve is not less fundamental than the interest not to be tortured. The crucial point is, of course, how far-reaching are the duties that correspond to both negative and positive human rights.

I will return to this matter later and will continue the classification of interests.

The chance for individuals to pursue their fundamental interests is a rule of justice. Therefore, in my concept, justice stands for the universal fundamental interests which I placed at the top of the pyramid of interests. The middle of the pyramid consists of the particular interests of separate political communities. These interests are addressed by the *bonum commune* or, as I shall call it, the public interest. Whereas justice is based on intrinsic values derived from anthropological knowledge and thus represents an ethical perspective, the public interest implies a more political or legal perspective, as a result of complex sociological, historical processes and power struggles. Finally, at the bottom of the pyramid we find private interests that are either neutral with regard to justice and the public interest or in conflict with at least one of them. A conflict is, of course, also possible between fundamental interests united in the notion of justice and public interest. The seriousness of such a conflict depends on the extent to which the demands of justice are taken into consideration when the political community in question defines its public interest by democratic discourse. An ideal example would be a community where fundamental and public interests are largely overlapping. Ideally, the public interest would comprise all the fundamental interests; in this ideal case, fundamental interests are a subset of the public interest. In reality, however, conflicts between demands of justice and the public interest will never be settled definitively.

At this point, I have to stress that the difference between justice and the public interest is *not* that the former is an ideal category and the latter merely represents reality. I am still dealing with interests and will turn to the realization of these interests by means of legislation later in the article. What is important to note here is that public interest remains an unattainable ideal for the political community concerned, since there will always be members of the community unwilling to behave in accordance with the public interest. How can justice then be distinguished from the public interest? The public interest contains not only all demands of justice, but also covers cultural and other contingent interests of a specific community. Although the latter interests are not fundamental interests they may, nevertheless, play an important role for the identity of the community in question. These contingent interests are either neutral with regard to justice or – as is often the case in reality – in conflict with it. The possibility to pursue some of these interests (those that are morally legitimate) is a fundamental

interest since it is placed on a more basic level compared to concrete interests, for example, the concrete interest in publishing a novel.

I just mentioned the criteria of moral legitimacy. This condition lies at the core of my concept and is useful to illuminate the hierarchical structure of the pyramid of interests described above. It underlines simultaneously the importance of a coherent concept of interests for both ethical and political theory and practice.

A distinction can be made between morally legitimate and morally illegitimate interests. Interests that are diametrically opposed to the demands of justice are morally illegitimate, while interests which are either neutral with regard to these demands or in accordance with them are morally legitimate. That is why fundamental interests united in the notion of justice are placed at the top of the hierarchy of interests and have the normative quality of drawing the line between morally legitimate and morally illegitimate interests. The public interests, however, do not have this normative quality in a moral sense, but in a legal sense. The public interest determines legal legitimacy in a particular community. Yet, one should bear in mind that the public interest itself is – at least in the ideal case – largely determined by fundamental interests. The public interest is by definition limited to a single community with its specific cultural and historical background. Thus, the public interest represents a communitarian concept. It is, of course, also possible to define legal legitimacy universally, i.e. with respect to all communities. Legal legitimacy then corresponds to moral legitimacy, because in this case contingent factors of culture and history are not taken into consideration.<sup>4</sup> From these comments follows the idea that universalism as such does not stand in the way of communitarianism – provided that the latter is morally legitimate. To a certain degree universalism based on fundamental interests even promotes the communitarian interest in self-determination and identity building, as long as this interest remains positive or neutral and does not become negative regarding the demands of justice.

