THE IDEA OF HUMAN RIGHTS AND ITS TRANSFORMATION IN THE CONTEXT OF INTERNATIONAL ORDER

A THESIS SUBMITTED TO
THE GRADUATE SCHOOL OF SOCIAL SCIENCES
OF
MIDDLE EAST TECHNICAL UNIVERSITY

BY

TAHİR ENES GEDİK

IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR
THE DEGREE OF MASTER OF SCIENCE
IN
THE DEPARTMENT OF SOCIOLOGY

SEPTEMBER 2012

Approval of the Graduate School of Social Sciences

_____

Prof. Dr. Meliha Altunışık
Director

I certify that this thesis satisfies all the requirements as a thesis for the degree of Master of Arts

_____

Prof. Dr. Ayşe Saktanber
Head of Department

This is to certify that we have read this thesis and that in our opinion it is fully adequate, in scope and quality, as a thesis for the degree of Master of Arts.

_____

Assoc. Prof. Dr. Erdoğan Yıldırım
Thesis Supervisor

Examining Committee Members

Assist. Prof. Dr. Nedim Karakayalı (Bilkent Uni, PS) _____

Assoc. Prof. Dr. Erdoğan Yıldırım (METU, SOC) _____

Inst. Dr. Barış Mücen (METU, SOC) _____

I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

Name, Last name: Tahir Enes Gedik

Signature :

ABSTRACT

THE IDEA OF HUMAN RIGHTS AND ITS TRANSFORMATION IN THE CONTEXT OF INTERNATIONAL ORDER

Gedik, Tahir Enes
M.Sc., Department of Sociology
Supervisor: Assoc. Prof. Dr. Erdoğan Yıldırım

September 2012, 97 pages

The 20th century can be characterized by the triumph of human rights; however, it also witnessed most atrocious events in history. After two world wars, genocides, and countless human rights violations, the burden of this crude fact is still weighing down. Nevertheless, human rights become the intellectual moral currency of our age. The aim of this thesis is to argue that, contrary to what it appears to be, human rights are not moral promises to be fulfilled but a specific way of doing politics which would be meaningful within the broad framework of power relations. The thesis focuses on the analysis of the emergence and development of human rights which provide a ground for the shift from the international order based on conceptualization of sovereign power of individual states to the new world order based on the moral conceptualization of human rights.

Keywords: justice, human rights, international order, security

ÖZ

İNSAN HAKLARI FİKRİ VE ULUSULARARASI DÜZEN BAĞLAMINDA DÖNÜŞÜMÜ

Gedik, Tahir Enes
Yüksek Lisans, Sosyoloji Bölümü
Tez Yöneticisi: Assoc. Prof. Dr. Erdoğan Yıldırım

Eylül 2012, 97 pages

20. yüzyıl insan haklarının zafer kazandığı bir yüzyıl olarak nitelendirilebilir, ancak insanlık tarihindeki en vahşet dolu olaylara da tanıklık etmiştir. İki dünya savaşı, soykırımlar ve sayısız insan hakları ihlaliyle bu durum hala ağırlığını hissetirmektedir. Buna rağmen, insan hakları çağımızın ahlaki ve entelektüel hakim değeri haline gelmiştir. Bu tezin amacı, insan haklarını, göründüğünün aksine, gerçekleştirilmesi gereken ahlaki vaadler olarak değil, daha geniş güç ilişkileri çerçevesinde anlamlı, belirli bir politika yapma biçimi olarak tartışmaktır. Tez, bağımsız devletlerin egemen gücüne dayalı uluslarası bir düzenden, insan haklarının ahlaki kavramsallaştırmasına dayalı dünya düzenine geçişe zemin hazırlayan insan haklarının ortaya çıkış ve gelişmesinin analizine odaklanmaktadır.

Anahtar Kelimeler: adalet, insan hakları, uluslararası düzen, güvenlik

ACKNOWLEDGMENTS

I would like to express my sincere gratitude to my supervisor, Assoc. Prof. Dr. Erdoğan Yıldırım for his patient guidance, detailed and inspiring comments and invaluable contributions, and for his encouragement throughout the development of this thesis. I also wish to thank to the two other committee members Assist. Prof. Dr. Nedim Karakayalı and Inst. Dr. Barış Mücen for their valuable comments.

I would also like to thank to my friends who helped me to create the right environment for the writing process. Their academic and morale support is gratefully acknowledged.

TABLE OF CONTENTS

CHAPTER I

INTRODUCTION

1.1. Preliminary: Three Cases of the Humanitarian Intervention

> If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica–to gross and systematic violations of human rights that offend every precept of our common humanity?[1]

The last decade of 20th century witnessed striking phenomena of the post-Cold War period: the humanitarian interventions and their condensation in a decade.[2] What is humanitarian Intervention? Apart from the differences in wording, there is a consensus in the literature on the definition of humanitarian intervention.[3] It is the coercive action of one or more states through the use of military force directed to another state on humanitarian grounds. Like many other definitions, the definition of humanitarian intervention did not make much sense about a complex practice on international level which forces one to face with the problems related to sovereignty, world order, justice, human rights and security. Thus, three cases were chosen and will be discussed to provide a preliminary perspective on humanitarian intervention *at work*. Following this, the significance of the interventions will be addressed in relation to the aim of the present study, because humanitarian interventions embody the tension peculiar to the transformation of the idea of human rights in a significant way: the tension between the conceptualization of sovereign power of individual states and the new world order based on the moral conceptualization of human rights. However, if one takes this moral conceptualization as the final realization of human rights ideal, one would be misleading. Briefly, the aim of the thesis is to argue that, contrary to what it appears to be, human rights are not moral promises to be fulfilled,

[1] The Millennium Report of The Secretary-General Kofi Annan: http://www.un.org/millennium/sg/report/ch3.pdf.

[2] Northern Iraq (1991), Bosnia and Herzegovina (1992-5), Somalia (1992-3), Rwanda (1994), Haiti (1994), Albania (1997), Sierra Leone (1997), Kosovo (1998-9), and East Timor (1999).

[3] Welsh (2005): 81, Heinze (2009): 2, Hehir (2008): 14.

but a specific way of doing politics which would be meaningful within the broad framework of power relations.

Two geographical territories appear as *privileged* with regard to humanitarian interventions: Africa (all over the continent) and especially Balkans. The lines of division that marked the conflicts are generally ethnic. Once more, the end of Cold War is presented as the ultimate reason behind ethnic conflicts; the proliferation of ethnic identities and the conflict resulted from that is an expression of the troubled transition to democracy. This argument is partly correct for Yugoslavia; however, in Sierra Leone, for example, these conflicts can be traced back to the postcolonial independence.[4]

In this context, Africa appears to be a land of destruction. In the report of Secretary-General, the crude facts were provided:

> Since 1970, more than 30 wars have been fought in Africa, the vast majority of them intra-state origin. In 1996 alone, 14 of the 53 countries of Africa were afflicted by armed conflicts, accounting for more than half of all war-related deaths world wide and resulting in more than 8 million refugees, returnees and displaced persons.[5]

There is no need to mention famines and pandemics; in public, the most commonly represented image of the Africa is starving people devastated by the economic and political instabilities: A perfect example of self-evident evil. In the midst of this chaotic depiction a crucial aspect of African case comes fore: the crisis of state: "Most African states are extremely fragile, partly because control of state institutions is regarded as a prize in a ferocious competition where the stakes are high and the players employ ruthless methods."[6] According to James Mayall, this crisis paves the way for the legitimacy of humanitarian interventions. This claim is partly true; undoubtedly, it enables a smooth functioning of certain international organizations. However, this is a pseudo-problem since the problem of legitimacy never appears *as such* in the new international order. The effect of this crisis is rather different, and it

[4] C.L. Sriram, O. Martin-Ortega and J. Herman, *War, Conflict and Human Rights: Theory and Practice* (London and New York: Routledge, 2010): 85.

[5] James Mayall, "Humanitarian Intervention and International Society: Lessons from Africa" in *Humanitarian Intervention and International Relations* (ed. J.M. Welsh) (Oxford: Oxford University Press, 2004) 127.

[6] *Ibid.*, 127.

is thoroughly negative for the "objectives" of humanitarian intervention. Although the formal functioning of international organizations surpasses the problem of legitimacy, the organizations still depends on the schemes of old international order for practical implementations; in this sense, the crisis of states and absence of certain institutions is astounding. Somali case is worth considering with regard to this issue.

At the beginning of the Somalia conflict stood the breaking apart of a fragile order, with the death of President Mohammed Siad Barre, a clan-based civil war erupted in the country. In one year, the humanitarian situation became alarming: "On January 1992 the ICRC [International Committee of the Red Cross] reported that hundreds of thousands of refugees were on the brink of starvation and at the end of the month the UNCHR reported that 140,000 Somali refugees had reached Kenya, with 700 now achieving every day."[7] The Secretary-General of that time, Boutros Boutros-Ghali proposed a two-way strategy. First step was an arms embargo with Security Council Resolution 733 under Chapter VII.

> [The Security Council] *decides*, under Chapter VII of the Charter of United Nations, that all States shall, for the purposes of establishing peace and stability in Somalia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Council decides otherwise;..[8]

As Newman argues, "this resolution appeared to accept that an internal situation could constitute an international threat and therefore warranted enforcement action."[9] Second step was to establish cease-fire which later became ineffective and followed by the Security Council Resolution 746 which repeats the same concerns for humanitarian problems. However, according to Newman, the importance of the resolution is "a further shift towards regarding an internal situation *in itself* as a reason for action."[10] But there is nothing that deserves special attention in this shift, since it has already taken place on a different level. The next move of the UN was the Security Resolution 751 in 24 April 1992 which initiated the deployment of

---

[7] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions* (London: Hurst & Company, 2009): 53.

[8] http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/010/92/IMG/NR001092.pdf?OpenElement

[9] *Ibid.*, 53.

[10] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions* (London: Hurst & Company, 2009): 53.

United Nations Somalia Mission (UNOSOM I) to monitor cease-fire activities that gradually had turned out to be ineffective.[11] Moreover, UNOSOM I was itself ineffective and threatened constantly by the conflicting parties. The situation continued got worse and worse by the end of the summer:

> In October the Secretary-General reported that approximately 300,000 had died since the previous November and that almost 4.5 million of the total Somali population of 6 million were threatened by severe malnutrition, with 1.5 million at immediate risk of death.[12]

Finally, in 3 December 1992, the Security Council adopted the Resolution 794 under Chapter VII. With this resolution, The Security Council:

> 8. Welcomes the offer by a Member State described in the Secretary-General's letter to the Council of 29 November 1992 (S/24868) concerning the establishment on an operation to create a secure environment;
>
> 9. Welcomes also offers by other Member States to participate in that operation;
>
> 10. Acting under Chapter VII of the Charter of the United Nations, authorizes the Secretary-General and Member States cooperating to implement the offer referred to in paragraph 8 above to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia….[13]

The member state mentioned in the Secretary-General's letter was United States: "The next day Bush ordered 28,000 troops into Somalia (out of a total at the peak of 37,000), and US Marines landed on 9 December 1992, taking charge of the United Task Force (UNITAF, also known as Operation Restore Hope) mission."[14] The UNITAF stayed in the region between December 1992 and May 1993. During this period, the task force was quick to deploy aids through seven provinces under its control, yet the weak political planning let the problematic situation continue.[15]

---

[11] http://www.unhcr.org/refworld/country,,WRITENET,,SOM,,3ae6a6c98,0.html

[12] *Ibid.*, 54.

[13] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/772/11/PDF/N9277211.pdf?OpenElement.

[14] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions* (London: Hurst & Company, 2009): 54.

[15] "The UN organised two 'reconciliation conferences' in Addis-Ababa, in January and March 1993. Those were vitiated from the start because they did not respect the Somali ways of peacemaking (*shir*) and tried to push through quickly arranged 'solutions' without really considering how representative the participants were or what motivated them. I.M. Lewis' warning had not been heeded and the UN was struggling to achieve too much, too quickly and by the wrong methods. This, in fact, reflected a sort of cultural gap. Elegant, well-paid and highly educated UN officials were not about to bend to the ways of a bunch of savage African nomads. The nomads, who should be glad that the world community had decided to 'help' them, had to adapt to Western ways and make peace in a civilized

Moreover, "it has been estimated that UNITAF saved only about 10,000…. In any case, the next phase was to be catastrophic."[16] The next phase mentioned by Newman is the replacement of UNITAF by UNOSOM II. The contradictory policy that led to the catastrophe is, simply, the extension of military engagement to whole country with the Resolution 814 while U.S. forces were gradually withdrawn.[17] In the absence of prior disarmament of warlords, this extension resulted with a military failure:

> This reduced force now attempted to disarm Aidid's forces, an action which led in June 1993 to the death of twenty-five Pakistani UN peacekeepers. This was then followed by an escalation of fighting when the US attempted to capture Aidid, leading to a battle on 3 October. In this, and other confrontations, between 625 and 1,500 Somalis (more than half of whom were women and children) were killed by UNOSOM II troops and between 1,000 and 8,000 were wounded. Two US military helicopters were shot down and eighteen Americans were killed, with the bodies mutilated and paraded in front of TV cameras.[18]

Beginning with the March 1994, US and UNOSOM II forces were completely withdrawn in 1995 from Somalia, leaving the political terrain of the country without considerable changes, the struggles continued, and no central power in full control was established until today.

On the verge of Europe, Yugoslavia provides striking cases which have direct influence on the development of the idea of humanitarian intervention.

The crisis that led the dissolution of the Socialist Federal Republic of Yugoslavia came with the waves of declarations of independence after the collapse of Soviet

---

fashion, i.e. not by reclining for months under trees composing poems and talking about past wars, but by sitting at tables in air-conditioned rooms and putting their signatures at the bottom of a little piece of paper. The trouble was that the wild nomads had absolutely no idea, intention or even understanding of what the 'international community' was so keen on. The lack of what a Western magistrate would call 'proper procedure' invalidated in their eyes the meaning of the whole process. They collected their *per diem* for sitting in Addis-Ababa, went shopping, met their friends living in exile in the Ethiopian capital and then went home. As one of the participants in the March 1993 conference was to remark: 'The speeches were nice, the slogans were really good but the whole thing was quite meaningless.'"

http://www.unhcr.org/refworld/country,,WRITENET,,SOM,,3ae6a6c98,0.html.

[16] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions* (London: Hurst & Company, 2009): 54.

[17] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/226/18/IMG/N9322618.pdf?OpenElement.

[18] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions* (London: Hurst & Company, 2009): 55.

bloc. The first states that declared independence were Slovenia and Croatia on 25 June 1991. The response of (Serb-dominated) Yugoslav National Army to protect its borders was swift. The independence of Slovenia was accepted by Yugoslavia without much conflict. However, the fights were fierce between Croatian forces and Yugoslav National Army. The first serious step taken by the UN was the adoption of the Security Council Resolution 713.[19] With this resolution an arms embargo was initiated and following diplomatic efforts were successful to reach a cease-fire. After that, with the Security Council Resolution 743 on 21 February 2002, the United Nations Protection Force (UNPROFOR) was deployed.[20] This led to the settling of conflicts in Croatia, however, they would erupt much more powerfully in Bosnia-Herzegovina.

The point of fissure was similar to previous independence movements, yet the ethnic composition of Bosnia made it a much more problematic political terrain: "The turning point came in February 1992 when the Bosnian-Muslim government held a referendum on independence."[21] The Bosniak and Croat populations favored independence and the tensions gave way to open skirmishes. There is no need to tell the whole story about the course of war and shifting alliances. The significant issue for present inquiry is the adoption of resolutions in an ambiguous and contradicting way. Two of them have particular importance, Resolution 770 and 771. The Security Council Resolution 770 was adopted under Chapter VII and

> 5. Requests all states to provide appropriate support for the actions undertaken in pursuance of this resolution.
>
> 6. Demands that all parties and others concerned take necessary measure to ensure the safety of United Nations and other personnel engaged in the delivery of humanitarian assistance.[22]

The Security Council Resolution 771, although was not adopted under Chapter VII,

---

[19] http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/49/IMG/NR059649.pdf?OpenElement.

[20] http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/011/02/IMG/NR001102.pdf?OpenElement.

[21] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions* (London: Hurst & Company, 2009): 62.

[22] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/379/66/IMG/N9237966.pdf?OpenElement.

> 2.Strongly condemns any violations of international humanitarian law, including those involved in the practice of "ethnic cleansing."
>
> 4.Further demands the relevant international humanitarian organizations, and in particular the International Committee of the Red Cross, be granted immediate, unimpeded and continued access to camps, prisons and detention centres within the territory of the former Yugoslavia and calls upon all parties to do all in their power to facilitate such access.[23]

Newman argues that as the main forces of UNPROFOR II (The extension of UNPROFOR to engage with the war in Bosnia), Britain and France continued to use traditional peace-keeping methods.[24] Moreover with its 7,000 European troops UNPROFOR II was not able to protect safe areas. The well-known result of this incapacity was the attack on Srebrenica in 1995 which was the greatest massacre in Europe since Holocaust. The war ended with the massive NATO bombing and ground control of Bosniak and Croat forces which reached an agreement. The following Daytona Accords, however, turned "Bosnia into a highly dysfunctional 'semi-state'."[25]

Four years later, the tensions had arisen in Yugoslavia again and resulted in the highly controversial Kosovo problem and NATO bombing. The conflict in Kosovo can be traced back to 1989, even before the independence of Slovenia. Kosovo had the privilege of extensive autonomy under Serbian rule until 1989, when Milosevic removed the autonomy of the territory. Following years witnessed the rise of nonviolent Albania resistance of League for Democracy in Kosovo (LDK) led by Ibrahim Rugova, till the establishment of Kosovo Liberation Army (KLA) in 1997. The exclusion of Kosovo from Dayton Accords had a considerable effect on the rise of KLA as an alternative to LDK; however, it remained highly suspicious and condemned as a terrorist group in international area because of its ties with the drug networks and attacks on civilians.[26]

---

[23] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/379/72/IMG/N9237972.pdf?OpenElement.

[24] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions* (London: Hurst & Company, 2009): 63.

[25] *Ibid.*, 65.

[26] David N. Gibbs, *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Nashville: Vanderbilt University Press, 2009): 180-181.

The conflict in the territory reached a level that forced the UN Security Council to take an action and the result was the UN Security Resolution 1160 under Chapter VII in 31 March 1998, which demands the end of violence from both sides of the conflict and a solution recognizing the territorial integrity of Federal Republic of Yugoslavia. "Russia and China expressed reservations about domestic jurisdiction and the latter abstained."[27] This resolution was followed by another one on 23 September 1998, UNSC Resolution 1199 again under Chapter VII, which clearly demands a cease-fire and improvement of humanitarian situation.[28] However, the opposition of Russia and China to any intervention continued, and anticipating NATO involvement,

> The Russians stated that they would veto any such resolution and three days later they issued a statement 'that use of force against a sovereign state without due sanction of the Security Council would be an outright violation of the UN Charter, undermining the existing system of international relations' [29]

The decisive move came from a different international organization, NATO: "On 13 October 1998 the North Atlantic Council issued activation orders (ACTORDS) for a phased air campaign in the FRY and limited air operations."[30] It was argued that the justification of these orders already resides in the UNSC Resolutions 1160 and 1199.As a result, "Milosevic agreed to allow 1,700 inspectors from the OSCE into Kosovo. Yugoslavia also agreed to establishment of a NATO air verification mission over Kosovo."[31] By this time, the support to the KLA became explicit and encouraged KLA for further action.

Thus, this fragile agreement was broken down first by KLA moving into the areas left by Serbian forces. Skirmishes intensified again, and this time, FRY army sought a much more brutal military solution which resulted in the massacre of 45 Kosovar Albanian in Racak on January 1999.

---

[27] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions* (London: Hurst & Company, 2009): 66.

[28] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/279/96/PDF/N9827996.pdf?OpenElement.

[29] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions*: 67.

[30] Simon Chesterman, *Just War of Just Peace? Humanitarian Intervention and international law* (Oxford: Oxford University Press, 2001): 209.

[31] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions:* 67.

The last attempt to reach a diplomatic solution was the Ramboillet Peace Conference; the negotiations took place from 6 to 23 January and 15 to 18 March between Hashim Thaçi, a KLA military commander and Serbian delegate Milan Milutinovic. However, this attempt was in vain, and "concluded with the FRY refusing to sign the agreement that requires freedom of movement for NATO throughout the whole of the FRY and a referendum on Kosovo's independence in three years."[32]

On 24 March 1999 NATO air strikes (Operation Allied Force) began and continued for the following three months until Russia forced Milosovic to surrender. An emergency session of the Security Council had taken place on 24 March in which Russia, China, Belarus and India opposed the operation as a violation of the UN Charter. The bombing campaign continued, however, the success of the intervention was highly controversial. As Newman argues:

> The immediate impact of the military intervention was to intensify the ethnic cleansing, as Serbian forces now marched hundreds and thousands of Kosovar Albanians out of their homes, and during the NATO air campaign approximately 863,000 civilians sought or were forced into refuge outside Kosovo, and additional 590,000 being internally displaced.[33]

1.1.1. A Brief Analysis of Interventions

The analysis of these interventions as significant examples of post-Cold War phenomena would be proper if a comparison will be made between interventions of the Cold War and post-Cold War periods. Prior to the collapse of Soviet bloc, lots of interventions also took place;[34] these interventions can be called "*first generation peacekeeping operations."*[35] It can be argued that the primary concern of these interventions was sovereignty principle (and non-intervention as its repercussion on

[32] Simon Chesterman, *Just War of Just Peace? Humanitarian Intervention and international law:* 210-211.