My concept of interests actually differentiates between four groups: (1) fundamental interests (or demands of justice); (2) the public interest (i.e. the *bonum commune*); (3) interests not belonging to these two groups but being nevertheless in harmony with both of them; and (4) interests not belonging to the first two groups, which cannot be reconciled with at least one of them. Examples for group four are to kill somebody out of anger or to keep somebody from speaking his mother tongue. The last two groups contain private interests that are not of a fundamental, anthropological nature and, therefore, cannot be universalized. It can be argued that the first three groups of interests are – still in the ideal case – morally legitimate whereas the last one is not. In reality, of course, some elements of the public interest could be morally illegitimate. There

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<sup>4</sup> I have to clarify that, in the context of this article, ‘legal legitimacy’ is more than ‘lawfulness’. The former implies a procedure of collective decision-making similar to the democratic one, whereas the latter is independent of the political structure of a specific community. The criteria of lawfulness can also be met in a crudely totalitarian state.

are not only conflicts between at least one of the first three groups on the one hand and the last group on the other hand, but also between group one and two. In the latter case, when justice and the public interest collide, the fundamental interests take priority over the public interest. If a community or its governing elite is not willing to comply with the demands of justice, civil disobedience may be a duty for the members of the community concerned, especially in cases of massive and continuous violations of fundamental interests acknowledged as human rights. The legitimacy of civil disobedience emerges from those fundamental interests that are not covered by the public interest of a community.

At the end of this paragraph I want to mention that conflicts do not only exist between groups of interests but also within these groups, e.g. between different fundamental interests. Although I am aware of the importance and necessity to deal with these internal conflicts within groups of interests, it will not be covered in this article.

### C. Organized Crime and the Rule of Law

A political community usually takes the form of a (national) state. Essential features of the state as a legal order are firstly, the monopoly on the use of force and the capability to enforce rights by sanctions; secondly, collective decision-making and acting (in some states this is democratically arranged), i.e. the authority to regulate certain fields of social life by law and to equip government officials with appropriate power to do their job; and thirdly, the institution of membership, which leads to the distinction between citizens and foreigners. This follows from the fact that the competence of a state is limited to its territory.<sup>5</sup> These three characteristics of states are closely linked to one another and can be united in the notion of sovereignty. In this paragraph, however, I will concentrate on the third characteristic of states in order to shed light on the difference between organized crime and the rule of law, which is more subtle than it may appear at first sight.

The institution of membership has serious consequences for the willingness of states to take different interests into account. States tend to grant privileges to their own members not only in a justice-neutral, specific area of the public interest, e.g. in the sphere of culture, but also in protecting the fundamental interests of their citizens. This is not surprising, since due to its territorial limitations each state is originally only responsible for its own citizens. Otherwise, by extending their competence to foreigners, states could encroach upon the sovereignty of another state. Still, the borders between states are not hermetically closed. On the contrary, there is a lively international exchange at

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<sup>5</sup> For the legal-political characterization of the state see G. Kohler, *Weltrepublik, Vernunftnotwendigkeit und die 'Garantie des ewigen Friedens'*, in S. Gosepath & J.-C. Merle (Eds.), *Weltrepublik, Globalisierung und Demokratie* 165-180 (2002); O. Höffe, *Demokratie im Zeitalter der Globalisierung* 95-125 (1999); J. Habermas, *Faktizität und Geltung* 167-171 (1994).

almost every level of life. Total political autonomy of all communities can only be morally legitimate if states are completely separated and each state equally considers the fundamental interests of its inhabitants – a condition which is apparently unfulfilled. Namely because of the phenomenon of globalization which goes back several thousand of years, to the first migration of peoples or even to the first occurrence of expansionism and of inter-ethnic exchange of goods in history. In fact, one could say that this phenomenon is actually as old as mankind itself. It seems therefore reasonable to claim that globalization results from the anthropological facts of the human need for cooperation, the natural lust for power and the universal curiosity of mankind. Globalization as such is unavoidable and irreversible; and it makes no sense to oppose it since it is not possible to change the fact that people and states live side by side on the globe. The challenge for political theory and practice is, of course, to reduce the negative effects of globalization and to make it morally legitimate.

The question arises, what the influence is of globalization and other forms of loose interdependence between nations on the institution of membership that has been fixed as one of the main characteristics of states and as a pillar of sovereignty.

From the inner perspective of a political community, it is rational to pursue economic and military expansionism in order to increase the prosperity of its own members, even if fundamental interests of non-members are being neglected. Such utility-based and egocentric policy-making is typical of both democratically elected governments as well as totalitarian regimes. In addition, the latter tends to ignore the fundamental interests of their own citizens too. A good example of expansionism on both the economic and the military level of a democratic state is the foreign policy of the United States. It is characterized by reckless exploitation of natural resources and bloody interventionism. This started in the middle of the 19<sup>th</sup> century in South America and continues at present (directly or indirectly) in different parts of the world, most evidently in Iraq. Multinational corporations based in the European Union do not always behave in accordance with European moral standards either, both abroad and sometimes even in their home country. And Russia makes use of the old Stalinist method to pacify nations, as shown in Chechnya.

These examples demonstrate clearly that the democratic structure of a state cannot guarantee its peace policy towards foreign nations and its willingness to accept the demands of justice with regard to foreigners. Yet this insight is in stark contrast to the political conceptions of two prominent theorists: John Rawls and Jürgen Habermas.

In his work entitled *The Law of Peoples*, Rawls sets up the notion of democratic peace and explains that liberal constitutional democratic communities are peace loving and just. He defines these communities as having a basic structure which satisfies certain requirements, like equality of opportunity, a decent distribution of income and wealth, provision of basic social and health care as well as public financing of elections.<sup>6</sup> Rawls says that

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<sup>6</sup> J. Rawls, *The Law of Peoples* 44-54 (1999), at para 5.

the duty of democratically arranged communities is to assist other societies that suffer from totalitarianism or other economic burdens: “[i]n the society of the Law of Peoples the duty of assistance holds until all societies have achieved just liberal or decent basic institutions.”<sup>7</sup> Thus, Rawls concentrates on the basic structure or the primary institutions of communities respectively states as the basic criteria for a peaceful state environment. He neglects the different ways of policy-making that are possible within this structure; especially the possibility of democratically legitimized economic or military expansionism. Collective acting of a community, which violates fundamental interests of non-members, cannot be excluded by any degree of domestic welfare and democracy.

The complex political conception of Habermas is in several respects analogous to that of Rawls. Habermas too deals with the structure of states and with institutional requirements, which the democratic procedure of decision-making in his opinion should meet. His whole discourse theory is actually based on the assumption that in our so-called post-metaphysical and pluralistic times, the only acceptable source of legitimacy is the discursive procedure of democracy.<sup>8</sup> Thus, for Habermas, those rules and acts are legitimate in which persons with a free will can agree to a proposition or solution in a rational discourse under conditions of equal opportunities for access to public communication. I cannot go into the fundamental issues of rationality and public communication here. I must, however, underline the extraordinarily important and, at the same time, very dubious role of today’s mass media in influencing and forming public opinion and the more or less democratic decision-making all over the world. Habermas points out crucial requirements of true democracy, yet there is a problem that his conception cannot solve. Habermas says

[w]e may find good reasons for human rights as *moral* rights; however, as soon as we conceive them as components of *positive* law, it is obvious that they may not be forced on a sovereign legislator.<sup>9</sup>

The basic principle of democracy is that the addressees of law are at the same time the authors of it. On the one hand, the principle of sovereignty would be ignored, if a politically autonomous community had to accept and adopt human rights coming from outside of its territory. On the other hand, it is evident that no community should be allowed to make decisions, which do not comply with human rights, i.e. with the fundamental interests. Habermas solves this dilemma in the following way: the discursive-democratic procedure of self-legislation can only be realized if individual basic rights like human rights are incorporated in law. Hence, in the conception of Habermas, the members of a community cannot change the constitutional structure of their state despite full legislative autonomy. In other words: a democratic state has full sovereignty towards all other states, whereas its citizens are only autonomous within the framework of

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<sup>7</sup> *Id.*, at 118.

<sup>8</sup> See, e.g., J. Habermas, *Faktizität und Geltung* 662-664 (1994).