[33] Michael Newman, *Humanitarian Intervention: Confronting the Contradictions*: 68.

[34] Anglo-French intervention in Suez (1956), the Soviet Intervention in Hungary (1956), the Indonesian intervention in East Timor (1975), the Moroccan intervention in Western Sahara (1975), the Soviet intervention in Afghanistan (1979), and the US-led interventions in Grenada (1983) and Panama (1989). Adam Roberts, "The United Nations and Humanitarian Intervention" in *Humanitarian Intervention and International Relations* (ed. J.M. Welsh) (Oxford: Oxford University Press, 2004): 78.

[35] Evren Balta Paker, *Küresel Güvenlik Kompleksi* (Istanbul: Iletisim, 2012): 78.

international level), the violation of which would cause instabilities in international relations, thus, *active consent* of the states intervened was sought; moreover, the use of force was limited to the self-defense and the peacekeeping forces were refrained from the active military engagements.[36] These two aspects would help preserving the impartiality of the intervening states. In addition to the active consent, the UN Security Council authorization was another requirement for intervention. This requirement caused deadlocks in the UN Security Council during the Cold War period, because of the power rivalries and the rhetoric of bipolar world order.

Following the end of the Cold War and the collapse of the Soviet bloc, a new interventionism emerged. Three examples discussed above indicate the differences between this new interventionism and first generation peacekeeping operations. First, the active consent of the states was no longer sought. The principle of sovereignty as the grounding norm of the international order was reinterpreted and relativized. The ICISS report is instructive:

> State sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself. Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state of failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.[37]

These words imply a shift in the conceptualization of the sovereignty principle which differed from the modern notion of sovereignty discussed in Chapter II.

Second, the UNSC authorization was no longer sought, for example, in Kosovo case. The intervention was initiated by an international military organization (NATO)[38] instead of United Nations which was established on the basis of independent sovereign states. The statement of Russia before NATO intervention was correct in this sense. Like responsibility to protect, the legitimation of this interventions without the SC authorization, comes from humanitarian grounds, which is nothing other than the violation of human rights. Thus, it can be argued that the privileged concept and the norm of this new interventionism is humanitarianism instead of

[36] *Ibid.*, 77-78.

[37] ICISS The Responsibility to Protect Report: http://responsibilitytoprotect.org/ICISS%20Report.pdf.

[38] After NATO involvement, the impartiality of interventions becomes very problematic and totally meaningless by Afghanistan and Iraq invasion.

sovereignty. It can be even argued, much more dramatically, that the Westphalian international order which replaced "the defunct *respublica christiana*"[39] in 1648, comes to an end.[40]

1.2. The Aim and the Scope of the Thesis

If one asks proper questions, the new interventionism and the related conceptual themes, like humanitarianism, responsibility to protect and the end of sovereignty, would appear as an expression of a different *problematic*. Actually, it is the question itself which establishes a problematic.

The aim of the thesis is to ask such questions and *seek* answers for them. The focal point of this questioning aimed by the present study is the concept of human rights which traverse and extend over the whole discussion, enabling one to deal with above mentioned themes in a different light, while addressing to the fundamental problems of socio-legal thinking. Thus, the new interventionism can be understood as the expression of the historical transformations which gave way to a distinct conceptualization of human rights as the discourse of legitimation and the intellectual moral standard of the new international order.

The aim of the thesis is also to understand human rights within the system of rules in which "humanity installs each of its violence… and thus proceeds from domination to domination."[41] Human rights do not simply legitimize because of the moral appeal emanating from them; they become the very ground of enunciating the socio-political demands, to determine the political. The aim of the thesis is develop a possible critique of the transcendence of human rights above politics, and try to take them back to the purview of the political.

The first issue addressed in the Chapter II of the thesis is the emergence of the discourse of rights which would later give way to the human right. Beginning with

[39] Randall Lesaffer, *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2009): 308.

[40] Evren Balta Paker, *Küresel Güvenlik Kompleksi*, 84-85.

[41] Michel Foucault, "Nietzsche, Genealogy, History" in *Aesthetics, Method and Epistemology* (London: Penguin Books, 2000): 378.

the Pre-Socratic understanding of *nomos*, this chapter discusses two distinct conceptualizations of justice in Ancient Greece closely related with the natural law and positive law, and their juxtaposition, even conflation, in the context of Stoic tradition. The following Christian tradition gave another direction to these doctrines and paved the way through the end of 14th century for a distinct understanding of individual right. This idea of individual right culminated further and gained the implications it still retains in the hands of Hobbes and Locke as the two foundational figures of political philosophy. Nevertheless, the tension between natural law and positive law continues and surfaced with the Hobbesian and Lockean conceptualizations of state of nature, natural right, and sovereignty. A return to the 14th century is initiated at this point to emphasize the importance of the concept of natural right to property as it was proposed by Locke. Finally, the chapter will be concluded by a discussion on Kant who provides a philosophically grounded exposition of the transition from natural to human right and who would claim the importance of international relations for the fulfilment of a world order based on the principles of right.

Chapter III is focused on the possibility of the implementing human rights regime after the Second World War. Following a brief discussion on the idea of international order through the ideas of Hugo Grotius, the chapter focuses on the United Nations and especially the Commission on Human Rights which was established for the preparation of an international bill of rights that would bind politically and legally the member states. The fragmentation of this bill into declaration, covenants and mechanism of implementation and consolidation of this fragmentation during the Cold War period has been paid special attention. By the end of the Cold War and the collapse of the Soviet bloc, a new world order was hailed by euphoria. Nevertheless, the following decade witnessed the most atrocious events since the Second World War and the extensive use of humanitarian intervention as discussed above.

Chapter IV focused on this new world order after the Cold War and the place of human rights within. The chapter began with a discussion of a critical line of thinking on Human Rights beginning with Hannah Arendt. The discussion identifies two critical attitudes towards human rights one is affirmative and the other negative.

In spite of their difference, both positions try to conceptualize an individual who would become the subject of emancipatory project whether this project entails the affirmation of human rights or not. The following part, arguing the deficiencies of this project, offers another line of critique which situates human rights within the mechanism of security peculiar to the new international order.

Finally, last chapter will briefly comment on the war on terror and conclude the thesis by a summary.

CHAPTER II

CONUNDRUM OF HISTORY: THE EMERGENCE OF THE DISCOURSE OF RIGHTS

This is because knowledge is not made for understanding; it is made for cutting.
Foucault, *Nietzsche, Genealogy, History*

Historians look backwards; and they end up *believing* backwards too.
Nietzsche, *Twilight of Idols*

2.1. Two senses of Justice

It is "Plato, our dear Plato, with whom everything begins"[42] for example, the present inquiry. Of course, this is an exaggeration, yet it would have made sense as he provided one crucial dead end that still occupies the minds of scholars. Before advancing further, it should be recalled that there is a cluster of meanings surrounding concepts like *dike, dikaion, physis* and *nomos*[43]; and these meanings changed constantly; the modern jurisprudential distinctions between right, law and justice are absent. Yet, there is a crucial distinction that precedes Plato and Socrates: between *nomos* and *physis*, law and nature. According to Friedrich (1963) as the order which embraces all, Pindar gave the formula: *nomos basileus panton* (law, the ruler over all and everything)[44] and the source of ancestral authority. However, this idea is challenged by Sophists; Friedrich (1963) continues that "*nomos* and *physis* are contrasted, and he who is by nature stronger and better is thereby put in the position of discarding the *nomos*"[45]. Thus, *physis* becomes a different source that would supersede *nomos* which is now limited to the order of the community instead of all

[42] Alain Badiou, "Plato, Our Dear Plato" *Angelaki* vol II no: 3 (2006): 39.

[43] "In archaic Greek, *dike* meant the primordial order, the way of the world. It included *nomoi* and *thesmoi*, customs and norms of conduct which, according to Parmenides, were binding on both gods and mortals. *Nomos*, the word later used for law, originally had the same meaning as *ethos*. [...] By the time of the classical period, the meaning of *dike* too had changed to rightful judgment, *dikaion* was the right and just and *dikaios* the rightful person." Costas Douzinas, *The End of Human Rights: Critical Legal Thought ad the Turn of the Century* (Oxford: Hart Publishing, 2000): 25-26.

[44] Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective* (Chicago: Chicago University Press, 1963): 13.

[45] *Ibid.*, 13.

and everything. It is the aim of Socrates, as it is presented by Plato, to establish a new ground for nature and law, different from sophists'.

Thus, we find a redefinition of *physis* which may remove the contradiction between law and nature: "Nature sets the fundamental norm of each being."[46] This normative character of nature assumes a different order, according to Douzinas (2000): "The new order was that of the soul and of the transcendent spiritual world it inhabits; it was the highest and most natural order and animated the empirical cosmos"[47]. These moves from one point to another (from *nomos* to justice, and from justice to the ideal of good[48]) could not be done by a sleight of hand. Thus, the discussion of Socrates with Trasymachus deserves attention. Trasymachus accused Socrates for his detours around the definitions of justice: "Tell us what *you* say justice is. And don't go telling us that it's what's necessary, or what's beneficial, or what's advantageous, of what's profitable, or what's good for you"[49]. In that way, he already limits the scope of inquiry; yet Socrates hesitates and other figures forced Trasymachus to give his answer: "I said that justice is simply what is good for the stronger"[50]. He clarified and exemplified this definition by a comparison between democratic and tyrannical laws.[51]

As a first step, Socrates attempted to render the definition ambiguous by proposing the fallibility of the rulers and stronger:

> 'But whatever they enact, their subjects must carry it out, and this is justice?' […] 'Then you must also accept,' I said, 'that we have agreed it is just to do things which are not good for the rulers and the stronger, when the rulers inadvertently issue orders which are harmful to themselves, and you say it is just for their subjects to carry out the orders of their rulers.[52]

[46] Costas Douzinas, *The End of Human Rights*: 27.

[47] *Ibid.,* 27.

[48] Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective*: 17.

[49] Plato, *Republic* (Cambridge: Cambridge University Press, 2005): 13.

[50] *Ibid.,* 15.

[51] "Every ruling power makes laws for its own good. A democracy makes democratic laws, a tyranny tyrannical laws, and so on. In making these laws, they make it clear that what is good for them, the rulers, is what is just for their subjects. If anyone disobeys, they punish him for breaking the law and acting unjustly." *Ibid.,* 16

[52] *Ibid.,*17

In one sense, he succeeded: A brief discussion between Polemarchus and Cleitophon over the meaning of the definition comes to a point where "what the stronger *thinks* is good for him, whether it really is good or not."[53] However, Trasymachus was keenly alert against the tricks of Socrates; while clarifying his definition again, he provided an important insight about the act of ruling.

> In precise language, since you like speak precisely, no one who exercises a skill ever makes a mistake. People who make mistakes make them because their knowledge fails them, at which point they are not exercising their skill. The result is that no one skilled, no wise man, no ruler, at the moment when he is being a ruler, ever makes a mistake….[54] […] But the most precise answer is in fact that the ruler, to the extent that he *is* a ruler, does not make mistakes; and since he does not make mistakes, he *does* enact what is best for him, and this is what his subject must carry on.[55]

So, the attempt to differentiate between actual good and what is thought as good was easily refuted. Moving beyond the literal meaning, the emphasis is on *the precise moment* of doing, acting. The failure at this moment is the failure of deciding what is good. It is not a matter of retrospective judgment concerning good and evil; as a matter of justice, the good for the stronger is the result and expression of this capacity to rule.

The way was blocked for Socrates, so he had to move to another path to continue his line of critique. His move was to argue that skills, including ruling, aim at the good of its objects and not the practitioners: "[…] no one in a position of authority, to the extent that *he* is an authority, thinks about or prescribes what is good for himself, but only what is good for the person or thing under his authority….[56] The examples given by him are simple: doctor, a ship's captain and finally shepherd. Yet, Trasymachus was also attentive to this move and reversed the argument by simply proposing "that rulers in cities – *rulers in the true sense*[*] - regard their subject as their sheep, and the only thing they're interested in, day and night, is what benefit

---

[53] *Ibid.*,18

[54] Another translation: "No craftsman, expert, or ruler makes an error at the moment when he is ruling...." Plato, *Complete Works* (ed. Cooper, J.M.) (Cambridge: Hackett Publishing, 1997): 985

[55] Plato, *Republic*:

[56] Plato, *Republic* (Cambridge: Cambridge University Press,2005): 21.

*Emphasis is mine.

they themselves are going to derive from them."[57] The only way left for Socrates is to continue previous examples and distinguish shepherd's concern for his sheep from his concern to earn a living. Moreover, he claimed that the good for others is prior to the good for the practitioner. Yet, this line of argument is condemned to remain a piece of rhetoric, since it could not be easily applied to the *rulers in the true sense.*[58] As a result of Trasymachus' intervention, Socrates had to appeal different sources. The following discussion on the benefits of justice over injustice was a clear indication of this. As Douzinas argues, "The Socratic quest for true justice is a refutation of injustice through reason." However, even this attempt was in vain: "But Socrates soon admitted that while philosophy is committed to the rule of reason, reasoning alone cannot prove the superiority of justice."[59] With regard to this impasse, it is not surprising to see Socrates' turn towards a discussion on the city in the Fourth book of *Republic*.

Socrates began with a simple proposition: "I take it our city, if it has been correctly founded, is wholly good…. Clearly, then, it is wise, courageous, self-disciplined and just."[60] The task was, then, to find what is wise, courageous, and self-disciplined; the remaining will be the just: simple, yet intriguing. Consequently, Socrates identified these three virtues with three classes of the city, respectively: guardian (or decision-maker), auxiliary, and commercial classes (Book IV, 427-432). So, what remains, what is justice? Socrates gave the answer with great astonishment, as if the answer was there from the beginning: "[…] – the ability of the commercial, auxiliary and guardian classes to mind their own business, with each of them performing its own function in the city – this will be justice, and will make the city just."[61] In other words, justice is the harmonious order. That was the farthest point he could reach as

[57] *Ibid.*,21

[58] As he is aware of this defect, Socrates argued that best rulers are reluctant to rule.

[59] Costas Douzinas, *The End of Human Rights*: 34.

[60] Plato,*Republic:*121

[61] *Ibid.*, 129

he pursued the line of thought mentioned above by Douzinas. Otherwise, he would be stuck on the *aporia of justice*.[62]

All these concepts, their meanings and possible implications change and take another direction in the hands of Aristotle. In the fifth book of Nichomachean Ethics, Aristotle provides a crucial distinction between general justice (justice as a whole of virtue, just as the lawful) and particular justice (just as the fair). General Justice can be regarded as a natural inclination of man towards just and good: "We see that all men mean by justice that kind of state of character which marks people *disposed* to do what is just and makes them act justly and wish for what is just…. Let us too, then, lay this down as a general basis."[63] On the other hand, particular justice (or injustice), although "it falls within same genus" with the general justice, is different.[64] This distinction found its expression on the use of *dikaion* (rightful) within Aristotelian framework: "The *dikaion* means the right or just state of affairs in particular situation or conflict, according to the nature of that case."[65] It aims to right proportion of things. Yet, this right proportion should not be confused with an external standard or general justice. This aspect of proportionality pieced the question of politics and justice together.[66] Thus, at the basis of this position lies an important discussion on the human good.

---

[62] "At the end, Socrates seems to accept that as no rational argument can conclusively justify his theory of justice, he must offer his own sacrifice as ultimate proof and the gravest offence against reason. In doing so, his argument and his action are joined in a paradoxical formulation which may be called *aporia of justice*: to be just means to act justly, to be committed to a frame of mind and follow a course of action that must be accepted before conclusive rational justification." Costas Douzinas, *The End of Human Rights***:** 37.

An interesting argument which has to be taken carefully, by keeping in mind what was said by Socrates to Crito: "[*The laws said:*] Is your wisdom such as not to realize that your country is to honored more than your mother, your father and all your ancestors, that is more to be revered and more sacred, and that it counts more among the gods and sensible men, that you must worship it, yield to it and placate its anger more than your father's?... To do so is right, and one must not give way or retreat or leave one's post, but both in war and in courts and everywhere else, one must obey the commands of one's city and country, or persuade it as to the nature of justice." Plato, *Complete Works* (ed. Cooper, J.M.) (Cambridge: Hackett Publishing, 1997): 45.

[63] Aristotle, *Nichomachean Ethics* (Oxford: Oxford University Press, 2009): 80.

[64]A step taken by Aristotle before discussing particular justice: "What the difference is between virtue and justice in this sense is plain from what we have said; they are the same but their essence is not the same; what, as a relation to another, is justice is, as a certain kind of state without qualification, virtue." *Ibid.*, 82.

[65] Costas Douzinas, *The End of Human Rights:* 38-39.

[66] "[…] but we must not forget that what we are looking for is not only what is just without qualification but also political justice." Aristotle, *Nichomachean Ethics:* 91.

In the first book of *Nichomachean Ethics*, Aristotle criticized the Form of good. At the beginning, he directed four objections against this form; or more properly against its philosophical conceptualization.[67] Even after, separating "things good in themselves from useful things", there remains a dilemma considering "whether the former are called by reference to a single Idea"[68] or not: [(1) if they refer to the Form, the Form would become pointless. (2) If they do not refer to the Form (distinction between goods in themselves, *per se* and the Form of good), their difference from each other becomes irrelevant.] The aim of this dilemma is to show that proposing goods-in-themselves and the Form of good is self-contradictory, because it makes impossible to differentiate goods among themselves.[69]

Following two objections were aimed at the heart of the Idea of good. First, "even if there is some one good which is universally predicable of goods, or is capable of separate and independent existence, clearly it could not be achieved or attained by man…."[70] Second, even if this universal good is taken as a model to the attainable goods, it does not fit to the conditions of arts and sciences: "It is hard, too, to see how a weaver or a carpenter will be benefited in regard to his own craft by knowing this 'good itself', or how the man who has viewed the Idea itself will be a better doctor or general thereby."[71]

---

[67] (i) "the term 'good' is used both in the category of substance and in that of quality and in that of relation, […]; so that there could not be a common Idea set over all these goods."
(ii) "since 'good' has as many senses as 'being' […] , clearly it cannot be something universally present in all cases and single."
(iii) "Further, since of the things answering to one Idea there is one science, there would have been one science of all goods; but as it is there are many sciences even of the things that fall under one category."
(iv) "[…] what in the world they *mean* by 'a thing itself,' if (as is the case) in 'man himself' and in a particular man the account of man is one and the same" *Ibid.,* 8,
*Italics is mine.

[68] Aristotle, *Nichomachean Ethics***:** 8.

[69] *Ibid.,* 9.

[70] *Ibid.,* 9.

[71] *Ibid.,* 9.

This critique on the Idea of good paved the way for a distinct political understanding. The particular justice (among different kinds of justice[72]) can be established within a polity through rhetorical and dialectical discussion: "This polyphonic procedure in which litigants and authorities, witnesses and precedents, opinions, reasons and arguments, 'the sic and the nunc' are brought into dialogue is the gist of the dialectic, and the way through which *jus* emerged."[73]

2.2. A New Identification: Natural Law as the Measuring Rod

On this heritage, a distinct Stoic tradition is established and certain implications of law and justice emerged for the first time. On the one hand, Stoic tradition followed Aristotelian conception of justice: *honeste vivere, alterum non laedere, suum cuique tribuere* (live decently, do not hurt anyone, give one his own). Douzinas quoted from *Digest* that "the rule describes a reality briefly. The *jus* does not derive from the rule but *jus* that exist creates the rule."[74] In a sense, the idea of just share and right proportion continues to exert the influence on Stoic thinking. On the other hand, we are confronted with the emergence of *jus gentium.* Through the rational universality of Stoics, we witnessed another redefinition of the concept of nature. More than a redefinition, it is an extension of concepts into each other's sphere: nature becomes much more static, it becomes the source of definite set of rules and norms, however, this change is possible through the extension of *nomos* to include *physis*: "The law, human institutions, rules and all worldly order proceeds from a single source, all powerful nature, the sole *fons legum et juris* and logos discloses them to man." [75] This identification of *nomos* and *physis* carried Stoics closer to Plato (in a problematic manner) as well as Judeo-Christian tradition. It is in favor of *nomos* as the primacy of *logos* accepted[76]. In a sense, Stoics left behind Aristotelian *dikastes* who observes and uses dialectic and rhetoric. "For there is both one Universe, made up of all things, and one God immanent in all things, and one Substance, and one

[72] For example, Aristotle distinguished political justice (justice of citizens) from justice of master and justice of father. These different types imply a dynamic conceptualization of justice. Nevertheless, justice is always particular.

[73] Costas Douzinas, *The End of Human Rights:* 42.

[74] *Ibid.*, 42.

[75] *Ibid.*,51.

[76] *Ibid.*,53.

Law, one Reason common to all intelligent creatures and one Truth [...],"[77] the judge needs to contemplate and listen to his inner voice. *Dikastes* was replaced eventually by the priest, while teleology was replaced by eschatology.