<sup>9</sup> *Id.*, at 670; own translation, emphasis in the original.

the constitutional system, since this political system guarantees the human rights in the form of basic rights. The assumption that democracy implies human rights is an elegant solution to the dilemma of democracy versus human rights: elegant but not convincing. This is true for logical reasons, democracy as a *formal* criterion – as interpreted by Habermas – of the political decision-making process just cannot serve as a guarantee for *normative* outcomes conforming to human rights. This theoretical statement is confirmed by empirical facts as the examples mentioned above show. Even a formal interpretation of democracy presupposes, of course, some normative assumptions, in particular the assumption of individual autonomy that belongs certainly to the group of fundamental interests.<sup>10</sup>

From this follows the requirement that human rights as part of fundamental interests are also relevant and topical for democratically organized states. Thus, it is important to distinguish between legal and moral legitimacy. Legal legitimacy, which is met by democracies, does not necessarily imply moral legitimacy. The latter alone makes political systems compatible with justice. The criterion of legal legitimacy as I use it refers to the procedure of decision-making, whereas moral legitimacy means that the outcome of this procedure and the community actions are in accordance with the fundamental interests of all. Aurelius Augustinus poses the following question that illustrates very well the great importance of this differentiation: “[w]hat else are empires, if they lack justice, than big gangs of robbers?”<sup>11</sup> Indeed, states that violate the fundamental interests of non-citizens have to be regarded as criminal organisations. Like constitutional states, criminal organisations have (mostly non-codified, but strict) social rules, which regulate the conduct of their members. From an insider’s perspective the rules may even be just, as they take the fundamental interests of the addressees into consideration. Certain criminal organisations as the Mafia in Sicily even offer social security to their members; something many states are not able to do. My intention is not to make propaganda for criminal organisations but to demonstrate that the only distinguishing factor between organized crime and the rule of law in a broad sense (i.e. including moral requirements), is the way criminal and political communities respectively treat non-members. This means that communities have to consider the fundamental interests of non-members in addition to those of their members. This holds especially true if they claim to be a constitutional state in a broad (also moral) sense and do not want to participate directly or indirectly in organized crime. It is, however, not only possible, but also

<sup>10</sup> For a more comprehensive discussion of this issue, see my German essay M. Joób, *Gemeinwohl als Grundlage globaler Gerechtigkeit*, in J.-M. Bonvin, G. Kohler & B. Sitter-Liver (Eds.), *Gemeinwohl – ein kritisches Plädoyer. Bien commun – un plaidoyer critique* 209-229 (2004). I demonstrate the difference between so-called procedural (formal) and substantial (normative) theories, which is nothing more than that procedural theories in an unjustified way grant privileges to the fundamental interest in autonomy and falsely claim the moral neutrality of a principle based on this interest, whereas substantial theories tend to consider all fundamental interests and thus meet the central criterion of moral legitimacy.

<sup>11</sup> Augustinus, *Vom Gottesstaat*, transl. by W. Timme (1977), at 173; own translation.

probable, that in most democratic states a majority of people value the state's domestic prosperity as more important than its moral status on the international level. Moreover, there will always be populist political parties, ready to take advantage of this general feeling in order to increase their own economic and political power regardless of victims abroad. Hence, the main problem of democracy is that the circle of persons proclaiming the rules is usually not identical but much smaller than the circle affected by the rules. As a result, the rules may be advantageous to the authors and simultaneously discriminate against a part of the addressees. That is why I have introduced the term 'rule of law in a broad sense', which is equivalent to 'constitutional state in a broad sense' or 'democracy in a broad sense' and includes the moral components we generally assign to these terms when we use them. The moral components covered by the broad sense of these terms are, what I call 'moral legitimacy' in contrast to 'legal legitimacy', which implies a narrow sense of democracy and rule of law expressing the formal, procedural character of these ideas. Yet it is obvious that democracy in a narrow sense, i.e. democracy as a technique only, cannot meet the normative requirements usually imposed on this kind of political system. This can be seen in the example of the requirement of a *bonum commune* that really is common because democracy alone permits a majority to discriminate against a minority within its own community and against a small or even very large group of non-members. The only way to avoid such malfunctioning of democracy is to expose it to moral legitimacy and the demands of justice.

In the public political discourse of democratic states, multitudinous different interests collide. From my remarks above follows that moral legitimacy does not result from a compromise of all these different interests, but from the right, i.e. morally legitimate, interests. Hence, a political theory that wants to handle both democracy and justice as well as sovereignty and human rights depends on a concept for evaluating interests, otherwise it cannot be regarded as a proper normative theory. That is why I have designed the pyramid of interests with a clear hierarchical structure at the beginning of this article. Due to a lack of an evaluation of interests, the theories of Rawls and Habermas are simplifying the complex connection between the individual and collective autonomy on the one hand and morality on the other hand.

## **D. Secret Services and Multinational Corporations**

The Central Intelligence Agency (CIA) of the United States formulates its 'mission' in part as follows:

We support the President, the National Security Council, and all who make and execute U.S. national security policy by: [...] Conducting counterintelligence



activities, special activities, and other functions related to foreign intelligence and national security as directed by the President.<sup>12</sup>

I shortly want to point to the general contrast between the democratic need for informing the public about the activities of the state's machinery and the secret character of intelligence agencies' work. Secret services are widely exposed to attempts of powerful political groups who misuse them for the pursuit of private interests that are detrimental to the morally legitimate public interest (thus including fundamental interests) of other communities or even of their own community. For the following issue, I will refer to the counter-intelligence activities mentioned by the CIA as an important part of its mission. Counter-intelligence, of course, is a central task of all secret services in the world, not only for the CIA. I do not want to question a state's right to pursue counter-intelligence, as national security is certainly a morally legitimate interest of all communities. Still, the worldwide need for this defence activity is a sign of a global struggle for secret information, i.e. economic, industrial, and military espionage.<sup>13</sup> An information war is conducted in the non-public covert departments of intelligence agencies, a continuous war that cannot be won, but in which one party can take the lead for some time and in certain fields. Whether a party is lagging behind or leading in this information war can have a considerable effect on the economy, the sovereignty, and the international influence of the community concerned.<sup>14</sup> Direct victims of this war are, for example, the so-called 'ghost detainees' of the CIA around the world.<sup>15</sup>

Yet, states (including the democratic ones) fight each other – not only in the field of collecting information, but also in the broad field of the economy. This has become especially significant in the last two to three decades due to an increasingly rapid globalization. The dictatorial, unequally liberal economic policy of the World Trade Organisation (WTO), as well as the demise of the static world order of the Cold War, followed by the economic opening up of the Chinese Empire, of the former satellite states of the Soviet Union, and the states of the former Soviet Union, has led to an extremely harsh competition between the different economic and social systems in our world. Thomas Pogge stresses the significant role of the WTO in making competition unfair and disadvantageous for the poor countries of our world:

My complaint against the WTO regime is not that it opens markets too much, but that it opens *our* markets *too little* and thereby gains for us the benefits of free trade while withholding them from the global poor. I see the appalling trajectory of world poverty and global inequality since the end of the Cold War as a

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<sup>12</sup> See <http://www.cia.gov/cia/publications/facttell/vision.html>.

<sup>13</sup> The fact of international espionage is admitted in the Report of The Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction of 31 March 2005, which is in part classified.

<sup>14</sup> See P. Todd & J. Bloch, *Global Intelligence* (2003).

<sup>15</sup> See Human Rights Watch Briefing Paper, October 2004.

shocking indictment of one particular, especially brutal path of economic globalization which our governments have chosen to impose.<sup>16</sup>

The arms race has been replaced by a race to the bottom in the field of taxes and social services. This took place after the quite rigid bipolar balance of power changed into the North American hegemony in a liberalized multipolar world order. Even if, due to both terrorism and the excessive intervention of the US government, the military power of states and the quality of their intelligence agencies are at the forefront on the international level, the economic perspective remains generally decisive.