Cicero can be discussed as a representative of Stoic tradition. *Recta ratio* (right reasoning) is a clear conceptual expression of the extension of nomos to include physis. Apart from other living beings, human can partake in the *logos* of nature through this *recta ratio*; it is what he shares with God: "But this does not mean that the laws of nature are product of human reason (*lex non hominum ingeniis excogitata*) nor that law is an order instituted by some peoples or states, but rather 'it is something eternal which rules the entire world by the wisdom of what it commands and what it forbids.'"[78]

As it is referred in passing, this characterization of natural law, *jus naturale,* can be brought to full relevance together with (and in contrast to) *jus gentium* (law of nations) and *jus civile* (civil law). Now it is the measuring rod that other two ought to conform. It is no longer the *polis* of Plato or Aristotle, but the community of men subject to *jus gentium*, in which *jus naturale* can find an expression.[79] Thus, as it is mentioned above, there is a reversal; it can be argued that Aristotelian conception of *jus* turned into *jus civile* and its conformity to *jus naturale* implied a different juridical understanding as Cicero provides a detailed definition of *jus naturale* in comparison to *suum cuique tribuere*: "We are told that the natural law consists in reverence for the gods; duty toward the fatherland, parents, and relatives; gratitude and readiness to forgive; and respect for all those who are superior to us in age, wisdom, or status, and finally he adds that *jus naturale* also consists in truthfulness."[80]

[77] Marcus Aurelius Antonius, *The Communings with himself of Marcus Aurelius Antonius* (London: William Heinemann, New York: G.P. Putnam's Sons, 1916): 169.

[78] Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective*: 30.

[79] *Ibid.*,34.

[80] *Ibid.*,33.

2.3. The Rise of Christian Spirit: Consolidation of Natural Law through Divine

This Stoic framework paved the way for Christian understanding of justice and law. Yet, one should be careful while pointing out the proximities; it was the rise of a new spirit which would change the whole terrain of legal thinking. In that respect, St. Augustine is a significant figure as the father of medieval Catholicism.

A point of clear distinction lies on his conceptualization of *civitas Dei* (City of God) and *civitas terrena* (earthly city). It was already mentioned that the transition from Greek *polis* to Roman community of men took place. Following this thread, Augustine provided a Christian transfiguration of the latter: "To put it another way, Augustine replaces the community of law by the community of charity and love. And such a community is essential to a Republic."[81] The emphasis on love (*diligere*) is crucial to understand the separation of religious and secular order. The transition from community of law to community of love found its utmost expression in the redefinition of justice: it is cherished by this community of love - which is not identical to Church, yet has to be represented by it - as a *value*. What began with the Stoics reached its completion; Christian spirit brought the modest definition of justice (live decently, do not hurt anyone, give everyone his own) to an end:

> Augustine makes the giving everyone his own more predominant, and he puts foremost among those to whom one must give his own God himself, who thus made the center of the whole argument. Thus, justice becomes a quality which comprehends piety. To believe in God, to venerate and adore him, to give to his church its proper place in the community, all this is now included in the concept of justice.[82]

Such a conceptualization of justice necessitates the distinction between moral and legal; that is why Augustine separates *civitas Dei* and *civitas terrena*. The governance of moral and spiritual life of people is assigned to Church as the representative of God. The latter, on the other hand, has the sole purpose of protecting order and peace: "Thus ordinary positive law is restrictive and merely prevents evil but does not make men good."[83] Reminding Stoic difference between *jus naturale* and *jus civile*, Augustine also separated *lex temporalis* (positive law)

[81] Carl Joachim Friedrich, *The Philosophy of Law in Historical Perspective*: 37.

[82] *Ibid.*,37.

[83] *Ibid.*, 40.

from *lex aeterna* (eternal law); in likely manner, eternal law sets limits to all positive law, and latter could not be called law in proper sense, if it could not conform the former.

All these distinctions can be regarded as the origin of the struggle, which occupied centuries, between religious and secular orders. A much more modest, yet intriguing, interpretation would be given as well. It can be argued that this distinction between moral and legal is an expression of another distinction that of between the *moralitat* and *sittlichkeit*. The non-coincidence of *civitas Dei* and *civitas terrena*, as well as the non-coincidence of *civitas Dei* on earth with the heavenly city, led Augustine to accept that one would have to live an ethically fragmented life:

> We see now a citizen of Jerusalem, a citizen of the kingdom of heaven, holding some office upon earth; as, for example, wearing the purple, serving as magistrate, as aedile, as proconsul, as emperor, directing the earthly republic, but he hath his heart above if he is Christian, if he is of the faithful.... Let us not therefore despair of the citizens of the kingdom of heaven, when we see them engaged in the affairs of Babylon, doing something terrestrial in a terrestrial republic....[84]

Both Stoic tradition and early medieval Christian thinking, as it is represented by St. Augustine, retained the Aristotelian notion of *suum cuique*, only to give it a Platonic flavour; in a sense it is inevitable because of the idea of God as the highest good. So, in spite of his emphasis on the legal, the Aristotelian tone of Thomas Aquinas should not be misleading. It is true that for Aquinas, unlike Augustine, political order has a much more positive and constructive place in relation to Church. Moreover, his fourfold distinction -between eternal, natural, divine and human law - actually enables him to reinterpret certain implications of Stoic identifications and loose connections; he would be able to consider natural and positive law together:

> *Natura hominis est mutabilis*[85], wrote Thomas, and this flexibility can lead to amendments not just in positive law but in the *jus naturale* itself. Natural law cannot be legislated in rules and or canons of behaviour and does not accept a

[84] Quoting from St. Augustine, Frederick Copleston, S.J. *A History of Philosophy: Volume II – Medieval Philosophy* (London, New York: Image Books, 1993): 88.

[85] "I answer that we can understand the mutability of law in two ways. We can understand it in one way by things being added to it. And then nothing prevents the natural law changing, since both divine law and human laws add to natural law many things beneficial to human life. We can understand the mutability of the natural law in a second way by way of substraction, namely, that things previously subject to law cease to be so." Thomas Aquinas, *Treatise on Law* (Indianapolis/ Cambridge: Hackett Publishing Company, Inc., 2000): 41.

> rigid or fixed formulation. It offers only general directions as to the character of people and the action of the law.[86]

Thus, in Thomistic understanding of law, a transformation can be observed, yet as mentioned, one must be cautious:

> *I answer that* everything for an end needs to be proportioned to the end. But the end of law is common good, since "law should be framed for the common benefit of citizens, not for any private benefit," as Isidore says in his *Etymologies*. And so human law need to be proportioned to the common good. But the common good consists of many things. And so law need to regard many things, both persons, matters, and times. For the political community consists of many persons, and its good is procured by many actions.[87]

In spite of his emphasis on proportional justice, Aquinas' conceptualization still carried the mark of early Christian thinking and Platonic influences, simply because of his argument that the end of law is common good. It is also evident in his definition of law: *quae nihil est aliud quam quaedam rationis ordination ad bonum commune, ab eo qui curam communitatis habet, promulgata* (law is an ordination of reason for the common good by one who has the care of the community, and promulgated).[88] This idea of common good is absent in Aristotelian *jus.* Moreover, the ordination of reason should be thought on the same line with the *recta ratio*; it is an act of partaking in divine reason. Thus, it dictates itself on the common good of community, as it is the community of the faithful.

2.4. The Emergence of Individual Right

A crucial turning point came, according to Douzinas, which can be characterized as the first step of the shift from objective *jus* to individual right. Two schools of scholastic tradition contributed to the idea of individual/subjective right which became the hallmark of modern jurisprudence: Nominalists and the Spanish scholastics. They deserve a brief mention: to put it simply, they emphasized the existence of particulars and rejected general terms. This position has certain legal implications: "William argued that the control exercised by private individuals over

[86] Costas Douzinas, *The End of Human Rights:* 58.

[87] Aquinas, *Treatise on Law:* 52.

[88] *Ibid.*, 6.

their lives was of the type of *dominium* or property and, further, that this natural property was not a grant of the law but a basic fact of human life."[89] As such, the basic fact of human life is the expression of the will of God, and this should not have to conform neither to nature nor reason: "The separation of God from nature and the absolutisation of will prepared the ground for God's retreat and eventual removal from earthly matters."[90] Quoting from Villey, Douzinas said that this shift from objective *jus* to individual right as liberty and power amounts to a "Copernican moment."[91] One has to be careful while proposing such a tremendous claim, yet it is clear that it has an impact and appears as foundational for later political thinking, like that of Hobbes. He writes that:

> THE RIGHT OF NATURE, which writers commonly call *jus naturale*, is liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature [...] For though they that speak of this subject, sue to confound *jus*, and *lex, right* and *law*: yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbear; whereas LAW, determineth, and bindeth to one of them: so that law, and right, differ as much, as obligation and liberty; which in one and the same matter inconsistent.[92]

The power of Hobbesian politico-legal reasoning lies in its clear definitions and identifications. Besides certain technical difficulties, it is easy to find an explicit line of argumentation. A common starting point with regard to this line of thought is the idea of *state of nature*. Chapter XIII of Leviathan has the title *Of the Natural Condition of Mankind as Concerning Their Felicity, and Misery*. This state of nature gives us crucial ideas about the political order arising out of covenant. But first, attention should be paid to the characteristics of man in this state of nature.

First argument is that the men are equal by nature. But it is simply the equality of being subject to death; the mortality and fragility of human beings make them equal to each other: "NATURE hath made men so equal, in the faculties of the body, and mind; as that though there be found one man sometimes manifestly stronger in body,

[89] Costas Douzinas, *The End of Human Rights:* 62-63.

[90] *Ibid.*, 63.

[91] *Ibid.*, 63.

[92] Thomas Hobbes, *Leviathan* (Oxford, New York: Oxford University Press, 1996): 86.

or of quicker mind than another; yet when all is reckoned together, the difference between man, and man, is not considerable…."[93]

First consequence of this equality is the "equality of hope in the attaining of our ends."[94] Thus, men desire things which others desire as well; and in the end, there is no possibility of enjoying the same thing. Moreover, even though one would be successful in subduing the other, he could not enjoy the things simply because "others may probably expected to come prepared with forces united, to dispossess, and deprive him, not only of the fruit of his labour, but also of his life, or liberty."[95] So, from this equality proceeds *diffidence* and gives way to war. It is war and conquest only which assures the security of men, regardless of one's being content with what he has. "So that" Hobbes argued, "in the nature of man, we find three principal causes of quarrel. First, competition; secondly, diffidence; thirdly, glory."[96]

Two claims are important with regard to these arguments. First, the war in state of nature should not be actual fighting; it is a constant threat causing diffidence: "so the nature of war, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary."[97] Second, in such a state of war nothing is unjust; this argument implies a sharp departure from the idea of natural law peculiar to Stoic and Christian doctrines:

> To this war of every man against every man, this also is consequent; that nothing can be unjust. The notions of right and wrong, justice and injustice have there no place. Where there is no common power, there is no law: where no law, no injustice. Force, and fraud, are in war the two cardinal virtues. Justice, and injustice are none of the faculties neither of the body, nor mind.[98]

Simple and precise statements; yet Hobbes discussed the natural laws as well. Beginning from two fundamental laws, he enumerated eighteen laws of nature; first three laws have a special place for present inquiry.

---

[93] *Ibid.*,82.

[94] *Ibid.*,83.

[95] *Ibid.*,83.

[96] *Ibid.*,83.

[97] *Ibid.*,84.

[98] *Ibid.*, 85.

First, fundamental law of nature is "*that every man, ought to endeavour peace, as far as he has hope of obtaining it; and when he cannot obtain it, that he may seek, and use, all helps, and advantages of war.*"[99] The statement consists of two parts: first part implies a general inclination *seeking peace*; the second part is the only right of nature, *to defend ourselves*. Derived from this fundamental law, second law of nature says "*that a man be willing, when others are soo too, as far-forth, as for peace, and defence of himself he shall think it necessary, to lay down this right to all things; and be contended with so much liberty against other men, as he would allow other men against himself.*"[100]

Following the inclination towards peace, men should give up his *liberty*[101] and lay down his right to things aside. Two ways for laying aside are renouncing and transference. Latter has a crucial significance because "the mutual transference of right is that which men call CONTRACT" and when "one of the contractors, may deliver the thing contracted on his part, and leave the other to perform his part at some determinate time after…" it is called covenant.[102]

As a result, the third law of nature says "*that men perform their covenants made.*"[103] According to Hobbes, this law is the source of justice, preceding which there can be no transference of right, simply because everyone has the right on everything. Yet, there is a constant fear accompanying the covenants of mutual trust: the fear of nonperformance of covenants. Such a fear should be removed to keep valid covenants. "Therefore before the names of just, and unjust can have place, there must be some coercive power, to compel men equally to the performance of their covenants, by the terror of some punishment, greater than the benefit they expect by

[99] *Ibid.*,87.

[100] *Ibid.*,87.

[101] "By LIBERTY, is understood, according to the proper significaion of the word, the absence of external impediments: which impediments, may oft take away part of a man's power to do what he would; but cannot hinder him from using the power left him, according as his judgment, and reason shall dictate to him." *Ibid.*,86.

[102] *Ibid.*,89.

[103] *Ibid.*,95.

the breach of their covenant…"[104] And this coercive power is nothing other than the commonwealth which should precede any valid covenant.[105]

Hobbes made a clever move to link this argument to the classical definition of just as *suum cuique tribuere*, giving one his own:

> where there is no *own*, that is, no propriety, there is no injustice; and where there is no coercive power erected, that is, where there is no commonwealth, there is no propriety; all men having right to all things: therefore where there is no commonwealth, there is nothing unjust.[106]

How Hobbes defined commonwealth more specifically? The question is directly related with the generation of commonwealth. It is a special act of transference of rights and conferring powers which, as mentioned, should precede covenants and make them valid. It requires all men to say that "*I authorize and give up my right of governing myself, to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner.*"[107] So, the commonwealth, or civitas emerged as the mortal god, Leviathan, or the sovereign power. One should be cautious with regard to two aspects of this act. First, difference between forms of government (monarchy, democracy and aristocracy) is irrelevant, simply because each of them retain sovereign power as absolute. Second, as it is repeated again and again before, "it is not that they [men] first make a covenant setting up a society and then afterwards choose a sovereign […]. It is rather that on the covenant being made sovereign and society come into existence together."[108] Theoretically speaking, the erection of common power through covenant creates in a single stroke society and political order.

Latter aspect of covenant could be discussed to shift our attention towards another important philosopher figure, John Locke. As it is mentioned, it is evident for

---

[104] *Ibid.*, 95-96.

[105] "So that the nature of justice, consisteth in keeping of valid covenants: but the validity of covenants begins not but with the constitution of a civil power, sufficient to compel men to keep them: and then it is also that propriety begins." *Ibid.*,96.

[106] *Ibid.*, 96.

[107] *Ibid.*, 114.

[108] Frederick Copleston, S.J. *A History of Philosophy: Volume V – Modern Philosophy: The British Philosophers from Hobbes to Hume* (London, New York: Image Books, 1993): 40.

Hobbes that the state of nature is a state of war, war of all against all. However, Locke separated state of nature and state of war, the latter is the consequence of force exercised without right,[109] yet it is possible to find right in state of nature: "The state of nature has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty and possession."[110] Apparently, this state of nature is totally different from that of Hobbes', which was marked by the fraud, diffidence and misery. Thus, Copleston rightfully argued that "for Locke, it [natural law which is accessible in state of nature] meant a universally obligatory moral law promulgated by the human reason as it reflects on God and His rights, on man's relation to God and on the fundamental equality of men as rational creatures."[111] These religious overtones are not surprising considering Locke's emphasis on divine law and reason.

It can be easily inferred that Locke's conception of natural right has a much more substantive character in comparison to Hobbes' right of self-preservation. Locke's conceptualization of natural right to property deserves special attention in that sense. This right to property proceeds not only from the right of self-preservation but also, more specifically, from the right given by God to flourish and glorify his greatness. From the very beginning Locke had in mind the cultivation of land; moreover, the earth was given mankind in common:

> Whether we consider natural reason, which tells us, that men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence; or revelation, which gives us an account of those grants God made of the world to Adam, and to Noah, and his sons; it is very clear, that God, as king David says, Psal. Cvx.16, "has given the earth to the children of men:" given it to mankind in common.[112]

The question is, then, how this common earth becomes private property of man. The answer is simple: it becomes his private property through his labor. The use of labor

[109] *Ibid.,* 128.

[110] Quoting from Locke, Frederick Copleston, S.J. *A History of Philosophy: Volume V:* 128.

[111] Frederick Copleston, S.J. *A History of Philosophy: Volume V:*129.

[112] John Locke, *Two Treatises of Government and A Letter Concerning Toleration*(New Haven, London: Yale University Press, 2003): 111.

is a simple act of appropriation and cultivation; by mixing his labour, man removes things from their states in nature. Thus, "that labour put a distinction between them and common: that added something to them more than nature, the common mother of all, had done; and so they become his private right."[113] In contrast to Hobbes, Locke's right to property and inheritance does not require a civil law emanating from a political order, but constitutes itself a thin layer of civil law which relates men to men through his private property. As a result, Locke moves on to construct his own liberal commonwealth.

The last argument concerning the difference between Locke and Hobbes is closely related with their understandings of covenant or compact. For both thinkers, it is the covenant which creates a distinct political order. Yet, Copleston, argued that, although there was no explicit mention, "Locke tacitly assumes that there are two" covenants:

> By the first compact a man becomes a member of a definite political society and obliges himself to accept the decisions of the majority, while by the second compact the majority (or all) of the members of the new-formed society agree either to carry on the government themselves or to set up an oligarchy or a monarchy, hereditary or elective.[114]

So, what resulted in the dissolution of the political for Hobbes, namely, the overthrow of the sovereign did not necessarily entails such a conclusion for Locke. In spite of his emphasis on legislature as the highest power in commonwealth, Locke's sovereign did not hold absolute power, unlike Leviathan. On the contrary, it is subject to (I) divine moral law, (II) good of people, (III) and consent of people.[115]

I want to take the risk of diverting the course of exposition to emphasize the *return* of a conceptual theme (which is a return to a discussion I mentioned in passing), differing with every distinct historical change; through this line of inquiry, it is possible to situate the theories already mentioned in a historical sense. The concept

---

[113] The limitation comes again from God to this right; men should not leave his property uncultivated. John Locke, *Ibid.*,112.

[114] Frederick Copleston, S.J. *A History of Philosophy: Volume V:* 135.

[115] *Ibid.*,136-137. "In any case the two points on which he insists are that the legislative must be supreme and that evey power, including the legislative, has a trust to fulfill." For Hobbes, as well, legislative has a trust to fulfill: security.Yet he did not require the consent of people after covenant.

that deserves special attention is *property*, yet the term, as it appears as such, did not have the repercussions one is accustomed today. As I said, changes imbued the term, replenished it with distinct historical meanings that makes it indispensable for the present study on rights.

I already mentioned William and the idea of *dominium.* As the general analytical category,[116] of legal thinking in 14th century, and more than that, as the beginning of a distinct understanding on property, this concept deserves further consideration. Grossi specified 14th century as an era of transition and the most peculiar characteristic of this transition is the emergence of a new anthropocentric understanding[117].

Voluntarism of this century found a distinct expression in Franciscan theology which defines human subject "as a being who *loves* and who *wills*."[118]Grossi continued that "everything becomes subjectivized and resolved within the boundaries of the subject, who thereby affirms his ontological separation from the world and consequent liberty within world."[119] One should be careful while interpreting these words and keep in mind that there is always a danger of falling into the overreading through history. Thus, I want to limit my discussion to the expression and consolidation of this voluntarism in the legal thinking. This consolidation is made possible through a distinction between *dominium sui* (ownership of body and skills) and *dominium rerum* (ownership of external things) which exemplifies how the separation from and liberty within the world is possible. In one sense, this distinction is inevitable, simply because will manifests itself through an assertion of itself on things. This will is not the will of secular individual subject, that is the reason behind our caution; it is the will that partakes in the will of God: Human being is *entitled* to assert its will as the heir of God in world. So, the right to property of human being emanates from this entitlement, to assert its will; one has to *have* necessary means to assert itself, to express its will. And, this assertion necessitates the ownership of, first, body and

[116] Paolo Grossi, *A History of European Law* (Malde: Wiley-Blackwell, 2010): 41.

[117] *Ibid.,* 42.

[118] *Ibid., 40.*

[119] *Ibid., 41.*

skills, then external things. If one overlooks the religious tones of this reasoning, it is easy to slip into a false interpretation of emancipation. So, the decisive consequence of this line of reasoning has to be evaluated carefully: "The will, in effect, becomes the essential character of human subject, and the guarantor of each person's liberty. This liberty is construed as *dominium*; the intrasubjective realm is governed by a series of rights of property," moreover, "these anthropological considerations allow us to capture the first instance of that typifying characteristic of modernity: the mingling of being and having, of me and mine."[120]

Following these ideas, it is not surprising to see this theological conceptualization at the beginning of a general liberation of human subject. Thus, Grossi did not hesitate to reach this conclusion: "In the two centuries that follow [14th century,] freedom has already been achieved."[121] The title of his subsection in the Foundation of the Modern Legal System is quite straightforward: *An Ideological Break with the Past: Ploughing the Furrow of Individual Freedom. Humanism, the Reformation, Proto-capitalism and the Scientific Revolution.*[122] In one stroke, he included four tremendous movements, each of which ensures the rise of individual freedom. The enthusiasm of the historian should be balanced with the caution of the thinker. There is no intention to underestimate the significance of these events, yet a critical inquiry has to be much more attentive to the nuances of historical changes. So, it is wise to limit the scope and focus briefly on a legal tradition: legal humanism. In spite of his optimism, Grossi is quite right to differentiate two attitudes peculiar to legal humanism: historicist and rationalist attitudes.[123] How would it be possible to think these two attitudes together? There is nothing contradictory, on the contrary there is a peculiar approach with regard to these attitudes.