The new centres of decision-making, besides democratically elected parliaments (or omnipotent elites in totalitarian states), are the governing boards of multinational corporations, employed by investors. Especially for democracies (I shall confine myself to this group of states) globalization involves serious problems.<sup>17</sup> In the previous section I mentioned three features of the state as a legal order. Firstly, the monopoly on the use of force, including the enforcement of right-conformal behaviour; secondly, the democratic collective decision-making and acting; and thirdly the institution of membership. I already discussed the specific moral requirements regarding the third characteristic of states. These universally valid requirements only gain in importance if there is a minimal degree of transnational interdependence, i.e. if the group affected by a state's or its members' acting is not identical with the citizens of the state in question (which is a given in our globalized world). I now want to focus on the second characteristic of states. Undemocratically organized and thus non-legitimate multinational corporations, the so-called global players, are competing with democratic states in the field of decision-making. Competition was originally confined to the economic field, but has extended to other fields. States with a free enterprise or social market economy depend highly on corporations for the creation and preservation of jobs and payment of taxes. Because global players are in a position to change their residence or that of their subsidiaries in a very short time, states compete with one another to offer better economic conditions to the global players. The result of this competition is twofold. On the one hand states offer increasingly lower tax rates to investors which effects the level of social services as these are financed from the tax revenues. On the other hand, despite this trend, it increases unemployment in countries with a high social standard. In fact, government officials execute the will of multinational corporations and their share holders and do not pay adequate attention to the interests of the

<sup>16</sup> T. Pogge, *World Poverty and Human Rights* 19 (2002).

<sup>17</sup> There are many instructive works on the economic, democratic, social, and legal aspects of globalization: see, for instance, H.-P. Martin & H. Schumann, *Die Globalisierungsfalle. Der Angriff auf Demokratie und Wohlstand* (1996); U. Beck, *Was ist Globalisierung?* (1997); K. Müller, *Globalisierung* (2002); A. Sen, *Ökonomie für den Menschen. Wege zu Gerechtigkeit und Solidarität in der Marktwirtschaft* (2002; original English 1999). There are, of course, also positive aspects of globalization as Emmert underlines, F. Emmert, *Das bonum commune in der Globalisierungsfalle*, in J.-M. Bonvin, G. Kohler & B. Sitter-Liver (Eds.), *Gemeinwohl – ein kritisches Plädoyer. Bien commun – un plaidoyer critique* 301-324 (2004).

community that elected them. Thus, private economic interests, which are not fundamental, take priority over at least partially fundamental interests, e.g. the interest of job security. In other words, democracy becomes more and more a plutocracy. Due to pressure from multinational corporations, states notoriously fail in their effort to regulate important fields for which they used to be responsible, such as financial transactions and environmental protection. Among governments there is a tendency to reject responsibility for unpopular political decisions and refer it to non-governmental economic actors or to the chimera of a world economy that is completely independent of national economies. This is a clear sign of politicians' helplessness and weakness. To take a different stance is not so easy. Even if some courageous politicians would take rigorous measures in order to limit the enormous influence of multinational corporations on their national legislation, the corporations concerned would probably simply divest in that state and continue their activities in other countries with less severe regulations.

These comments show clearly that under the current circumstances the sovereignty of separate states is not given much importance any more, since they cannot decide and act autonomously. Thus, the second characteristic of states, i.e. the capability of collective decision-making and authoritarian regulating within a certain territory does not correspond with reality. Single states have (partially) lost their main function, as they do not have the (full) capacity to act in favour of their citizens, i.e. to pursue the public interest. However, as the example of the WTO shows, some influential governments are in a position, due to their joint bargaining power, to shape agreements on tariffs and trade in the interest of the corporations and the people of their own countries, often using unfair methods. Usually such agreements are made not to be mutually beneficial to all parties involved, but just to impose additional burdens on the poor and yield extra benefits for the rich. As all of us very well know, this unequal economic competition, which for the rich is a struggle for wealth and for the poor a struggle for survival, leads to the death of countless people, who are innocent, and find themselves caught in a vicious situation.<sup>18</sup> What must this behaviour of western governments be called, if not a conduct of war by non-military means as it results in the same amount of victims had this been a military war?