According to Grossi, the legal humanists had a specific understanding of Roman Law:

---

[120] *Ibid.,* 41.

[121] *Ibid.,* 50.

[122] *Ibid.,* 50.

[123] *Ibid.,* 54.

> Classical Roman jurists came to be seen as sages similar to the logicians and geometers of ancient Greece in their capacity to construct rigorous and systematic theoretical models, the single elements of which were attributed the indisputable rigour of geometrical figures.... The classics were held to have read nature, to have understood it and then have translated it into a laudable system of extraordinary logical cogency. [124]

It is nothing other than *recta ratio*, which I discussed before, that was highly valued by these legal humanists. The return to *logic* is not surprising considering the rising spirit of science. Yet, this return was not a simple appropriation of an age-old discipline, there was an intention to devise a lively rigorous method; that is the thrust behind historical attitude: "The first principle that Roman law is a historical artefact premises a second, more general, methodological assumption: legal systems are historical artefacts and, as such, deserve to be evaluated along with the historical movement they reflect"[125]

Thus, coming together of these two attitudes reflected a specific intention, combining two functions: On the one hand, historical reading enables one to contextualize tradition of law (in this case, Roman law) and point out its contingency; from this position it is easy to reach the conclusion that different historical periods demand different laws based on the necessities and needs peculiar to that period. On the other hand, this conclusion would be misleading, if one overlooks the rationalistic attitude; it is not a matter of radical historicism. Historicism of legal humanism paved the way for a return to *recta ratio* which would enable one, once again, to read nature properly and translate it into human law. This historicist understanding was at the service of constructive *recta ratio*.

So, it is not a surprise that, following legal humanism, we encountered with natural law of 17th and 18th century. Needless to say, for Grossi, the liberating currents of reformation and renaissance was resumed by the doctrine of human rights, it gains different connotations thanks to the advances in natural sciences:

> In the seventeenth century, the mathematical and natural sciences now provide a secure methodological fortress for jurists, who now claim to make discoveries like

[124] *Ibid.,* 56.

[125] *Ibid.,* 58.

> natural scientists. In the same way as someone who discovers a universal physical law that governs the way things naturally behave, jurists seek to establish universal rules of conduct as defined by the nature of mankind - something which should be visible to anyone who as the correct outlook.[126]

Following this passage, two important concepts emerge. One of them is *evidence*, coming from natural sciences*;* giving examples from the work of Huig van Groot (*Hugo Grotius*), Grossi argued that *evidence* is the distinct feature of new legal outlook which is secular: "first of all, I have been concerned to base my proofs regarding natural law on notions so evident that no one could deny them without committing violence upon themselves. In fact the principles of such a form of law [...] are manifest and evident in and of themselves."[127] It is secular simply because it is self-evident and self-justified; there is no divine intervention. Apparently, such a way of approaching the issue is oversimplifying the complexity of doctrine of natural law, especially after the discussions on the *will* of human being. Moreover, evidence itself becomes subject to interpretative power of prince, as I will discuss later.

The other concept is *nature of mankind.* Again, Grossi argued that this concept is closely related with the question of "how to liberate oneself from the artificial provisions of history and arrive at a perfect understanding of what the primitive natural state of mankind was."[128]Thus, it is not surprising to see a familiar figure: Locke, but now as the successor of Grotius: Van Groot's idea of the natural state is underpinned by one fundamental rule: the respect of every person's *proprium* (literally 'own things').[129] One could easily infer the relationship between *dominium*, *properium* and *property*. Grossi is well aware of this lineage:

> Treatises was thus embarked on in the be now remote fourteenth century. Yet the central thesis remains the same: the ownership of goods is seen as *natural* since it emanates form the ownership of oneself and the instinct for self-preservation, which is instilled by the deity to safeguard the self and is therefore indisputably *natural*.[130]

[126] *Ibid.,* 60.

[127] Quoting from Grotius, *Ibid.,* 61.

[128] *Ibid., 60.*

[129] *Ibid., 62.*

[130] *Ibid., 63.*

This emphasis on the natural and also *sacred* rights of property explains why Grossi skipped Hobbes in his historical account. It also explains why he interpreted The legal Enlightenment and legal Absolutism as a betrayal to the doctrine of natural law.

It can be argued that the rational and historicist attitudes of legal humanism found a novel expression in the hands of the rising sovereigns of legal enlightenment who participated in the legal and cultural disputes: A novel expression, simply because of their capacity "to align historical reality with recently identified natural laws."[131] As Grossi argued,

> The legal Enlightenment represents a truly political view of the law: it tackles the problem of the relationship between natural law and political power and resolves it via innovative reorganization of the sources of law. The law itself becomes the privileged object of intellectual reflection and political action, something which rocks the discipline to its core, bringing to it a new political dimension.[132]

The rise of the political is directly related with the rise of the sovereign, the *prince* and the bureacratic apparatus around him. The accompanying idealization had two dimensions. First, prince was thought as "the model of mankind and champion of all virtues, could remain untouched by the emotions and accomplish objective contemplation of the common good necessary for maintaining public containment."[133] Behind, these sincere explanation, one can see *Leviathan*. Moreover, with his ideal character and, as Beccaria put it, as "the representative of the current will of all,"[134]it was prince who would interpret the nature of things and translate into laws. Here, the will of the prince and *recta ratio* which enables one to identify natural laws come together. The second dimension is closely related with this conjunction of natural law and political power: The obedience to law, which is both the expression of general will through the will of the sovereign and the natural law derived by the human reason, becomes the condition of liberty. This inference marks the emergence of an important concept: security. It is not a coincidence to see

[131] *Ibid., 65.*

[132] *Ibid., 65.*

[133] *Ibid., 67.*

[134] *Ibid., 68.*

liberty, property and security even in *Virginia Declaration of Rights* (1776) as the fundamental rights of individual.[135]

Thus, one must be cautious again, when arguing that "behind the figleaf of 'natural reason' and the 'general will' lies the deposition of the whole mechanism of the production of law in the hands of politically powerfully."[136] To a degree, one could agree with Grossi with regard to this conclusion. Yet, the natural law and natural rights would gain a different direction with the bills of rights and French Revolution, and in a way retain its ethico-political influence. The single figure to understand that direction properly, in a philosophically grounded way, is Immanuel Kant.

One aspect of the "epoch-making importance" of Kant's philosophy resides in the critique of the antinomy between voluntaristic and normative thinking, or in other words, between human *freedom* and rational *necessity*.[137] It can be argued that there is a parallelism between this antinomy and the tension between (universal) natural law and (human) positive law. The privileged concept is *autonomy* to reapproach this antinomy, and was placed at the heart of both his first and second critiques. Moreover, *autonomy* becomes the distinctive feature of reason, as the knowledge is limited to the phenomena and the categories of understanding for the production of this knowledge have to be accounted autonomously. This cognitive doctrine holds true for practical philosophy as well:

> […] the function of practical reason is to legislate maxims for volitional action under which action becomes independent of all material and sensory stimulus, and so authorizes itself as internally consistent, justifiable and, consequently *free*.... The central focus of Kant's idea of reason is, thus, the delineation of the human being as an agent endowed with legislative faculties of self-causality, which allowed it to constitute itself as free.[138]

---

[135] "SECTION I. That all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." http://www.constitution.org/bcp/virg_dor.htm.

[136] *Ibid., 69.*

[137] Chris Thornhill, *German Political Thought: The Metaphysics of Law* (London and New York: Routledge, 2007): 98.

[138] *Ibid., 100.*

This argument entails the transcendence of self-interest for the "universally valid and morally necessary exercise: "In the deduction of universally valid maxims or laws, reason recognizes "its own absolute or transcendental *idea of freedom*."[139]The conformity with these laws are the conditions for the *freedom,* in other words, with this subversive move, Kant reconciled *freedom* and *necessity*.

Chris Thorhill is well justified to call Kant as a "Protestant Aquinas;" the doctrine of autonomy carried the tension between natural law and positive law to a different level: to the level of self-constituting subject. It is no longer God who determines the fundamental, normative structure of the world and legislates laws for his subjects. "Indeed, at the centre of Kantian thought is an endeavour to transpose the will of the rationally free God onto the human will, to allow the human will to reintegrate the unity of intellect and freedom originally possessed by God...."[140] Accompanying the transition from the natural law to human law of autonomous subject who transform universal valid law into positive law, the natural right turned into the human right:

> In this world, [...] each person, in so far as he or she follows these universal maxims, recognizes each other person as a bearer of rights and freedoms which cannot be legitimately restricted, and each person recognizes each other person as possessing an innate and rationally demonstrable dignity.[141]

One should not get a false impression of a supersession of the natural rights with the human rights. Surely, the transposition enables one to redefine the terms of the discourse of rights, yet with its abstract structure and displacement of law-making subject, this new discourse carried along the old tension in a different manner: Declarations of human rights or rights of man can be interpreted as an expression of this continuation. As Douzinas put it clearly:

> Rights are declared on the behalf of the universal "man," but the act of enunciation establishes the power of a particular type of political association, the nation and its state, to become a sovereign law-maker and secondly, of a particular "man", the national citizen, to become beneficiary of rights. First, national sovereignty. The declarations proclaim the universality of right but their immediate effect is to establish the boundless power of the state and its law. It was the enunciation of rights which established the right of the Constituent Assemblies to legislate. In a paradoxical fashion, these declarations universal principle "perform" the foundation

[139] *Ibid., 100.*

[140] *Ibid., 99.*

[141] *Ibid., 101.*

> of local sovereignty. The progeny gave birth to its own progenitor and created him in his own image and likeness.[142]

Moreover, in the face of this insurmountable tension, how would it be possible to think a human rights system internationally? Kant preferred recourse to the Hobbesian state of nature argument on international level, but with a nuance:

> […] this duress [of constant wars] must compel nations to that state in which, while there is no cosmopolitan commonwealth under a single head, there is nonetheless a rightful state of federation that conforms to commonly accepted [principles of] *international right*.[143]

Compared to the idea of a single international commonwealth a federative system is a better solution and much more preferable. However, he was quite aware that the idea of this kind of international order is very unlikely; "for this proposal has always been ridiculed by great statesmen, and even more by leaders of nations, as a pedantically childish academic idea."[144] Here, Kant's appeal and *trust* to nature appears as that which "comes to the aid of that revered but practically impotent general will, which is grounded in reason."[145] Both in *On the Proverb: That May be True in Theory But Is of No Practical Use* (1793) and *To Perpetual Peace: A Philosophical Sketch* (1795), he quoted from Seneca: *fata volentem ducunt, volentem trahunt* (fate guides the willing and drags the unwilling.).[146] Moreover, this fate found expression in the burden of war and the spirit of trade which "cannot coexist with war, and sooner or later this spirit dominates every people."[147] Nearly one and a half century later from Kant, this burden of war was experienced as devastation in the world and paved the way for the idea of international human rights which became subject to a great deal of controversy and considerable failures.

---

[142] Costas Douzinas, *The End of Human Rights*: 101.

[143] Immanuel Kant, *Perpetual Peace and Other Essays* (Indianapolis: Hackett Publishing, 1983): 88.

[144] *Ibid.*, 89.

[145] *Ibid.*, 124.

[146] *Ibid.*, 92.

[147] *Ibid.*, 125.

CHAPTER III

INTERNATIONAL ORDER AND THE FAILURE OF HUMAN RIGHTS SYSTEM

3.1. The Legacy of Hugo Grotius

The last part of previous chapter gave an explanation, through Kant, of the necessity of thinking international (human) rights. However, the terrain of international order, as a domain of possibility for this rights regime, has a distinct conceptual outlook. An inquiry on the human rights should take into consideration the theoretical ground of this international order; the emergence of this ground can only be understood properly by recalling a significant thinker and his ideas: Hugo Grotius. It is not just the scholarly opinion behind this claim of significance. More than that, there is a lively figure who always engaged in the political struggles of his time; his ideas clearly reflect the effects of such an engagement. However, it also explains the dilemmas which he bequeathed to his successors; two of them being Hobbes and Pufendorf.

It can be argued that there is a conventional approach to Grotius' ideas on law of nature and law of nations. In his two books,[148] Charles Covell provides an example of this conventional approach. He characterized Grotius, first, as one of the founders of modern secular natural law theory, and, second, as the heir of just war tradition. According to Covell, even the magnum opus of Grotius, *De Jure Belli ac Pacis*, was organized with regard to the core principles of just war tradition: "principle of lawful authority, just cause and right intention."[149] What bound the tradition of just war and

[148] Charles Covell, *Hobbes, Realism and the Tradition of International Law* (New York: Palgrave MacMillan, 2004),

Charles Covell, *The Law on Nations in Political Thought: A Critical Survey from Vitoria to Hegel* (New York: Palgrave MacMillan, 2009).

[149] Charles Covell, *Hobbes, Realism and the Tradition of International Law* (New York: Palgrave MacMillan, 2004): 101.

natural law doctrine in his theory is the distinction between three forms of law and the conceptualization underlying this distinction.

He distinguishes three types of law: law of nature, civil law (municipal law) and law of nations. One can easily comprehend that there is nothing original in this distinction considering the long tradition discussed in the second chapter of the present study. However, his conceptualization of natural law and its relation with the law of nations has a peculiar characteristic. Before that, the law(s) of nature should be mentioned briefly; In the Prolegomena of *Commentary on the Law of Prize and Booty*,[150] he provided thirteen laws of nature:

> [1st and 2nd Law:]*It shall be permissible to defend* [*one's own*] life and to shun that which threatens to prove injurious; a secondly, that *It shall be permissible to acquire for oneself, and to retain, those things which are useful for life...*
> [3rd and 4th Law:] *Let no one inflict injury upon his fellow.* The other is the precept: *Let no one seize possession of that which has been taken into the possession of another...*
> [5th and 6th Law:] Hence these two laws arise: first, *Evil deeds must be corrected;* secondly, *Good deeds must be recompensed...*
> [7th and 8th Law:] *Individual citizens should not only refrain from injuring other citizens, but should furthermore protect them, both as a whole and as individuals;* secondly, *Citizens should not only refrain from seizing one another's possessions, whether these be held privately or in common, but should furthermore contribute individually both that which is necessary to other individuals and that which is necessary to the whole....*
> [9th Law:] This precept runs as follows: *No citizen shall seek to enforce his own right against a fellow citizen, save by judicial procedure...*
> [10th and 11th Law:] Consequently, in this connexion also two laws exist, laws inherent in the contract of [magisterial] mandate by its very nature: first, *The magistrate shall act in all matters for the good of the state;* secondly, *The state shall uphold as valid every act of the magistrate.*
> [12th Law:]*Neither the state nor any citizen thereof shall seek to enforce his own right against another state or its citizen, save by judicial procedure.*
> [13th Law:]*In cases where* [*the laws*] *can be observed simultaneously, let them* [*all*]*be observed; when this is impossible, the law of superior rank shall prevail.*[151].

In these laws, one can find an expression of principle of self-preservation [1st Law] which was indispensable for the state of nature argument of both Hobbes and Locke. Moreover, it is possible to see the seeds of Locke's natural right to property [2nd Law]. There is also an emphasis, although implicitly, on the role of the sovereign

[150] Hugo Grotius, *Commentary on the Law of Prize and Booty* (Indianapolis: Liberty Fund, Inc., 2006).

[151] Ibid., 19-51.

(magistrate) [10th and 11th Law]. And most importantly, Grotius proposes the superiority of judicial procedure [9th and 12th Law]. That is why Covell placed him along the tradition of just war.

The list of these laws gives a rich but complicated picture of a conceptualization of the doctrine. This amalgamation is the reason behind dilemmas and different appropriations of Grotius' ideas. Following the tradition of natural law, this is not surprising; nevertheless one can argue that he lacked the precision (or single-mindedness) characteristic of Hobbes.

Again, there is nothing especially original in this list of natural laws. However, Grotius' ideas become distinct with his claim on the intrinsic relationship between law of nature and law of nations; in other words, his title as the originator of international relations came from his argument that law of nature is the "underlying normative foundation of law of nations,"[152] although these two have to be distinguished clearly. Covell argued that this foundation was established by the principle of pacts:

> […] the law of nature included a general principle of just conduct whose observance by nations and states stood as the precondition for the possibility of their being able to generate, through their own will and consent, a body of laws for the regulation of their mutual external relations…. This was the principle of pacts, and with it relating to the general requirement that the terms of voluntary agreements were to be fulfilled by the parties to them.[153]

Moreover, this principle of pacts is closely related with the morality and justice that emanates from the law of nature:

> Herein lies the origin of pacts, which is necessarily bound up with the Sixth Law, as has been indicated above. It was this law that Simonides had in mind when he proposed the following definition of justice: "To speak the truth, and to pay back what has been received." The Platonists, moreover, frequently refer to justice as *άλήθειαν*, a term translated by Apuleiusc as "trustworthiness" [*fidelitas*].[154]

[152] Charles Covell, *The Law on Nations in Politica Thought: A Critical Survey from Vitoria to Hegel* (New York: Palgrave MacMillan, 2009): 54.

[153] *Ibid.*, 55.

[154] Hugo Grotius, *Commentary on the Law of Prize and Booty* (Indianapolis: Liberty Fund, Inc., 2006): 35.

Following this line of argument, one can argue that the international order based on this principle would be law-governed both in times of war and peace. In spite of this underlying principle of "trustworthiness," Grotius was keen to distinguish law of nations from law of nature. Once more there is nothing novel; it is a commonplace to differentiate natural and divine law from human/positive law which based on the customs of different folks. Clearly enough, international law as the law ordering the relations between different states and rulers is a form of positive law; the will and agreement of states are decisive in their external relations. Although, law of nature is underlying normative foundation, law of nations is the "binding normative force."[155] In addition to that, the sphere of application of law of nations is only external relations between states (Grotuis separated *ius genium primerium* from *ius genum secundarium*).[156] An example is provided by Grotius through the distinction between private and public war; only the latter is pertained to the sphere of law of nations: "That is to say, the law of nations related essentially to war waged by states on the authority of the sovereign power, and in accordance with such formal conditions as, for example, the condition that war was to be accompanied by a declaration of war on the state rulers concerned."[157]

Still, the normative foundation provided by law of nature prevails in this conventional account of Grotian perspective. The distinction between law of nations and law of nature enforces the systematic exposition of law-based character of international relations. Thus, Covell argued that Grotius should be understood as an internationalist whose ideas follow the tradition of just war, and not as a realist unlike, for example, Hobbes.[158]

However, one could risk a different interpretation of Grotius, which would enable one to decipher a different proximity. In his book, *The Rights of War and Peace*,

[155] Charles Covell, *Hobbes, Realism and the Tradition of International Law* (New York: Palgrave MacMillan, 2004): 106.

[156] Hugo Grotius, *Commentary on the Law of Prize and Booty:* 25.

[157] Charles Covell, *Hobbes, Realism and the Tradition of International Law* (New York: Palgrave MacMillan, 2004): 106.

[158] According to Covell, Hobbes disregard Just War tradition and thinking law of nature and law of nations together.

Richard Tuck provides such an interpretation. In one sense, this interpretation was already provided long ago by Rousseau:

> When I hear Grotius praised to the skies and Hobbes covered with execration, I see how far sensible men read or understand these two authors. The truth is that their principles are exactly the same: they only differ in their expression. They also differ in their method. Hobbes relies on sophism, and Grotius on the poets, all the rest is the same.[159]

From Tuck's interpretation, two objections would be derived against this conventional account.

The first objection is concerned with the right of punishment, *ius gladii*.[160] Apart from the previous arguments which were discussed, this right to punishment reveals an important identification concerning the state:

> […] that an individual in nature (that is, before transferring any rights to a civil society) was morally identical to a state, and there were no powers possessed by a state which an individual could not possess in nature. The kind of state he had in mind, moreover, was one which was sovereign in the strong sense: he remarked that '*supra rempublicam nihil est*' and used the Roman legate's answer to the Ansibarii to vindicate this view – 'the gods had empowered the Romans to tolerate no judges but themselves.'[161]

This interpretation implies the distance of Grotius from a peaceful, internationalist image. Another distinct point is Grotius' reading of Aristotelian justice. In the second chapter of present study, the distinction between general and particular justice was emphasized. The latter kind of justice also included two different kinds of justice: commutative (administration of punishment) and distributive (distribution of goods) justice. Through a clever *misreading*, Grotius elevated the latter distinction to the

---

[159] Quoting from Rousseau, Richard Tuck, *The Rights of War and Peace: Political thought and International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001): 102.

[160] Tuck quoting from Grotius: "Is not the power to punish essentially a power that pertains to the state [respublica]? Not at all! On the contrary, just as every right of the magistrate comes from him from state, so has the same rigt come to state from private individuals; and similarly, the power of the state is the result of collective agreement ... The following argument, too, has great force in this connexion: the state inflicts punishment for wrongs against itself, not only upon its own subjects but also upon foreigners; yet it derives no power over the latter from civil law, which is binding only because they have given their consent; and therefore, the law of nature, or law of nations, is the source from which the state receives the power in question." Richard Tuck, *The Rights of War and Peace: Political thought and International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001): 82. In a very different manner - different in terms of political implications - the connection between law of nature and law of nations was established.