## **E. Human Rights and Global Government**

Before turning to my last point, I will briefly summarize the results of the previous paragraphs. First I explained the hierarchical structure of interests conceived as a pyramid, which explains the normative relation between fundamental interests united in the notion of justice, the public interest, and other interests. This way I set up the decisive criterion of moral legitimacy. Then, referring to the institution of membership, I demonstrated that only moral

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<sup>18</sup> See, e.g., The State of the World's Children 2005, The Least Developed Countries Report 2002.

legitimacy (and not democracy) qualifies states for being better and thus more desirable than criminal organizations. In the last paragraph, I outlined problematic aspects of globalization concerning the worldwide struggle for information, national autonomy, and world economy.

All this implies a double need for an institutional system that is able to decide and to act globally. There are pragmatic reasons as well as moral issues pleading for some kind of global government, which is legitimate enough to establish international law and powerful enough to enforce it. By 'pragmatic reasons' I mean arguments that mainly refer to legal legitimacy and the public interest. The fact that single states have lost a big part of their regulatory power leads to a huge vacuum of legally legitimate power on the international level. It is certainly not desirable if non-legitimate multinational corporations would fill this vacuum, as they act only according to the principle of profit-maximizing and do not care about the public interest. Instead of leaving regulation to the market itself, which oppresses plurality and results in the brutal monopoly of one party, it is necessary to find a political solution to the problem of a global lack of regulatory power. The competition between states of offering increasingly favourable tax rates to corporations and investor's financial transactions, thus jeopardizing fundamental social services, such as unemployment relief and old-age pension schemes, must be stopped. On the other hand, the capability of states to take care of their citizens must be restored. This is not a socialist demand, but a requirement of legal legitimacy. The widening income gap between rich and poor in the last decades<sup>19</sup> – also seen within the developed countries – clearly indicates that today's global economy does not allow for a fair distribution of goods (i.e. a distribution that results from truly free competition where the parties continuously have approximately equal chances to benefit from their cooperation). The misery of the masses in the Third World countries, which represent the majority of the world's population, indicates that our world economy causes more problems than it solves. Political efforts to neutralize the negative effects of globalization notoriously fail. This is not surprising, since most of these negative effects are also accepted by political parties and their members, which depend on the good will and donations of influential economic groups.<sup>20</sup> Today's global economy, hence, is undemocratic and in the long run self-destructive – not only regarding the excessive exploitation of natural resources, but also the possibility of a collapse of free enterprise into monopoly. Not to mention the political tensions which are emerging and will increasingly emerge from social inequality. Pogge points out another severe malfunctioning of the present world order:

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<sup>19</sup> See B. Milanovic, *True World Income Distribution, 1988 and 1993: First Calculation Based on Household Surveys Alone*, 112 *The Economic Journal* 51-92 (2002).

<sup>20</sup> Such donations are in reality more like bribes, since corporations and investors act primarily out of profit-maximizing and therefore expect a service in return for their 'investment'. This shows that both totalitarian regimes and democracies are exposed to corruption. In my view, the only remedy for this insidious disease of states is a strict separation of powers and the chance for citizens to have a direct influence on governmental decision making, as is the case in Switzerland.

Still more significant [than corruption], in my view, are the resource and borrowing privileges that our global order confers upon those who manage to bring a country under their control. Such rulers are internationally recognized as entitled to sell natural resources and to borrow money in the name of the country and its people. These international privileges facilitate oppressive rule and greatly encourage coup attempts and civil wars in the developing countries'.<sup>21</sup>

Even from a pragmatic perspective, a world order that favours constructive and democratic cooperation is much more desirable than the current one which is determined by unfair economic competition and by reckless struggles for influence, political and financial advantages and power hegemony.

There are strong pragmatic reasons to establish a global government since only a globally competent authority is in the position to deal with the problems mentioned above. In their argumentation, sociologists, political scientists and even politicians frequently use these or similar pragmatic reasons, although most of them do not plead for a global government with executive power. In the next paragraph I will answer the question as to why soft law and international cooperation cannot reduce the negative effects of globalization, by introducing moral reasons for the universal coercive assertion of human rights. Moral reasons refer to moral legitimacy and thus to fundamental interests.