[161] *Ibid.*, 82.

level of former. Thus, he could identify commutative justice with general justice, and particular justice with distributive justice. The emerging account of justice reflected the brilliant manipulation of Grotius:

> In other words, Grotius claimed that in some sense the universal relations of men were like civil society, in that commutative justice could straightforwardly apply to their dealings in the state of nature; but these relations were like a very thin version of human society, since they excluded considerations of distributive justice.[162]

One can claim that this thin human society gets even thinner with the Hobbesian state of nature. But as this reading implies, Grotian argument already indicates that direction. The state of nature started to become a violent ground of struggle.

The second objection is concerning the right of property and Native peoples. Tuck followed Grotius' arguments rigorously and argued that how his claims are in accordance with the annexation strategy of United Provinces.[163] To put it simply, Grotius gave another crucial distinction, between *property* and *jurisdiction*; and there is a natural right to possess waste lands:

> If there be any waste or barren Land within our Dominions, that also is to be given to Strangers, at their Request, or may be lawfully possessed by them, because whatever remains uncultivated, is not be esteemed a Property, only so far concerns Jurisdiction [*imperium*], which always continues the Right of ancient People.[164]

However, this rather peaceful account hides (or reveals) a different intention and it can be argued that, here, a different face of just war tradition unmasked. As Tuck argues,

> there is a general natural right to possess any waste land, but one must defer to the local political authorities, assuming they are willing to let one settle. If they are not, of course, then the situation is different, for the local authorities will have violated a principle of law of nature and may be punished by war waged against them.[165]

Together with these two objections, this latter interpretation depicts Grotius as a different figure, who was well aware of the *necessities* of the political struggles of his time, as well as the demands of colonial movements; in this sense, he was a realist in

---

[162] Richard Tuck, *The Rights of War and Peace: Political thought and International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001): 88-89.

[163] *Ibid.*, 103.

[164] Tuck quoting from Grotius, *Ibid.*, 105

[165] Richard Tuck, *The Rights of War and Peace: Political thought and International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001): 106.

the strict sense and belonged to the brutal tradition of humanist jurisprudence.[166] Thus, apart from the differences he also mentioned, Rousseau was right when he claimed that Hobbes and Grotius were same. Following centuries witnessed this brutality ever greater extent and when it comes to 20th century, two world wars swept the surface of the earth. The naivetés become ridiculous and tragic, while the reality suffocating. However, after failures, at the end of the Second World War, the establishment of an international order and human rights regime with hopes of global peace and freedom, turned out to be possible. Yet, as it will be discussed, these hopes were in vain.

3.2. United Nations: Promises and Delusions

There is nothing mysterious with regard to the dominance of three great powers (UK, USSR, and especially USA) after the defeat of axis alliance, as well as their power of determination on new world order. This dominance found its explicit and direct expression in the meetings of Dumberton Oaks in 1944. Normand and Zaidi subtitled the section in their book as "the betrayal of Dumberton Oaks" because of the marginal place of human rights in the proposal; a weak reference under C*hapter IX: arrangements for international economic and social cooperation* in *Section A. Purpose and Relationships*:

> 1. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms.[167]

Yet, it is not surprising: there are numerous meetings and agreements which clearly showed the value of human rights for the big three.[168] Although previous meetings

[166] *Ibid.*, 108.

[167] http://www.ibiblio.org/pha/policy/1944/441007a.html.

[168] "17 August 1943, Churchill and Roosevelt met in Quebec and agreed to a declaration favoring "establishing at the earliest practical date a general international organization, based on the principle of the sovereignty of all nations." Human rights were not mentioned in the declaration. At Moscow in October 1943, the foreign ministers of Russia, the United States, and Britain and the Chinese ambassador signed a declaration reiterating the need to establish a global organization based not on human rights but on "the principle of sovereign equality of all peace-loving nations." Roosevelt, Stalin, and Churchill met in Teheran on 1 December 1943 to discuss postwar security arrangements; the resulting declaration did not mention human rights." Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008): 108.

and agreements clarified complex issues, there were still disagreements on certain matters: the situation of colonies, the extent of veto powers, the inclusion of individual Soviet states. Only later, the omission of human rights appeared as a problem, and buried out of sight, as Norman and Zaidi argues, in the Chapter IX.[169] Above mentioned problems were not acute to become an obstacle to the proposal(s). It established crucial organs of United Nations (General Assembly, Security Council and Secretariat) and determined their place in the overall structure; the hierarchy between these organs and their respective roles within organization remained unchanged:

> The Security Council was given authority over security matters with veto rights for the victorious powers. There was some debate over how these powers would relate to the principle of noninterference in domestic affairs, which was accepted by all present as the basic right of states. The General Assembly, on the other hand, was accorded minimal authority to discuss and debate various social and economic issues. Roosevelt reportedly envisioned this body as meeting once a year for a limited time "to allow all the small nations to blow off steam." Churchill echoed this sentiment later at Yalta, explaining that "The eagle should permit the small birds to sing and care not wherefore they sang."[170]

In addition to these three organs, an international crime court which would be permanent also mentioned, yet, it had to wait until 2002, Rome Statute of the International Criminal Court, and has to wait until 2017 for jurisdiction over crimes of aggression.

Thus, the following San Francisco Conference (1945) should not be exaggerated, after all these agreements. As Normand and Zaidi argues,

> Almost all major issues, including the fundamental structures and powers of the new organization, had already been resolved between the great powers in a series of open as well as secret agreements. All that remained was for the rest of the world to ratify the package after tinkering at the margins in a public show of due diligence and careful deliberation. In this way, the angst and drama of San Francisco was much ado over nothing, sound and fury signifying very little substance.[171]

Nevertheless, it was a big event, a great public demonstration of the USA dominance over the newly emerging international organization:

---

[169] *Ibid.*,112.

[170] Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008):110.

[171] *Ibid.*,123.

> High-level delegations from forty-six nations, headed by prime ministers and foreign ministers, gathered in the city of San Francisco to discuss, modify, and ratify the Dumbarton Oaks proposals for the creation of the United Nations. For nine weeks, beginning on 25 April 1945, the delegates debated changes to the blueprint of a new international organization. It was an extraordinary gathering, promising a chance to remake the world—an illusory promise given that the Big Three had already constructed the global architecture. Over 5,000 people attended the conference: 850 delegates, 2,600 media, 1,000 U.S. residents working at the secretariat, 300 security officers, and 120 translators working in five languages. Upon reaching San Francisco, Virginia Gildersleeve wrote of "the exaltation as every heart and mind turned hopefully towards the City of the Golden Gate." The San Francisco conference was, by one standard, an unprecedented global event, truly the first of its kind.[172]

Behind this illusory, international acclamation, US came forward, once more, to determine the language and frames of reference of the UN and its charter. Again, there is nothing surprising with regard to the long-run political project; UN would provide a basis for the realization of a two-headed strategy: on the one hand, it would provide an ethical basis of legitimation in the area of popular politics, on the other hand, the internal structure of the organization would ensure the persistence of US power in global politics. Thus, the relative increase of emphasis on the human rights and following changes in the Charter, in comparison to Dumberton Oaks proposal, should not mislead one with regard to the pressure of NGOs and third world countries: "These changes, according to memo[173], would advance U.S. interests without infringing on the principle of state sovereignty, so long as the Commission on Human Rights was prohibited from serving 'as a court appeal from national courts or as a means of super-national government.'"[174] These vague references were also affirmed by UK and USSR although Soviet delegation tried to provide its own conception of human rights, which would later lead to the preparation of two different covenants.

In the end, nothing considerable had changed with regard to the value of human rights within Charter; or rather, the change occurred somewhere else and had a

[172] *Ibid.*,122.

[173] In fact, prior to the San Francisco conference, McDiarmid had drafted and Kotschnig had reviewed a secret State Department memo recommend ing change in the Dumbarton Oaks human rights provisions. The memo proposed recognizing human rights as one of the purposes of the UN and ensuring that a commission on human rights was established in the Charter. *Ibid.*, 130.

[174] *Ibid.*, 131.

tremendous impact on the practice of human rights. It is the article 2(7), or famous domestic jurisdiction clause, which has such an impact: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll."[175] The reference to the Chapter VII would not become effective until 1990s, and even after it had been taken seriously, there arose important discussions around the contradictory character of the article. This clause perfectly fit to the general structure of the organization as it was decided by great powers of the Dumberton Oaks Conference. In a single stroke, it privileges principle of sovereignty and block the way for an effective human rights system; what was left is the vague references to human rights, like the article 1(3) of the Chapter: "To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."[176]Nurser, simply yet precisely, pointed towards the delusions:

> Because they wanted to believe that San Francisco heralded a brave new world of human rights, they shut their eyes to the realities of power politics. Instead of seeing the United Nations for what it was—a security organization run for and by world's most powerful states—they saw it for what they wanted it to be: a vehicle for the advancement of the rights of the disenfranchised and dispossessed.[177]

3.3. Commission on Human Rights

After all these discussions, one does not have to think that the course was set definitely for human rights in UN, without further transformations. Human rights are too precious to disregard; it has to be worked over and over again. In this sense, one has to approach towards the United Nations Commission on Human Rights (CHR) which was established under UN Economic and Social Council (ECOSOC) in 1946, with a particular interest. It was the commission which determined the further development of human rights system within the organization: "The initial decisions

[175] UN Charter: http://www.un.org/en/documents/charter/chapter1.shtml.

[176] UN Charter: http://www.un.org/en/documents/charter/chapter1.shtml.

[177] Normand and Zaidi quoting from Nurser. Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008): 138.

taken by its eighteen members would create the framework, set the tone, and circumscribe the discourse within which the idea of human rights would develop over the next half-century."[178]

The first step taken in the course of this development was the preparation of an international bill of human rights; as it will be discussed, this endeavor was marked with a failure. The idea of an international bill of human rights was itself appealing, because of a new ethico-political order it promised:

> The UN Secretariat staff noted that as of 1946 it had received twelve different draft bills of rights, all from western representatives. These included drafts submitted by the delegations of Panama, Chile, and Cuba and the American Federation of Labor as well as private drafts from Hersch Lauterpacht of Cambridge University, Alejandro Alvarez of the American Institute of International Law, Rev. Wilfrid Parsons of the Catholic Association for International Peace, Prof. Frank McNitt of the faculty of Southwestern University, and H. G. Wells. [179]

It became clear that this enthusiasm has no basis given the structure of international organization and functioning of certain commissions like CHR. Far from being the herald of a solid international bill of rights, CHR itself "took a series of actions that resulted in the progressive fragmentation and weakening of the human rights idea."[180]

An important aspect of commission was that it consisted of the representatives of member states (five from permanent members of the Security Council, thirteen from other member states; this number increased later). This composition of CHR was indicative of the intentions behind its projects. An important example with regard to this aspect is Eleanor Roosevelt, wife of late Franklin Roosevelt, who was elected as the chair of Commission; a very symbolic yet clever maneuver. Her election helped U.S. authorities to maintain their influence on the framework of the coming declarations and covenants. As Normand and Zaidi argues,

> Mrs. Roosevelt's status as a revered and respected public advocate of human rights of human rights was sufficient to mask her contradictory behind-the-scenes role as a

[178] Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008):144.

[179] *Ibid.,* 144.

[180] *Ibid.,* 145.

> representative of U.S. power politics, even though she frequently engaged in ideological debate with representatives of communist bloc countries at the behest of State Department.[181]

Another crucial aspect of the commission was its denial of power and, thus, the rejection of the right to petition. Although there were members who insisted on the necessity of mechanism to respond petitions,[182] the pressure from great powers forced them to give up the issue due to procedural problems and immaturity of the organization. This denial of power was further reinforced by the resolution 75(V) of ECOSOC in 1947.[183] The right to petition was postponed for further consideration to the preparation of international bill of rights. As it will be discussed, this self-denial was a preliminary step of a general fragmentation of universal bill of rights.

At the very beginning of the drafting process of universal bill of rights, the above mentioned aspects caused disputes again; there was a strong support for a legally binding international bill of rights. As Normand and Zaidi mentioned:

> The global consensus for implementation was based on the simple understanding that human rights were above all a matter of practice, not theory, and that it made little sense to proclaim recognition of human rights in grandiose terms if neither the political will nor the practical machinery existed to bring the concept down to earth. Without enforcement, rights would remain abstract and out of reach. By the same token, enforcement would be meaningless without a definition of what human rights actually were in substance. [184]

This pressure coming from certain commission members and NGOs had an obstacle, which was present from the beginning, as our present narrative already indicated. Together with the Soviets this time[185], US opposed to a legally binding treaty that

---

[181] *Ibid.,* 150.

[182] "Cassin, Hodgson, and Mehta were of the opinion that the CHR needed to establish a mechanism to respond to petitions regarding urgent crises." *Ibid.,* 159.

[183] "The Economic and Social Council, having considered chapter V of the report of the first session of the Commission on Human Rights concerning communications (document E/259), approves the statement that "the Commission recognizes that it has no power to take any action in regard to any complaints concerning human rights";" http://daccess-ods.un.org/TMP/3300687.96873093.html.

[184] Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008): 168.

[185] The difference of Soviet and U.S. opposition to a legally binding treaty is worth noting: "Humphrey remarked that the Soviet stance had at least the virtue of frankness, unlike the United States, which often disguised its opposition to implementation on procedural and technical grounds." *Ibid.,* 169.

would assume a different structure of international organization. Such a treaty would pave the way for a different distribution of power in international area which was now dominated by the triumphant states of the World War II. To put it simply, the inflexible and determined stance of US-Soviet opposition forced the Commission to find a compromise, which later became perfectly suitable for Cold War inertia:

> Chang forwarded a compromise in recognition that the UN's two most powerful members were adamantly opposed to any form of legally binding and enforceable international bill of rights. He proposed a way out: the bill of rights would take a tripartite form, comprising a general declaration, a legally binding covenant, and measures for implementation as three separate but interdependent components of the broader human rights concept—a "triptych," with the UDHR forming the central panel and the covenant and the measures for implementation forming the two side panels. The first would be drafted immediately, with the other two to follow soon after.[186]

3.3.1. The Fragmented Structure of Universal Bill of Rights

This fragmentation was perfectly suitable for the aims of great powers: on the one hand, it enabled them to preserve the force of legitimation behind the discourse of the human rights; on the other hand, there won't be any possibility of drastic structural changes with regard to legal obligations as well as implementation mechanism.

It is the Universal Declaration of Human Rights which should be finished first. Not surprisingly, as a declaration without legal binding, it was prepared, rather quickly, in two years and declared in 1948. Apart from certain oppositions, there was a consensus with regard to its general organization. The first draft was drawn by John Peters Humphrey, revised by Réne Cassin and lastly discussed and clarified by the Commission before declaration. Although it provided the framework that persisted throughout the process, first one of four distinct ideas, present in the preamble, was preserved: "(1) there can be no peace unless human rights are respected; (2) men and women have not only rights but also duties to society; (3) each person is not only of the state but also of the world; and (4) there can be neither human freedom nor human dignity unless war and the threat of war are abolished."[187] The change was

[186] Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008): 171.

[187] *Ibid.*, 180.

significant, because, once again, it indicated the nonbinding character of UDHR as well as the abstinence from the idea of supra-national order.

As anticipated, a critique of UDHR was directed by the Soviet delegate Koretsky, whose suggestions were ignored and regarded as obstructionist.[188] Following this controversy, certain articles were discussed; one of them deserves mention: the article on the right to rebellion. The article received extended support because most states "had attained independence through its exercise."[189] Again, unsurprisingly, the article met with an opposition from US and UK The reason behind UK opposition was evident; it would provide a ground of legitimation for the independence of its colonies. For US, on the other hand, it meant the possibility of international instability following the World War II. Yet, as Normand and Zaidi argue, the support for the article was so strong that it was not possible to reject it altogether. Thus, a familiar strategy was employed:

> […] The U.S. and British delegations worked together successfully first to weaken the language and then to bury it in the preamble. The final text reflected U.S. concerns that rebellion not be recognized as an affirmative right but rather as a desperate measure applicable only in the absence of human rights protection.[190]

The last, and most important, issue was the hierarchy within the declaration, between civil-political rights and social-economic-cultural rights. This separation later became the basis of the drafting two different covenants in Cold War era. It was not a matter of recognition of social, economic and cultural rights in this case, unlike the right to resistance; the striking point was that even the supporters of these rights assumed a hierarchy between these two sets of rights:

> Cassin […], nevertheless perceived a hierarchy between them; economic, social and cultural rights were "almost as important" as civil and political rights, representing a "logical development" from rather than an equal part of the human rights foundation. He argued that economic and social rights "were different in character from any rights outlined in the earlier declarations of the rights of man. They all had in common the fact that national effort and international cooperation were needed for their very realization." In contrast, traditional rights to life and freedom of

[188] One example of Koretsky's critique: "Koretsky also objected to the legalistic and uninspiring language of atomized rights as insufficient to awaken people's social and revolutionary consciousness. Instead he proposed that the declaration should be simple and decisive, that it should 'imitate the style and manner of the old laws, especially their conciseness and clarity.'"

[189] *Ibid.,* 185.

[190] *Ibid.,* 186.

> conscience were more fundamental in nature and could be immediately safeguarded.[191]

This hierarchy was envisaged in the organization of the Declaration: first twenty one articles of the UDHR focus on the civil and political rights, and last nine articles are pertained to economic, social and cultural rights.[192]

This separation was consolidated further by the transition from the brief, peaceful post-war period to Cold War era. The so-called bipolar world order (which should not be taken for granted) becomes the utmost characteristic of this era. This polarization found its expression in United Nations as well, throughout the discussions on Covenant; in contrast to "smooth" declaration of UDHR, the preparation of Covenant(s) revealed the pathetic functioning of UN. The fragmentation of bill occurred in 1946; however, covenant(s) had to wait until 1954 to be drafted, 1966 to be signed and 1976 to be efficient. This delay can be explained by the Cold War conditions, but more than that it proved the inefficiency of the organization.

It is not hard to imagine the deadlock experienced in the bureaucratic functioning of UN during the Cold War period, "while the balance of power in the General Assembly continued to shift sharply away from western control."[193] There is no need to repeat historical commonplaces; the interesting point is the bouncing of covenants between CHR, ECOSOC and General Assembly like a bomb to be exploded.

The main issue was the inclusion of economic and social rights in the covenant. However, this time it could not be solved within CHR and "at its eleventh session in Geneva (July-August 1950) ECOSOC deemed the CHR's draft covenant unsatisfactory and requested that the General Assembly resolve the major points of disagreement such as the federal and colonial clauses and the status of economic and

[191] Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008):189.

[192] http://www.un.org/en/documents/udhr/.

[193] Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008):199.

social rights."[194] One could easily guess the sides of the quarrel. General Assembly strongly supported the inclusion of economic and social rights in the Covenant, nevertheless, there was a call for the third way, the Norwegian delegate proposed the preparation of two covenants to prevent delay resulting from oppositions; in the guise of technical and practical reasons, an important political maneuver was initiated. Nevertheless, in its fifth session General Assembly supported the idea of a single covenant including the economic and social rights.[195] The respond from Anglo-American was immediate, proposing a resolution "calling on the General Assembly to reconsider its decision about unified covenant,"[196] which was easily defeated. Nevertheless, the US and UK opposition continued "on the grounds that economic and social rights were not justiciable," and they were successful to pass a resolution in ECOSOC for the reconsideration of General Assembly.[197] Following controversy in the Assembly gave a perfect example of diplomatic sleight:

> Rejecting American pressure, The Third Committee of the General Assembly approved, by a vote of 29 to 21, with 6 abstentions, a joint resolution by Chile, Egypt, Pakistan, and Yugoslavia that called on the General Assembly to reaffirm a single covenant that included economic, social and cultural rights. But this was far from the end of the matter. In an interesting procedural tactic, Belgium, India, Lebanon, and the United States added an amendment that once again asked ECOSOC to direct the CHR to draft two separate human rights covenants that would be approved by the General Assembly and opened for signature simultaneously. Other countries objected that this was not an amendment but a nullification of the resolution, but Malik used his authority as chair to forward the amended resolution without further vote to the plenary session of the General Assembly.[198]

Finally, Western blocs' lobbying activity gave its fruits: with the Resolution 543 (VI) of the General Assembly in 1952, the preparation of two covenants was accepted.[199] Resulting drafts also reflected the influence of the liberal legal reasoning. Articles of civil and political rights have a rather clear language, pertaining to the long tradition of liberal rights. However, "[…] the economic, social, and cultural rights covenant not only omitted any mention of violations or remedies but also provided a broad

---

[194] *Ibid.*,202.

[195] *Ibid.*, 205.

[196] *Ibid.*, 205.

[197] *Ibid.*, 205.

[198] *Ibid.*, 206.

[199] Daccess-ods.un.org/TMP/2547453.64189148.html.

escape clause in Article 2(1) that undermined the prospects for holding states accountable."[200] Thus, the hierarchy between two sets of rights was consolidated further through covenants.

While all these diplomatic struggles were going on, the preparation of implementation mechanisms reached a dead-end. The CHR working group could not provide a serious proposal and faced continuous opposition from great powers. As Normand and Zaidi argues, in spite of the apparent "polarizing Cold War rhetoric, the great powers presented an immovable, implacable, and ultimately united front against any advances toward the implementation and protection of human rights."[201] Even after the little progress that was made with regard to petitions, the emphasis was still on state consent: "[…] The CHR turned to an optional protocol that would allow state parties to choose whether their citizens would be eligible for this privilege–but only in the case of civil and political rights. Economic, social, and cultural rights were deemed unsuited for even a quasi-judicial process."[202]

3.4. Out of Cold War: A Possible Resolution of Deadlocks

The fragmentation of the bill of rights into the UDHR, the Covenants and the implementation mechanisms, the consolidation of this fragmentation with the preparation of two different covenants, and also the omission of implementation mechanisms provide a striking description of the failure of the initiation of a human rights system. Taking the risk of an overstatement, one can argue that the Grotian-Hobbesian doctrine of international order, consisted of individual, sovereign nation-states, had retained its relevance without considerable challenges. The powerful article 2(7) of UN Charter, the so-called domestic jurisdiction clause, became the hallmark of the period between 1945 and 1990, in spite of the explicit reference to the Chapter VII of the Charter.

---

[200] Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008): 207.

[201] *Ibid.,* 237.

[202] *Ibid.,* 240.

The optimism emanated from the end of power rivalries of the Cold War should not mislead us with regard to this fundamental paradigm of international order and the place of human rights within it. Actually, this was what happened after the collapse of the Soviet bloc and spread of democracy in former states of the bloc:

> In western political and intellectual circles, the feelings of euphoria unleashed by the stunning and unexpected victory over Soviet ideology and practice were expressed in popular arguments about the "end of history," premised on the irrevocable spread of democracy, rule of law, and human rights…. After a long period of neglect the fractures within human rights could be redressed by all three levels of the United Nations: the peoples of international civil society; agencies, institutions, and operational programs of the organization itself; and of the community of states.[203]

The disillusionment again came quick: freed from the deadlock of the Cold War, one of the first decisions of the Security Council was to authorize US for the Persian Gulf War. Following years witnessed humanitarian catastrophes, devastating crises, and war on terror. Is it possible to call post-cold war period a new era, or a transitional one? The answers would differ, nevertheless, one can argue that there is an unanimity with regard to the privileged position of US; it was the main actor of the narrative of the international order after 1945, and remains to be so until today. However, one should be cautious not to fall into hasty conclusions and conspiracy theories. Hardt and Negri argue that the place assumed by US in the international order can be understood properly through an examination of the US constitutional history.[204] The merit of their exposition is to avoid classical accounts of imperialism and to conceptualize the emergence of a different order peculiar to the post-Cold War era, which denotes more than US dominance.[205]

Hardt and Negri actually began their discussion of American constitution with praise and argued that two models of Rome could be summoned up to exemplify peculiar characteristic of constitution: the republican Rome of Machiavelli and the imperial

---

[203] Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008): 318-319.

[204] Michael Hardt and Antonio Negri, *Empire* (London: Harvard University Press, 2000): 168.

[205] Before moving further, it is proper to mention certain problematic aspects of Hardt and Negri's exposition of Empire: the conceptualization of multitude, the opposition between immanence and transcendence that gave way to the idea of modern sovereignty, the understanding of biopolitics through a synthesis of Foucault, Deleuze & Guattari and "some Italian authors," the postmodern critique of Enlightenment as a transcendental (not immanent) tradition, naïve Spinozism.

Rome of Polybius. What is of specific importance about this characterization is the emergence of a new type of sovereignty distinct from European one. They point towards three aspects of U.S. notion of sovereignty, or more correctly three movements. The first two movements were simply a naïve replication of the discussion on modern European sovereignty in a different manner. The problematic aspect of this exposition is that it opposes transcendence to immanence, and characterized multitude as the expression of this immanence, which is the *true revolutionary tradition* of European philosophy: "The American Declaration of Immanence of Independence celebrates this new idea of power in clearest terms. The emancipation of humanity from every transcendent power is grounded on the multitude's power to construct its own political institutions and constitute society."[206]
As one might guess easily, the second movement came as a repression of the first; the inevitable return of the transcendence to initiate European style sovereignty, to control productive, emancipatory forces of immanence.[207] The difference of U.S. constitution is rested on a third movement, the movement of opening towards outside: "the third characteristic of this notion of sovereignty toward open, expansive project operating on an unbounded terrain." This last point will be clarified with the history of U.S. constitution. But it is worth to remind the difference between modern (*imperialist*) and *imperial* sovereignty. As it is exemplified in the political philosophy of Hobbes, modern sovereignty is keen to differentiate an inside (civil order) from outside (state of nature / or the international order); even the expansion of this order, always, presupposes an outside that would enable it to define its limits. However, the imperial order blurred the limit and abolishes inside-outside: "*its space is always open;*" that also explains why the idea of peace is so precious for the development of Empire.[208]
These arguments would remain inadequate and groundless without further account, thus Hardt and Negri tried to provide a historical narrative which overlapped to some extent with the discussions of previous parts. They divided U.S constitutional history into four phases: Civil War and Reconstruction; Progressive era; the era stretching

[206] *Ibid.*, 165.

[207] The exaggeration behind this idea was, later, demonstrated by Hardt and Negri themselves.

[208] Michael Hardt and Antonio Negri, *Empire* (London: Harvard University Press, 2000): 167.

from New Deal to height of Cold War; and finally, the era between 1960 and 1990.[209]

The first movement or aspect of U.S. constitution, the proliferation of multitude's productive forces, took place and shape in times of Civil War and Reconstruction. Hopefully, this time, they were keen to recognize the exception within: "This utopia of open spaces that plays such an important role in the first phase of American constitutional history, however, already hides ingenuously a brutal form of subordination,"[210] that of Native Americans and Black slave workers. This exception was an intrinsic aspect of the Constitution, yet, they insisted on to interpret it as an internal obstacle that prevents the productive potential of the new republic to be realized: "This contradiction posed a crisis for the newly developed U.S. notion of sovereignty because it blocked the free circulation, mixing, and equality that animate its foundation."[211] The optimistic oversight is evident in these words; so the network power they praised was limited from within.

In their narrative this limitation came with the second phase; the republic reached its limits simply because there is no open space left to expanse. Thus, the temptation to return European style imperialism surfaced. "There was always, however, another option: to return to the project of imperial sovereignty and articulate it in a way consistent with the original 'Roman mission' of the United States."[212] They did not hesitate to link this development with the rise of the class struggle and of monopolistic financial powers:

> Since the expansion of the state was no longer possible and thus could no longer be used as a strategy to resolve conflicts, social conflict appeared directly as a violent and irreconcilable event. The entrance on the scene of the great U.S: worker's movement confirmed the closure of the constitutional space of mediation and the impossibility of the spatial displacement of conflicts.[213]

[209] *Ibid.*, 168.

[210] *Ibid.*, 169.

[211] *Ibid.*, 171.

[212] *Ibid.*, 172.

[213] *Ibid.*, 173.

Two progressivist responses were given against this closure of space, that of Woodrow Wilson and Theodore Roosevelt. Roosevelt's response is based upon a European model of imperialism, "this path led to the colonialist experience of the United States in Philippines."[214] Wilson's response to the crisis has a particular importance for this present inquiry. Although it did not succeed to prevent World War II, "his concept of world order based on the extension of the U.S. constitutional project…, was a powerful and long-lasting proposal."[215]

In spite of this genuine attempt, third phase witnessed the appearance of the imperialist tendencies. The main reason behind this tendency was the Cold War and the Manichaean rhetoric of the struggle.[216] It is in this period that the UN bodies experienced the deadlock, under the auspices of the domestic jurisdiction clause. Nevertheless, the end came, rather quickly, with the defeat of the Vietnam War: "The path of European-style imperialism had become once and for all impassable, and henceforth the United States would have to both turn back and leap forward to a properly imperial rule."[217]

The fourth phase led to this imperial rule and coincided with the emergence of a different international order. The most drastic effect was not the collapse of Soviet bloc "under the burden of its own internal contradictions," but the reorganization of "the lines of hegemony within the imperialist world, accelerating the decline of the old powers and raising up the U.S. initiative of the constitution of an imperial order."[218] This initiative was crucial to give way to a different international organization (one does not have to adopt Hardt and Negri's terminology). UN and,

> […] the proliferation of these different international organisms and their consolidation in a set of symbiotic relationships–as if one asked the other for its own legitimation–pushed beyond a conception of international right based in contract or

[214] *Ibid.,* 175.

[215] *Ibid.,* 175.

[216] It should be mentioned that Hardt and Negri recognized the imperialist tendeny within constitution: "Indeed, the super-exploitation of black labor gives us one example, an internal example, of the imperialst tendecy tht has run throughout U.S. history." *Ibid.,* 177.

[217] *Ibid.,* 179.

[218] *Ibid.,* 179.

> negotiation, and alluded instead to a central authority, a legitimate supranational motor of juridical action.[219]

Once more it is crucial to remind that this order provides more than a scheme dominated by the single power, although U.S. retains its privileged power within, as one can see in the discussion on interventions in the first chapter. These interventions give way to the questioning of human rights as the hallmark of the new world order after the Cold War. Actually, there is a line of critique dealing with the human rights after World War II, beginning with the fundamental paradox as proposed by Arendt. Next chapter focuses on this line and two subsequent critiques of human right, and in addition, an alternative critique of human rights is offered.

[219] *Ibid.,* 181.

CHAPTER IV

HUMAN RIGHTS, POLITICS AND SECURITY

4.1. Politics of Human Rights: Two lines of Critique

The attempts to implement a human rights system after the Second World War were in vain; it is not hard to diagnose the situation as a result of the invincibility of the principle of the national sovereignty and the interests of victorious great powers. The Cold War period consolidated this situation further, until the collapse of the Soviet bloc. However, this collapse was not self-explanatory in spite of its historical significance; the euphoria of the end of the power rivalries was followed by theses on "the ends." However, the decade of intense interventions should lead one to adopt a different perspective on the world order. The second part of this chapter will try to specify characteristics, or apparatus, peculiar to this new order and the significant place of human right within.

Before discussing these issues, an important debate on the privilege of human rights deserved to be mentioned. The following part focused on two lines of thinkers taking sides on the debate. This debate would enable one to comprehend the "cul de sac" of human rights: emancipation project.

First line of thinkers consists of Hannah Arendt and Giorgio Agamben. In the first part, we will discuss the fundamental paradox of human rights as it has been set by Arendt. Then, we are going to focus on the ideas of Agamben on modern sovereignty and subjectivity, and the crucial function accomplished by human rights in this framework.

Second line is a little more complicated. At first sight, ideas of two thinkers of second part are highly uncompromising. Ranciére affirms human rights, but after serious considerations, and provides a critique of the first line. Badiou has a different view and rejects human rights as well as its ethico-political purview. Nevertheless, I

argue that both thinkers can agree on a certain ground as we will see. And finally, I'll present my ideas on the issue through a reading of Wendy Brown's article.

What are interested in these two lines are not merely their ideas on human rights, but their particular and peculiar conceptualizations of the political which continually make themselves manifest in their discussions of the human rights. Yet, an inquiry on human rights *per se* could not illustrate this controversial phenomenon adequately, thus it would be wise to keep in mind this dimension as well.

4.1.1. Fundamental Paradox and Biopolitical Horizon

It will be appropriate to begin with a consideration of Arendt's arguments in "the Perplexities of the Rights of Man", for her ideas did not only function as a departure point for many important thinkers (like Agamben, Balibar, Ranciere etc.), but also set the course of critical reflection on human rights by precisely pointing out the fundamental paradox;

> If a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually the opposite is the case. It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man.[220]

Thus, what appears as the rights of man could not be understood properly without taking into account the idea of citizenship and the sovereign people. In other words, the "abstractness" of human rights tacitly presupposes a political organization which would guarantee its embodiment in tangible forms (laws).[221] There is no need for further implications at this moment; the importance of this argument would become later. Yet, Arendt's other arguments on this issue points to other manifestations of the paradox of human rights. The most visible paradox of human rights is, of course, the problem of refugees, for their appearance as such actually leads us to the problematic nature of the relation between an idealized conceptualization of right and politics. From the very onset, Arendt realizes the impossibility of approaching the concept of right as separate from politics. As it is well observed, last two centuries

[220] Hannah Arendt, *The Origins of Totalitarianism* (San Diego, New York, London: Harvest Book, 1966): 300.

[221] *Ibid.*, 293.

witnessed the forced or voluntary migration of large populations. Although these extensive population movements make the phenomena notable in a different way, Arendt warned us against the examination of the situation merely in terms of population and space: "What is unprecedented is not the loss of home but the impossibility of finding a new one… This, moreover, had next to nothing to do with any material problem of overpopulation; it was a problem not of space but of political organization."[222] As a result, they experience the paradox in an acute manner; their loss of governmental protection is not only limited to their own country; they found themselves "no longer caught in the web of legality."[223]

Our second issue is about the prevailing criminal procedure, which is elaborated by Arendt in a genuine shift and comparison. The significance of "web of legality" is shown through the comparison between refugee and criminal: "One of our surprising aspects of our experience with stateless people who benefit legally from committing a crime has been the fact that it seems to be easier to deprive a completely innocent person of legality than someone who has committed an offense."[224] The point is not about our entrance into this web of legality (this point would become clear when we discuss Agamben), but how we continue to stay within. The criminal act as an *act* (upon something), as an initiation, does not demand but necessitates recognition whether it is negative or not. And this necessity emanates from the order itself as well as from the unavoidable effects of act; (legal) order could not *simply* exclude/execute any criminal, who is still a citizen precisely because of his insistence within (legal) order through his act, "who has taken upon himself the responsibility for an act whose consequences now determine his fate."[225] All legal procedures and trials are embedding him deeper into the heart of the legal order, because his acts also necessitate an act on behalf of the order. As Arendt strikingly says "Innocence,

[222] *Ibid.,* 294.

[223] "The Russian refugees were only the first to insist on their nationality and to defend themselves furiously against attempts to lump them together with other stateless people." *Ibid.,* 292.

[224] *Ibid.,* 295.

[225] *Ibid.,* 300.

in the sense of complete lack of responsibility, was the mark of their rightlessness as it was the seal of their loss of political status."[226]

Third argument is related with the rise of humanity, not as "a regulative idea, but as an inescapable fact." Again, the paradox is encountered here as well but in a new form: "This new situation, in which 'humanity' has in effect assumed the role formerly ascribed to nature and history, would mean in this context that the rights to have rights, or the right of every individual to belong to humanity, should be guaranteed by humanity itself."[227] Again, such humanity should transcend nation-states or any polity for that matter and assume, in a sense, a form of "world government," if it would have any effect on the state of affairs. For Arendt, this doesn't seem probable. However, the crucial question is not whether it is possible or not; it is a question of the probable consequences of such a regime and the evaluation of rights in this regime: "The crimes against human rights… can always be justified by the pretext that right is equivalent to being good or useful for the whole in distinction to its parts."[228] As it can be guessed, Arendt has in mind the National Socialism and Fascism, but she claims that the emergent problems would not be solved if the whole is imagined as the entire humankind. Here, Arendt's argument would remind us Schmitt's on "the absolute last war of humanity"[229] : "For it is quite conceivable, and even within the realm of practical possibilities, that one day a highly organized and mechanized humanity will conclude democratically – namely by majority decision – that for humanity as a whole it would be better to liquidate certain parts thereof."[230] Precisely in that sense we encounter with the *inhuman*. The notion of humanity necessarily identifies its beyond as inhuman and this identification is accompanied by an introduction of moral categories and losing the sight of the *political*.

[226] *Ibid.,* 295.

[227] *Ibid.,* 298.

[228] *Ibid.,* 298-299.

[229] Carl Schmitt, *The Concept of the Political* (Chicago: Chicago University Press, 2007): 36.

[230] Hannah Arendt, *The Origins of Totalitarianism*: 299.

As we said, these ideas around the fundamental paradox give a thrust to later critical inquiries and Giorgio Agamben can be taken as a representative figure in this sense. One of the sections in his well-known work *Homo Sacer* is reserved for a discussion on the topic and called "Biopolitics and the Rights of Man." Agamben acknowledges the importance of the ambiguity surrounding the relationship between man and citizen. However, the question is not the inclusion of one by the other; rather it is a matter of bounding two in a peculiar way to produce a distinct notion of modern sovereign subject. Thus, "[…] it is time to stop regarding declarations of rights as proclamations of eternal, meta juridical values binding the legislator (in fact, without much success) to respect eternal ethical principles, and to begin to consider them according to their real historical function in the modern nation-state."[231] As Agamben continues, we understand that this function is "the inscription of natural life in the juridico-political order of the nation-state"[232] and unfolds a distinct biopolitical sphere.

What was accomplished by the declarations of rights of man is (the completion of) the convergence of two distinct principles of the *Ancien régime*: principle of nativity and principle of sovereignty. Here, we witnessed the emergence of the paradox and the entrance into the above mentioned legal order: "The fiction implicit here is that *birth* immediately becomes *nation* such that there can be no interval of separation [*scarto*] between two terms. Rights are attributed to man (or originate in him) solely to the extent that man is the immediately vanishing ground… of the citizen."[233] However, this rather smooth shift was pregnant to a crisis and Agamben has a similar historical context in mind when he discussed it: Nazism and fascism represents "two properly biopolitical movements that made of natural life the exemplary place of the sovereign decision."[234] Agamben returns the discussion on two principles (on nativity and sovereignty) and their convergence. The ill-reputed Nazi formula, "Blut und Boden," actually is an expression of this situation. However, Agamben

[231] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, California: Stanford University Press, 1998): 127.

[232] *Ibid.,* 127.

[233] *Ibid.,* 128.

[234] *Ibid.,* 129.

strikingly argues that "…it has too often been forgotten that this formula, which is so highly determined politically, has, in truth, an innocuous juridical origin"[235] and can be traced back to the Roman law: *ius soli* and *ius sanguinis*. The Politicization of these two principles is the result of their above discussed convergence. And the crisis came when this politicization (and certain other redefinitions) demands answers for the questions about the nationalities of people.

As another crisis, Agamben acknowledges refugee problem as discussed by Arendt. In addition to that, however, he says, there is a separation between rights of the citizen and rights of man, "for the sake of the supposed representation and protection of bare life that is more and more driven to the margins of the nation-states, ultimately to be recodified into a new national identity."[236] Precisely at this point the source of the failure of humanitarian initiative can be found, and the separation of humanitarianism and politics is one of the serious consequences. As such, these initiatives fall back into the same trap, namely, the one to "maintain a secret solidarity with the very powers they ought to fight."[237]

The aim of such an exposition of human rights is to reveal the underlying function that makes possible the shift from traditional to modern sovereignty. In this sense, the argument itself functions as a point of leverage. However, it is also indicative of the modern political subject as the bearer of rights. The discourse on rights of man enables one to hide the fact that "what lies at its [modern state's] basis is not man as a free and conscious political subject but, above all, man's bare life, the simple birth that as such is, in the passage from subject to citizen, invested with the principle of sovereignty."[238]

---

[235] *Ibid.,* 129.

[236] *Ibid.,* 133.

[237] "It takes only a glance at the recent publicity campaigns to gather funds for refugees from Rwanda to realize that here human life is exclusively considered (and there are certainly good reasons for this) as sacred life […] and that only as such is it made into the object of aid and protection. The 'imploring eyes' of the Rwandan child, whose photograph is shown to obtain money but who 'is now becoming more and more difficult to find alive,' may well be the most telling contemporary cipher of the bare life that the humanitarian organizations, in perfect symmetry with state power, need." *Ibid.,* 133.

[238] *Ibid.,* 128.

Could it be possible to characterize this paradox as productive and instructive? In one sense, it is possible. All these reflections provide valuable insights concerning the legality, modern subjectivity and sovereignty, and humanity. However, another line of thought, which is not content with these arguments, affirming them or not, can be also pursued. And it is our aim to discuss these positions in the next part.

4.1.2. Dissensus, Truth-Event and the Deadlock of the Social

First figure to be taken into consideration is Jacques Ranciére with his forceful discussion in his article "Who is the Subject of the Rights of Man?" (2004). Douzinas regarded him among the thinkers who welcome human rights, however, it should be noted that his approach to the issue is neither naïve nor without hesitation.

Ranciére begins his discussion with a critique of Arendt and especially Agamben; actually former is taken as a precursor for the latter's much sharper ideas: "But paradoxically this [archipolitical] position did provide a frame of description and a line of argumentation that later would prove quite effective for depoliticizing matters of power and repression and setting them in a sphere of exceptionality that is no longer political, in an anthropological sphere of sacrality situated beyond the reach of political dissensus."[239] This turn from archipolitics to depoliticization is accomplished through certain substitutions that can be easily discerned in Agamben's arguments. First one was already mentioned; biopolitics implies a positive control over biological life of man, which is absent in *Ancien Régime*: "Through biopolitical conceptualization, what, in Arendt, was the flaw of modern democracy becomes in Agamben the positivity of a form of power."[240] Second and more significant step is the correspondence between biopolitics and state of exception: "Agamben identifies the state of exception with the power of decision over life. What is correlated with the exceptionality of sovereign power is the *exception of life*."[241] Thus, the depoliticization is accomplished; Agamben's emphasis on camp as the *nomos* of modernity is the clear indication of this and we

[239] Jacques Ranciére, "Who is the Subject of the Rights of Man?" *South Atlantic Quarterly*103:2/3 (2004): 299.

[240] *Ibid.,* 300.