Proceeding from the assumption that contrary to criminal organizations states are intended to meet the criteria of moral legitimacy, it is necessary to describe a set of institutional requirements which would, even on the condition of human egoism and all its ramifications, guarantee a global state of justice instead of the present international situation that resembles a state of nature. In view of the fact that on the national level only a central power, divided into legislative, executive and judicial institutions (which are largely independent of each other), can ensure law and order and allow a high degree of justice, it is likely that the same applies to the international level. Why be against a world police, if we think that on the national level the police is absolutely necessary for our security? Why be against an international criminal court, if we think that on the national level criminals should be condemned? Only states and people committing crimes have (understandable yet illegitimate) reasons to reject such international institutions. But why should the decent part of the world adapt to criminals? And finally a question that is probably more controversial than the previous ones: why be against international social standards that in the case of a fair global redistribution could be provided to all?

As we know, there is something like a global legislative (even if in many respects undemocratic) institution called the United Nations since 1945; there are universally declared human rights since 1948 (which are widely ignored and rarely enforced); and the most important achievement of the last decades, there is an International Criminal Court since 2002 (that is boycotted by states like China, the USA, India, Pakistan, Turkey, Japan, and Israel)<sup>22</sup>. The objective of

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<sup>21</sup> Pogge, *supra* note 16, at 22; with my supplement.

<sup>22</sup> See <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp#N3>.

international politics must be to reform these institutions corresponding to the demands of legal and moral legitimacy. In addition a global executive power should be established which represents the central prerequisite for effectively acting on behalf of world's communities. It would go beyond the field of political philosophy to describe the structure of such global institutions in detail. Yet, this discipline has to contribute to the assessment of principles for both national and international institution-building. It would be a grave mistake not to consider normative aspects and reduce politics to a technique of making compromises between non-reflected interests. It is necessary to value interests corresponding to a hierarchical concept like the pyramid of interests outlined above and to distinguish between the legitimacy of interests as different as the interest in luxury goods and the interest in survival.

The example of Otfried Höffe demonstrates that philosophy can make constructive proposals in order to resolve concrete political problems like the problem of global government. Proceeding from fundamental principles of justice and assessing a set of civil duties he designs a convincing model of a subsidiary and federal world republic with the classical separation of powers and institutions as the 'global department of social security' and the 'world cartel department'.<sup>23</sup> The truly innovative and forward-looking concept of Höffe may appear to be rather utopian under the present circumstances in international politics. It is, however, the only consistent conclusion that can be drawn from the fact that Höffe thinks is primary regarding the human rights: "[l]aw without a power that serves is a mere word".<sup>24</sup>

The only way to protect fundamental interests from detrimental public and private interests is to establish corresponding human rights. Human rights, however, cannot be guaranteed in view of human egoism and its implications unless a powerful authority enforces, if necessary, the duties corresponding to these rights. If we accept these premises, we consequently come to the conclusion that in the international realm only institutions similar to those already existing on the national level would be able to ensure justice. The crucial point, of course, is whether such new or reformed global institutions themselves meet the qualifications of moral legitimacy. On the other hand, global institutions can only function effectively if all states transfer a part of their sovereignty to them. Yet this transfer of sovereignty results from the general interest of the particular states' citizens in maintaining justice as well as law and order on both the national and the international level. The concept of moral legitimacy is an anthropocentric one, since in its framework individuals represent the source of legitimacy.

Although the European Union has several shortcomings, it serves as a model of successful supranational institution-building in the world.<sup>25</sup> If the EU makes

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<sup>23</sup> O. Höffe *Demokratie im Zeitalter der Globalisierung* (1999), at 296-335 and 352-434; own translation.

<sup>24</sup> *Id.*, at 295; own translation.

<sup>25</sup> The Australian philosopher Peter Singer concludes at the end of his book *One World*: "We therefore need to strengthen institutions for global decision-making and make them more

real efforts to consider the fundamental interests of all its inhabitants without neglecting or ignoring the fundamental interests of the people living outside its borders and if it uses its international influence to establish a morally legitimate global order, it could indeed be a ray of light in the darkness of our time's world politics.

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responsible to the people they affect. This line of thought leads in the direction of a world community with its own directly elected legislature, perhaps slowly evolving along the lines of the European Union". P. Singer, *One World*, at 199 (2002).