[241] *Ibid.,* 300.

found ourselves in a biopolitical trap, "a historico-ontological destiny from which only a God is likely save us" as Ranciére sarcastically claims.[242]

Against these arguments, this impasse, Ranciére offers another way of thinking power, politics and the Rights of Man, which would escape the paradox and the resultant tautology (rights of those who already have rights): "The Rights of Man are the rights of those who have not the rights they have and have the rights that they have not."[243]

Such an offer requires reconsideration of certain essential notions as well as their reconstitution in a new sense. Ranciere's point of departure is the critique of the well established distinctions like that of Arendt's; he argues that the relation of subject with his or her rights is complicated and the difficulty is apparent in every clear-cut separation. First, he emphasizes not definite subjects but processes of subjectivization, like what is witnessed in the *use* of human rights. As such rights are not only abstract ideals but part of the configurations of the given: "what is given is not only a situation of inequality. It is also an inscription, a form of visibility of equality."[244] Second point answers a question that can be raised in relation to the first one: what is meant by subjectivization? Here, Ranciere provides a different conceptualization:

> Man and citizen are political subjects. Political subjects are not definite collectivities. They are surplus names, names that set out a question or a dispute (*litige*) about who is included in their count. Correspondingly, *freedom* and *equality* are not predicates belonging to definite subjects. Political predicates are open predicates: they open up dispute about what they exactly entail and whom they concern in which cases. [245]

Behind this conceptualization, there lies a different understanding of the politics. For Arendt and Agamben, human rights, essentially, designate a separation between *bios* and *zoe*, which means missing a crucial area of conflict. It is not a matter of placing political on one side and private on the other; politics is about the line separating these two. There is always a decision to be made, which can never set the issue once

[242] *Ibid.*, 302.

[243] *Ibid.*, 302.

[244] *Ibid.*, 303.

[245] *Ibid.*, 303.

and for all. The paradigmatic example of Ranciére is Olympe de Gouges, a revolutionary woman during French Revolution, who argues that the entitlement to death also entails the entitlement to be elected. The example becomes much more significant as it reminded us Arendt's discussion on criminal and refugee: "Olympe de Gouge's argumentation precisely showed that the border separating bare life and political life could not be so clearly drawn. There was at least one point where 'bare life' proved to be 'political.'"[246]

And finally, these two points should lead us to a distinct understanding of democracy. As we mentioned, politics is a struggle to determine boundaries, to name, extend and comprehend different subjects. As such human rights cannot be thought as a completion which creates a vicious cycle (unlike what Agamben says); they are radically open, and subjects struggle to decide (to verify) on this sphere. According to Ranciére "the generic name of the subjects who stage such cases of verification is the name of the demos, the name of the people" which "does not mean the lower classes. Nor does it mean bare life. Democracy is not the power of the poor. It is the power of those who have no qualification for exercising power,"[247] except their having no qualification. Another name for demos is "the count of the uncounted,"[248] which functions to situate the logic of political subjectivization:

> [Politics] separates the whole of community from itself. It opposes two counts of counting it. You can count the community as the sum of its parts – of its groups and of qualifications that each of them bears. I call this way of counting *police*. You can count a supplement to the sum, a part of those who have no part, which separates the community from its parts, places, functions, and qualifications. This is politics, which is not a sphere but a process.[249]

The first form of counting (*police*) entails what can be called as *consensus*, the second *dissensus*. To put simply, *consensus* is our flat, social life. In its pragmatic dimension, it equates surplus subjects with definite social groups, thus absorbing

---

[246] *Ibid.,* 303.

[247] *Ibid.,* 304.

[248] "In the third book of *Laws*, Plato lists all the qualifications that are or claim to be sources of legitimate authority. Such are the powers of the masters over the slaves, of old over the young, of the learned people over the ignorant people, and so on. But, at the end of the list, there is an anomaly, a'qualification' for power that h calls ironically God's choice, meaning by that mere chance: the power gained by drawing lots, the name of which is democracy." *Ibid.,* 305.

[249] *Ibid.,* 305.

their potential. As Ranciére argues conflicts turn into problems that can be solved by expertise and adjustments: "*Consensus* means closing the space of dissensus by plugging the intervals and patching over the possible gaps between appearance and reality or law and fact."[250] Thus, *consensus* turns democracy to an *ethos* of a society. The severe consequences of this transformation are, actually, evident. The diminishment of political space leaves the question of human rights to the hands of humanitarian organizations. Precisely at this point, it is possible to talk about rights of man as the rights of "bare life": "…when they are of no use, you do the same as charitable persons do with their old clothes. You give them to the poor. Those rights that appear to be useless in their place are sent abroad, along with medicine and clothes, and rights." This striking interpretation explains what is called as humanitarian interference. These rights that had been sent to rightless sent back in a new form as the right of absolute victim, the victim of absolute evil: "Therefore the rights that come back to the sender – who is now the avenger – are akin to a power of infinite justice against the Axis of Evil."[251]

A strong tension emerges with this genuine interpretation of the right of humanitarian intervention. On the one hand, Ranciére emphasizes the use and the test of verification of the human rights as a radical opening to politics. On the other hand, the rights that had been sent are less likely to be an object of such a political appropriation. This situation can be explained by the fact that Ranciére seemed to take a step back to a position he repudiated: there is an implicit identification. The return to sender cannot be understood properly without taking into consideration United States, United Nations, And European Union. This tension indicates the fragility of the concept of *dissensus*; or rather a naïve application of the term. Dissensus would inspire a thoughtful political attitude, however, it lacks the rigor indispensable for a strong critique; it motivates but cannot explain away the ambiguity surrounding *any* kind of subjectivization through human rights. The

[250] *Ibid.,* 306.

[251] *Ibid.,* 309.

evident institutional deficiencies[252] characterizing international organizations are well-known in that respect.

From this critique, it is proper to move to our consideration of Alain Badiou, who, in one sense, agrees and in another, disagrees with Ranciére. The point of agreement is based on a similarity between the *consensus-dissensus* and the irruption of truth-event: *Dissensus* opens a space within *consensus* and initiates instances of genuine political subjectivization which, in return, is reduced by consensus to definite social identities. Thus, dissensus is the insistence against this closure.

Badiou's account of truth-event represents a similar contradiction. On the one hand, there is the world of everyday opinion and established knowledge which sustains itself through communication. On the other hand, there is a singular truth-event which breaks this cycle of everyday life and initiates a subject who deserves to be called as such if s/he also assumes it with fidelity: "At the start, in a given situation, there is no truth, unless it is supplemented by an event. There is only what I term veridicality. Cutting obliquely through all the veridical statements, there is a chance that a truth may emerge, from the moment that an event has encountered its supernumerary name."[253] This process would remind us *interpellation*; truth interpellates us as well as demands our fidelity.

Obviously, both accounts aspire to elaborate a genuine position against the closure of politics by an all-encompassing notion of the social order which exhausts every possibility. A much more philosophically grounded discussion will be provided later. For the time being, it is important to discuss their difference. Apparently, the embodiment of this difference is human rights. As we can remember, for Ranciére, human rights would be thought with regard to dissensus. These rights can be seized by political subjects to pursue their struggles against *consensus*. Although it is not stated explicitly, such a struggle seems to have a particular basis in contrast to the

[252] See also: Costas Douzinas, "Human Rights, Humanism and Desire" *Angelaki*vol:6, no:3 (2001): 183-206.

[253] Dews quoted Badiou; Peter Dews, "States of Grace: The Excess of the Demand in Badiou's Ethics of Truths" *Think Again: Alain Badiou and The Future of Philosophy*(ed. Peter Hallward) (London, New York: Continuum, 2004): 110.

human rights as a universal ethical agenda. As such human rights have a place among other notions which would throw a suspicion on the democracy as an *ethos*. Badiou would be willing to affirm this position to a certain extent. However, his *ethics of truth*, as we discussed before as truth-events, has a different scope: "… one central aim of this ethics is to move beyond the tension between the particular contexts of emergence of ethical claims and their purportedly universal range."[254] Instead of "false," abstract universality of human rights, Badiou proposes a positive universality of truth-event.

Let us now focus on Badiou's specific discussion on human rights.What is significant in his analysis is the use of a concept which is usually considered as outmoded: Evil. To understand his use of the notion, however, we need to consider an important contemporary movement, return to Kant. Of course, this return is neither exhaustive comparing to the scope of Kantian corpus, nor based upon an "innocent" reading. According to Badiou, what is retained is,

> […] the idea that there exist formally representable imperative demands that are to be subjected neither to empirical considerations nor to the examination of situations; that these imperatives apply to cases of offense; of crime; of Evil; that these imperatives must be punished by national and international law; that, as a result, governments are obliged to include them in their legislation, and to accept the full legal range of their implications; that if they do not, we are justified in forcing their compliance.[255]

The primacy of evil is encountered in this sense. Through ethics, we are able to discern Evil as a priori and then, can pass a judgment about it: "[…] good is what intervenes visibly against an Evil that is identifiable as an a priori."[256] After that Badiou summarizes the presuppositions behind this conceptualization of Evil. First, we posit a general human subject who is both passive and active: passive in the sense that he suffers, active in the sense that he is able to identify suffering and act against it. Second, politics is posited as inferior in relation to ethics, because there is only one perspective that really matters, which is perspective of "sympathetic and

[254] Peter Dews, "States of Grace: The Excess of the Demand in Badiou's Ethics of Truths" : 109.

[255] Alain Badiou, *Ethics: An Essay on the Understanding of Evil* (London, New York: Verso, 2001): 8.

[256] *Ibid.,* 8.

indignant judgment of spectator of circumstances."[257] Third, Evil is prior to Good, and the latter must be derived from the former. And fourth, human rights are, actually, the rights of not to be offended and harmed by others.[258] Thus, the power of this conceptualization rests upon its self-evidence. It is much easier to establish a *consensus* about what is Evil. However, Badiou challenges precisely this self-evident character of Evil: "this 'ethics' is inconsistent, and that the – perfectly obvious – reality of the situation is characterized in fact by the unrestrained pursuit of self-interest, the disappearance or extreme fragility of emancipatory politics, the multiplication of 'ethnic' conflicts, and the universality of unbridled competition."[259] In the light of this critique, Badiou does not abandon the concept of Evil altogether, he tries to redefine it. As it can be guessed, such a redefinition must spring from "the ethics of truth"; we should accept its primacy and then has to move to the problem of Evil. Consequently, Badiou arrives at three manifestations, or names of Evil: *terror*, *betrayal*, and *disaster*. Following Dews, I argue that there is a fundamental tension between two names, leaving aside *betrayal* which is considered by Dews an equivalent of traditional lack, *terror* and *disaster*. What Badiou means by these two terms would clarify the argument. *Terror* arises when a truth-claim is directed towards a definite, limited interlocutor; thus every truth claim must be universal in the sense that it must not be preserved for a certain group (whether it would be national, ethnic, religious). *Disaster*, on the other hand, is related with its detachment from its original content, from its particularity: "to identify truth with total power is Evil in the sense of *disaster*."[260] The tension between these two accounts makes doubtful Badiou's attempt and his positioning in between: "The Good is Good only to the extent that it does not aspire to render the world good. Its sole being lies in the situated advent [*l'advenue en situation*] of a singular truth. So it must be that the power of a truth is also a kind of powerlessness."[261] Although a different one, like that of Ranciére, Badiou's position is also characterized by fragility. Behind its inspiring and courageous motifs, there is a lack of rigor, which shows itself as an

[257] *Ibid.,* 9.

[258] *Ibid.,* 9.

[259] *Ibid.,* 10.

[260] *Ibid.,* 71.

[261] *Ibid.,* 85.

inability to answer even most obvious questions.[262] It is truth-event itself which makes the idea of the ethics of truth so ungraspable; it is singular, incommunicable, and unsocial. Not accidentally, this argument would remind us Kierkegaard's comparison between tragic hero and Abraham in "Is there a Teleological Suspension of the Ethical?"[263] When tragic hero, like Agamemnon, Jephthah, and Brutus, encounters with a dilemma, he has to make a choice to solve it, but the crucial point is that this choice is within the ethical; it can be justified in ethical terms. However, Abraham is an exception precisely because his act of sacrifice cannot be justified; it is purely incomprehensible in relation to ethical. Note that, here, the ethical implies what is universal and public. Thus, the problem must be recast in terms of universal (ethical) and particular (single individual). To understand Abraham and his transgression, Kierkegaard argues, there is a need for another category, faith:

> Faith is precisely the paradox that the single individual as the single individual is higher than the universal, is justified before it, not as inferior to it but as superior – yet in such a way, please note, that it is the single individual who, after being subordinate as the single individual to the universal, now by means of universal becomes the single individual who as the single individual is the superior, that the single individual as the single individual stands in an absolute relation to the absolute. This position cannot be mediated, for all mediation takes place only by virtue of the universal; it is and remains for all eternity a paradox, impervious to thought. And yet faith is this paradox […][264]

There is no need to exaggerate the similarity, especially when we take into account the tradition of structuralism behind Badiou. Nevertheless, there is an undeniable resemblance which deserves to be scrutinized carefully; however, this is beyond the scope of present inquiry.

Although, they evaluate human rights in different ways through different conceptions, as we noted before, both Ranciére and Badiou base their arguments on a ground where social as consensus or world of everyday opinions *fails*. Where social as such fails, politics arises as the expression of disclosure. How could it be possible to explain this same concern? A philosophically grounded discussion is provided by Douzinas, in "Adikia: On Communism and Right" (2010).

[262] Peter Dews, "States of Grace: The Excess of the Demand in Badiou's Ethics of Truths": 111.

[263] Søren Kierkegaard, "Is there a Teleological Suspension of the Ethical?" *Continental Ethics Reader* (ed. M. Calarco and P. Atterton) (New York, London: Routledge, 2003): 57-63.

[264] Søren Kierkegaard, "Is there a Teleological Suspension of the Ethical?": 58.

Douzinas reading is an attempt to trace a tension between two Greek terms *dike* and *adikia* and to assess its relevance for contemporary politics. As it can be guessed, the emphasis is put by Heidegger in his discussion of the Anaximander fragment. "The proper presence of beings is 'lingering awhile,'" or self-presencing and that is the implication of *dike*as joint/jointure. However, there is crucial aspect of Being that must be added: it also withdraws, conceals itself in beings:

> The Fragment clearly says that what is present is in *adikia*, i.e. is out of joint. However, that cannot mean that things no longer come to presence. But neither does it say that what is present is only occasionally, or perhaps only with respect to some one of its properties, out of joint. The fragment says: what is present as such, being what it is, is out of joint. To presencing as such jointure must belong, thus creating the possibility of its being out of joint.[265]

What can be called as history, thus, can be placed precisely in this process. The disorder of Being, concealment/unconcelment, is unfolding history. However, Douzinas reminds Derrida's critique of "the one-dimensional interpretation of *dike* and *adikia*, which emphasize pacific jointure and care."[266] He emphasized the primacy of *adikia* and accentuates the disjunction in Being. According to Douzinas, this will pave the way for a new interpretation: "An archaic *adikia*, dissensus or conflict, animates the unconcealment of Being. It endures in human history which is the unfolding (*tisis*) of *adikia*'s overcoming (*dike*)."[267] As a result, this archaic *adikia*, which is enduring, is named as injustice. After that, the question is what the source of this injustice is.

Following Heidegger, Douzinas argues that an answer was given by Sophocles. Anew term, *deinon*, in *Ode on Man* can be the key word. It has two meanings: "First, it is man's violent creative power, evident in *techne* (knowledge, art, law). Secondly, *dike* is an overpowering power, the order and structure into which humanity is thrown and struggle with."[268] Thus, there is a struggle and confrontation between *techne* and *dike. Techne* shapes the surface of world and beings; human beings

[265] Martin Heidegger, *Early Greek Thinking* (San Fransisco: Harper & Row, 1984): 41.

[266] Costas Douzinas, "*Adikia*: On Communism and Rights" *The Idea of Communism* (ed. S. Žižek and C. Douzinas) (London: Verso, 2010): 87.

[267] *Ibid.,* 88.

[268] *Ibid.,* 88.

impose their order onto the order of beings and break asunder their structure, disrupt their course. However, "*dike*, the overpowering order, can never be fully overcome. It tosses *pantoporos* (all-resourceful and everywhere-going) man back to *aporos* (without passage and resource)."[269] Thus failure and defeat is the condition of every human endeavor. The name of this failure, dislocation, *injustice* is *adikia*. According to Douzinas, it is this sense of injustice, "which prepares the militants of revolution against the dominant order, is history's judgment and reparation for the original and enduring *adikia*."[270] However, we should be careful of the meaning of *adikia* as such. It mediates between *techne* and *dike*. As we mention before, this mediation itself is the source of unfolding of history. It cannot be understood simply within the contradiction between justice and injustice: there is something aboriginal in *adikia*. *Adikia* as injustice is not "the opposite of justice; the unjust is not the contrary of the just […]. *Adikia* is both the gap between justice and injustice and the endless but impossible attempt to bridge it."[271] Thus, Douzinas strikingly argues that the theory of justice is oldest failure of human thought and marks the paradox at the heart of the issue: "while the principle has been clouded in uncertainty and controversy, injustice has always been felt with clarity, conviction and sense of urgency."[272] However, as we discussed above, this paradox can be overcome, if we destruct the idea of the opposition between justice and injustice. Otherwise, similar to what Badiou has shown in his critique of the self-evidence of evil, we found ourselves in a trap of impotence.

To a certain degree, this discussion on *adikia* explains the discontent of Ranciére and Badiou with regard to the idea of social. There is always something impenetrable, called *adikia* in this case, that is always tried to be enclosed desperately by the social. However, the possibility of the political resides precisely in this failure. What this discussion implies for our inquiry of human rights? The answer is this: the juxtaposition of human rights with a certain political implication requires a further step which is not self-evident and already-there with regard to politics, but itself

[269] *Ibid.,* 88.

[270] *Ibid.,* 89.

[271] *Ibid.,* 90.

[272] *Ibid.,* 90.

political; an act of decision is required. Different positions based on similar assumptions imply this. Our intention is not to reduce and ignore their differences but to emphasize similar and "converging" understandings of the political. Thus, I argue, the tensions between main lines endure.

4.1.3. Leaving Emancipation Behind

In this part, I simply try to discuss my step towards the issue. My guiding thread is an article "'The Most We Can Hope For…': Human Rights and the Politics of Fatalism" (2004) by Wendy Brown. Discussing Michael Ignatieff's idea of "minimal, pragmatic human rights,"[273] she criticizes the idea as the international moral currency. But her critique goes deeper and claims that it is impossible to have a minimalist position within the discourse of human rights. Thus,

> Human rights activism is a moral-political project and if it displaces, competes with, refuses, or rejects other political projects, including those also aimed at producing justice, then it is not merely a tactic but a particular form of political power carrying a particular image of justice, and it will behoove us to inspect, evaluate, and judge it as such.[274]

Against such a well-known critique, it is often argued that human rights are beyond politics, some kind of antipolitics, or even an ethical agenda. As Badiou discussed before, they are rights not to be harmed and inflicted pain. Continuing her critique, Brown argues that this perspective could not be content with its limited scope; inevitably, there is an opening to the "progressive political possibility that exceeds their purview:"[275] First, there is the emergence of a new kind of agency. Second, freedoms that were flourished by the human rights are necessary for economic development. And third, discourse of human rights creates the basis for conflict and deliberation as well as their minimum common denominator. Brown argues that these claims are related with the "ontological logic, historical logic and political logic

[273] Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001).

[274] Wendy Brown, "'The Most We Can Hope For…': Human Rights and the Politics of Fatalism" *South Atlantic Quarterly* 103: 2/3 (2004): 453 .

[275] *Ibid.,* 454.

of human rights," respectively.[276] It should be noted thatglobal perspective should not mislead us to an isolated point of view.

Ontological logic based on the empowerment of individuals through human rights is highly deceptive because it "fully equates empowerment with liberal individualism."[277] It is this discourse *itself* which draws a line between private and political (compare with the ideas of Arendt, Agamben and Ranciére), and places empowerment in the first sphere: "In his framing, human rights discourse thus not only to be beyond politics (notwithstanding his own insistence that it is a politics), but carries implicitly antipolitical aspirations for its subjects – that is, casts subjects as yearning to be free of politics and, indeed, of all collective determinations of ends."[278]

Historical logic is much more intriguing. Related with the first one, the necessity of individual freedoms for economic development implies a hidden concern: a concern to differentiate individual human rights from collective rights. Although the necessity of individual freedoms is mentioned carefully, rights of food, shelter and healthcare (if there are any, of course) are carefully ignored, because of their "left tilt."[279]
Finally, political logic implies the value of human rights as international moral currency. Far from being the ground for political deliberation, (contrary to Ranciére's idea) it is the negative limit of what politics is:

> Rights, especially those dependent on a universal moral vocabulary as human rights are, hardly guarantee local political deliberation about how we should live together; indeed, they may function precisely to limit or cancel such deliberation with transcendental moral claims, refer it to the courts, submit it to creeds of tolerance, or secure an escape form it into private lives.[280]

I do not affirm each point of the critique; rather the general "orientation" of Brown's approach is important: there is an unavoidable reconfiguration (i.e. rights as individual human rights) which is required by any consideration of human rights. In

[276] *Ibid.,* 454-455.

[277] *Ibid.,* 455.

[278] *Ibid.,* 456.

[279] *Ibid.,* 457.

[280] *Ibid.,* 458.

that sense the discursive character of human rights is crucial; the discourse does not stand isolated as an object of inquiry; it constitutes itself as a crucial aspect of international courts, humanitarian organizations and political initiatives.

In one sense, Ranciére is justified: human rights are open to the *use* of political subjects, their appropriations; they emerge as the essential ground of conflict. However, in another sense, there is no such ground, or it is essentially dislocated. Brown's discussion can be interpreted in that way. Human rights are already "not just defenses against social and political power but are, as an aspect of governmentality, a crucial aspect of power's aperture."[281] Thus, any act upon it as a strategic appropriation or as a demand for radically different conception of politics should take into account that there is something more than aspired. In our case, that "more", *excess* pointed towards the working of mechanisms of security.

4.2. The Apparatus of Security: Consolidation of Two Sides of the Discourse

What makes the concept of security so appealing for the present inquiry? For the sake of clarity, it is a commonplace to explain reasons behind the utilization of certain concepts. Yet, the so-called usefulness of this act presupposes, at least, a general understanding with regard to the concept at hand. What is needed, however, in this present study, is an initial account of the concept.

So, I take the risk of, in addition to many risks that has already been taken, returning to an important study with regard to the conceptualization of the security; to Foucault's 1977-78 lectures at College de France, which were later published by the title of *Security, Territory, Population* (2009). First three lectures provided a distinct understanding on the apparatuses (*dispositifs*) of security as well as the concept itself. One should be reminded about the modesty of Foucault's analysis, which "could and would only be at most a beginning of a theory, not of what power is, but simply of power in terms of the set of mechanisms and procedures that have the role or

[281] *Ibid.,* 459.

function and theme, [...] of securing power."[282] Following this, there is no intention of drawing superfluous conclusions and summarizing in a repetitive fashion what was perfectly explicated by Foucault.

On the contrary, through this reading, I aim to derive the lines of thought that enabled him to problematize the issue and use them to establish a grid which later will be used to scrutinize the problem of security on the international level. This attempt does not imply a simple adaptation which would result in arbitrary conclusions; with each step, an act of rectification will be carried as certain elements were transposed to a different level.

In each lecture, Foucault discussed the mechanisms of security through three specific issues, respectively: the spatial organization, the event and normation/normalization. In each discussion, he has taken into consideration three modalities: juridical-prescriptive, disciplinary and security. With regard to the second triad, an immediate warning is necessary. There is no strict separation between these modalities; it would be a mistake to conceptualize them as successive phases, temporal or logical. Rather, he tried to conceptualize *technologies* which would give way to a regime within which these three modes or modulations find a distinct formation: "a technology of security, for example, will be set up, taking up and sometimes even multiplying juridical and disciplinary elements and redeploying them within its specific tactic."[283] It does not mean that it is impossible to carry out a historical analysis, but the analysis indicated by such an inquiry is much more sensitive to the convergences and new formations.

The first discussion is about the spatial organization; Foucault preferred to focus on the town and chose examples according to this preference. As it is said there is no need to give an account of his discussion. The important point is the emergence of three distinct approaches on the organization of town. The first approach took into consideration the problem of the relationship between sovereign and the territory, of

[282] Michel Foucault, *Security, Territory, Population: lectures at the College de France 1977-78* (New York: Palgrave Macmillan, 2009): 16-17.

[283] *Ibid.,* 23.

"connecting the political effectiveness of sovereignty to a spatial organization."[284]The second approach is based upon a structuring of an enclosed, geometrical space:

> In this simple schema I think we find again disciplinary treatment of multiplicities in space, that is to say, [the] constitution of an empty, closed space within which artificial multiplicities are to be constructed and organized according to the triple principle of hierarchy, precise communication of relations of power, and functional effects specific to this distribution, for example, ensuring trade, housing, and so on.[285]

And, finally, the last approach is directed towards the organization of circulations and space as something open, that cannot be structured beforehand. Obviously, each approach exemplifies functioning of a different mode: juridical, disciplinary and security, and the peculiar characteristic of the last and most important approach will be clarified by a comparison between disciplinary and security mechanisms.

To put it simply, disciplinary organization presupposes an empty space devoid of prior relations or purified from them (that is why Foucault gave the example of artificial towns of 17th Century France planned in the form of a camp). The aim of this organization is the perfection of certain functions and moving from the (juridical) pair of (disciplinary) permitted-prohibited to obligated-prohibited. In the third approach, however, the town is accepted as a space already populated, as something given. It does not strive to purify the space of security from these elements, on the contrary, it aims to ensure "the best possible circulation" of them.[286] The term used by Foucault to define this town is *milieu.* First of all, as a given and open space (taking into account the extension of urban space), *milieu* "refers to a series of possible events; it refers to the temporal and the uncertain, which have to inserted within a given space."[287] Second, it is both "the medium of an action and the

[284] *Ibid.,* 29.

[285] *Ibid.,* 32.

[286] *Ibid.,* 34.

[287] *Ibid.,* 35.

element in which it circulates."[288] And third, it is a field of intervention not affecting the individual bodies, but populations.[289]

So what is the importance of this analysis of the spatial organization through different modalities? What can be derived for a discussion of international order from this analysis? And most importantly, if something can be derived, how is it made use of? Before any inference, it should be mentioned that one-to-one correspondence is impossible. The schematic distinction between three different approaches to the organization of space and the transition from one to the other cannot be found on the international level. The legal-juridical organization of the international order which consists of sovereign individual states has an indisputable prominence; this idea of modern sovereignty remains unchallenged even after the establishment of international organizations. As it was discussed in the previous chapter, the international order consolidated this position. Moreover, it is unthinkable to transpose the disciplinary organization to the international order. In addition to the apparent reasons, it would be a pathetic example of anachronism. So far, nothing has been said that requires a scholarly understanding.

However, when it comes to the idea of the space of security, there are some insights that can be made use of. It is possible to think the new world order as that of *milieu*. The sovereign nation-states continue to exist and exert their power; however, after the collapse of the Soviet bloc, and the end of bipolar world order, new instabilities emerged as in the case of Yugoslavia and Africa. In these new spaces, open to struggles, new lines of political divisions appeared; ethnic identities being the most significant one. In the face of all these *uncertainties,* the response was not the restoration of order based on the old idea of international order, but managing the situation and keeping the peace: the main insight is that it is impossible to stop these struggles completely. Thus, the aim is not to close the spaces and to end struggles; on the contrary intervening so as to ensure the circulation of people, products and

[288] *Ibid.,* 36.

[289] *Ibid.,* 37.

capital while managing them. The concept of *milieu* implies the extension of town; on international level, it implies shrinking of world.

The second issue, "the relationship of government to the event"[290], will clarify these arguments. The event which was taken as an example is the scarcity. This time, he compared two strategies dealing with the problem of scarcity; the comparison also implies a transition from the mercantilist to the physiocratic approach.

The first strategy appears as a combination of juridical and disciplinary mechanisms: to prevent scarcity, one has to recourse to the classical restrictions:

> price control, and especially control of the right to store; the prohibition of hoarding with the consequent necessity of immediate sale; limits on export, the prohibition of sending grain abroad with, [...] the limitation of the extent of land under cultivation....[291]

Thus, in accordance with the spatial organization, this strategy presupposes an empty space, which can be organized and closed so as to impose limitations through the authority of the sovereign power. In other words, the prevention of the scarcity relied on a mechanism which would interfere from *outside* and solve the problem with certain measures.

The second strategy, that of physiocrats, employs a different logic; it is not a matter of acting on to prevent and limit anymore, but of recognition to manage. Thus, the physiocracts,

> [...] tried to arrive at an apparatus (*dispositif*) for arranging things so that, by connecting up with the very reality of these fluctuations, and by establishing a series of connections with other elements of reality, the phenomenon is gradually compensated for, checked, finally limited, and, in the final degree, cancelled out, without prevented or losing any of its reality.[292]

Similar to the former strategy, the idea of free circulation of grain has a close connection with a specific organization of space: the free circulation extends beyond the borders of the town as well as the country as the spaces were open under the

[290] *Ibid.,* 51.

[291] *Ibid.,* 53.

[292] *Ibid.,* 60.

mechanism of security. By this opening, the solution of free circulation invites more relations and, as a result, more uncertainties; the legal and disciplinary measures become ineffective. Moreover, the objectives of these measures abandoned as the solution relativized and split: "the scarcity-event is split. The scarcity-scourge disappears, but scarcity that causes the death of individuals not only does not disappear, it must not disappear."[293] From the beginning, the problem is not the prevention of the event, but management and ensuring circulations within "the reality of fluctuations."[294]

The questions directed after the discussion of the first issue, on spatial organization, would be repeated as well. This time, however, it is possible to illustrate the significance of these arguments for the international order through an example. Instead of scarcity, the humanitarian crisis can be taken as an event, and the humanitarian intervention can be interpreted as an expression of the security apparatuses. The objective of intervention is not to control and to impose strict measures, although its legitimation depends on such a claim. From this perspective, the prevention of physical violations becomes irrelevant, or rather byproducts; both in Bosnia and Somalia, interventions did not target the underlying sources of conflict. In fact, the detection and correction of them never appear as an objective; that would be ineffective. The aim is to ensure the continuation of circulation and the stabilization of conditions so as to manage them. The threat to security of the territory, as a legitimate cause of intervention, should be interpreted with regard to this strategy.

Finally, the third issue is related with the normation/normalization, or, more clearly, the transition from the former to the latter. The paradigmatic example of Foucault was endemic-epidemic disease. Similar to the second issue, the relationship of government to the event, he compares disciplinary and security apparatuses.
First of all, he made a detour and enumerated four functions of disciplinary mechanisms: (1) the analysis and breaking down of components to survey and

[293] *Ibid.,* 64.

[294] *Ibid.,* 60.

modify them. (2) the identification of components in relation to definite objectives, (3) the establishment of optimal sequences, and (4) the fixation of the processes of progressive training.[295]Through these functions, disciplinary mechanisms set a model (norm) and differentiate the suitable (normal) from the unsuitable (abnormal) :

> In other words, it is not the normal and the abnormal that is fundamental and primary in disciplinary normalization, it is the norm. That is, there is an originally prescriptive character of norm and the determination and the identification of the normal and the abnormal becomes possible to this posited form.[296]

Because of this primacy of the norm, Foucault preferred to use the term *normation* instead of normalization which is reserved to specify the security apparatus.

Following the general thread that comes derived from the discussions of spatial organization and event, one can easily pointed towards a transition from disciplinary *normation* to normalization. It is no longer a matter of fixing a norm, which is impossible in the face of the fluctuations, uncertainties and interplay of differences which are given.

> Here, instead, we have a plotting of the normal and the abnormal, of different curves of normality, and the operation of normalization consists in establishing an interplay between these different distributions of normality and [in] acting to bring the most favorable in line with the more favorable.[297]

The importance of this transition to understand the new world order after the Cold War period has to be evaluated carefully. Actually, the idea of such a transition consolidates what was accepted with regard to the humanitarian intervention above. The old international order considered individual, sovereign nation-state as its ground; it is the norm of international order. The domestic jurisdiction clause in the UN Charter is nothing but the reaffirmation of this basic principle; international organizations forced to acknowledge its primacy even after the collapse of Soviet bloc.

However, the practice of humanitarian intervention suggested that a different interpretation is possible. The sovereign nation-state as the norm of international order was surpassed to manage the interplay of differences and struggles peculiar to

[295] *Ibid.,* 84-5.

[296] *Ibid.,* 85.

[297] *Ibid.,* 91.

territories. In Somalia, for instance, the norm did not appear as something that has to be enforced, on the contrary, the so-called failure of the intervention was closely related with this norm and its application as a thread to be followed. Moreover, as mentioned above, such an imposition could not appear as an objective. Even though an independent state was established, as in cases of Bosnia, Kosovo (and East Timor), the struggles have not reached an end, on the contrary they become manageable. What was called as a failure - the continuation of struggles because of leaving intact the underlying reasons - by the supporters of interventions on humanitarian grounds is an indispensable aspect of intervention.

How one could understand the relationship between the apparatus of security and discourse of human rights? Through the idea of liberty. Two different conceptions of liberty emanated from the Enlightenment and the liberal thought. First, after the French Revolution, the human rights have become the living embodiments of the liberal emancipatory project:

> From the French Revolution onward, the liberty promised by liberal doctrine has essentially been defined through rights, and the expansion of the quantity and purview of rights is equated with the expansion of freedom. The presumably universal reach of rights in liberal constitutional orders has also implied historically that a quantitative increase in rights generates a quantitative increase in equality.[298]

The fundamental paradox of human rights expressed by Arendt has shown the difficulties of this liberal project. Two following lines of critique, one is affirmative and the other negative, ended up with renewed conceptualizations of individual subject who will continue the emancipatory project, and in return neglected human rights as a "crucial aspect of the power's aperture."

Second, apart from this critique, in the second chapter of present inquiry, an important conjunction was mentioned between rights, liberty and security; the line from *dominium*, to *properium* and property. As the main analytical category of the 14th century, *dominium* pointed towards the manifestation of *will* within this world. Through the distinction between *dominum rerum* and *dominium sui*, the entitlement of human being extends a right to property from the body and its skills to the external

[298] Wendy Brown, *Politics Out of History* (Princeton and Oxfrod: Princeton University Press, 2001): 11-12.

things which become the necessary means to assert one's *will*. Thus, Grossi concluded that "[The] liberty is construed as *dominium*; the intersubjective realm is governed by a series of rights of property."[299] The protection of this *dominium*, or securing the liberties, necessarily becomes a problem with high priority for political thought; Hobbes, very well aware of this necessity, hailed *Leviathan*. However, in contrast to this absolutist position, the liberal project emerged as the champion of the rights and liberties. Neocleous brightly argued that this commonplace hides the intrinsic relationship between security and liberty in liberal thought. The concept of *prerogative* in Locke is a striking expression of this relation:

> The power to act in these circumstances [Accidents and Necessities] is what Locke understands by prerogative: 'This power to act according to discretion, for the public good, without the prescription of the law, and sometimes against it, *is* that which is called *Prerogative*'. Through prerogative the people permit their Rulers to act 'of their own free choice,' not only where there is no clear legal position ('where the law was silent') but sometimes where they might feel the law insufficient or unimportant ('against the direct letter of the Law').[300]

Thus, there was just a difference in degree, and not a qualitative one, between Hobbes and Locke with regard to the problem of the exceptional uses of power by authorities.

These contradictory conceptualizations, proliferation of liberties through rights and the liberties as something that should be secured, give a distinct outlook to human rights, which makes it perfectly suitable to the new world order and the new apparatuses of security. The consolidation of two conceptualizations within human rights turned it into a universal, "intellectual and moral currency." A brief comparison will clarify this argument.

In her book[301], Evren Balta Paker argues that there is an irresolvable contradiction between the ethics of the state of exception and norms of the human rights.[302]

---

[299] Paolo Grossi, *A History of European Law*: 41.

[300] Mark Neocleous, "Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics" *Contemporary Political Theory* 6 (2007): 135. This emphasis on security was expressed by other important figures of the liberal thought as well, *Ibid.*, 141.

[301] Evren Balta Paker, *Küresel Güvenlik Krizi: Uluslararası Siyaset ve Güvenlik* (Istanbul: Iletisim, 2012). A curious question would be: why not norms of the state of exception and the ethics of human rights?

Beginning with Carl Schmitt's classical definition of the sovereign – he who decides exception – she claimed that, following Neocleous, state of exception is not *exceptional* in the sense that it is peculiar to certain periods; on the contrary it becomes the part of the "normal" legal practices in each crisis of the modern nation state. More specifically, in states of exceptions, the law legitimizes the violence which appeared to be outside of the law for the reestablishment of the order.[303]

According to Paker, the human rights practices stand in contrast to this sovereign exception which tends to curtail individual human rights, and control the oppressive tendencies. This contrast is based upon a reading of human rights, in accordance with the liberal thought, as the extension of the sphere of freedom through rights which express individual liberties. There were undeniable flaws and fluctuations throughout the history of human rights, however, when it comes to the 2000s, one can argue that they become the cornerstone of international order, the major criteria for states to become a member of this international order.[304] In spite of the realpolitik of states, human rights would gradually affect their political agenda. An important event, however, disturbed the balance and initiated a transition from a decade characterized by the human rights to another characterized by the security and 'war on terror.' As Richard Ashby Wilson argues, "the new anti-terror doctrine responds to real security threats which existing international institutions were not originally designed to deal with."[305] The humanitarianism of 1990s has passed and human rights have lost their appeal as a political agenda, and even become an obstacle for the fulfillment of higher goods, like national security and liberal democracies.

This way of understanding the relationship between liberties (proliferated through human rights) and security (as the common good of community) is misleading, if one takes into consideration the arguments mentioned above. At first sight, security and liberty would appear contradictory; however, they merged and consolidated within

---

[302] *Ibid.,*101.

[303] *Ibid.,* 99-100.

[304] *Ibid.,* 107.

[305] Richard Ashby Wilson, "Human Rights in the 'War on Terror'" in *Human Rights in the 'War on Terror'* (ed. R.A. Wilson)(Cambridge: Cambridge University Press, 2005): 6-7.

human rights. Reading the history of human rights as one of emancipation overlooks the connection between the doctrine of natural law, natural rights and human rights. As discussed in the first chapter, individual rights emerged out of a historical context in which the relationship between natural law and human/positive law is in favor of the former. That is why one could detect a line of continuation between *dominium*, *properium*, and property. When it comes to the question of natural rights, the right to property has a privileged historical place: as *dominum sui* (ownership of body and skills) extended towards *dominium rerum* (ownership of external things), the right to self-preservation would extend towards a right to property. Thus, for the present inquiry, the significance of Locke does not reside in his *liberal check* on the sovereign power, but his characterization of right to property as a natural right, given by God. And this significance gains another sense, when it comes to the question of security: now, Hobbes and Locke stand on the same side. The right to property illustrates, from a historical point of view, the logic of paradox which later identified with the human rights as Arendt did. One could take a further step and claim that this paradox is not something to be resolved, or in other words, human rights appear paradoxical only with regard to the promises they give. The politico-legal reasoning underlying human rights indicates more than promises: as promises to be fulfilled, human rights refer to a sphere (of freedoms) which could not be exhausted by the political order; however, the embodiment of these freedoms as liberties is possible through human rights which necessitates a political act of translation. Moving beyond this reasoning, one should acknowledge that there is no outside (sphere of freedom) or inside (political order) prior to *political* act which would set the limit between. Thus, from the purview of this political act, liberty and security is coextensive. If a sphere prior to political act assumed, as Locke did with regard to natural right to property and as inalienable human rights imply, this does not overrule the political order; on the contrary, this assumption extends the scope of rights as a peculiar way of doing politics which could be easily checked and balanced with security concerns as it was exemplified by the Lockean *prerogative*.

There is no contradiction between exception expressed through security politics and liberties expressed through human rights. However, security and human rights also do not constitute an equation, the ultimate aim of which is equilibrium. What

happened after 9/11 is not a clear-cut transition from a human rights regime to security politics: the apparatus of security operated in 1990s as well, although not fully effective. Now, a different formation of international political context enables one to recognize another configuration of security and liberties: “The war on terror.”

CHAPTER V

CONCLUSION

At the beginning of his article, "Human Rights in an age of counter-terrorism,"[306] Conor Gearty mentioned the difficulties of finding an objective definition to terrorism. What he has gradually recognized is the importance of the subject which relies on this ambiguity with regard to the definition; in that way, the concept becomes much more open to expert speculation. Following this line, he argued, the proliferation of meanings around the concept came forward with the question of morality which extends the meaning of terrorism as a method of violence.

According to him, this moral outlook of "war on terror" has disruptive effects from the point of view of human rights. A striking example of this degrading effect is an appeal to torture, from the side of "liberal hawks":

> What is particularly disturbing is the way in which lawyers, such as Alan Dershowitz, and liberal commentators, including the human rights warrior Michael Ignatieff among many, are prepared to enter into debate about the morality and legitimacy of torture and to develop detailed plans about ways of legalising it through 'torture warrants', 'sunset clauses' and judicial supervisory regimes. Ignatieff is interested in the gradations of torture as part of the 'lesser evils' strategy: 'permissible duress might include forms of sleep deprivation ... together with disinformation and disorientation (like keeping prisoners in hoods) that would produce stress'.[307]

The idea of "lesser evil" is worth mentioning as a special expression of moral perspective. First of all, it implies an awareness of evil. For instance, in the case of torture, what was done by the liberal-democratic authorities is recognized as evil by the authorities themselves. Second, this evil emerges as a necessity: facing with the threats to the liberal democracies, "necessity may require us to take actions in defence of democracy which will stray from democracy's own foundational

[306] Conor Gearty, "Human Rights in an age of counter-terrorism " in *'War on Terror' The Oxford Amnesty Lectures 2006* (Manchester: Manchester University Press, 2009).

[307] Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (New York: Routledge-Cavendish, 2007): 5.

commitments to dignity."[308] Finally, this evil is lesser compared to the evil of terrorist, simply because it is defensive and promoting the rights and liberties of man. Thus, one could legitimately argue that "If Abu Ghraib was wrong, then the wrongness consisted not in stepping across the line into evil behaviour but rather in allowing a 'necessary evil' (as framed by the intellectuals) to stray into 'unnecessary evil' (as practiced by the military on the ground)."[309]

This explanation of lesser evil perfectly fits to the last part of the preceding chapter: as a necessary evil, security apparatus and measures will curtail the rights for the defense of democracy. However, the moral ground of these measures does not exclude human rights as obstacles; rather, rights entail these security policies so as to constitute a distinct figuration of power. Specifically, where can one find human rights within this figuration? One can find them in the Afghani women's right to education as it was envisioned by the U.S., or you can find them in the Iraqi people's right to democratic election. These are rights of victims; here, one can find a similar rhetoric employed during the decade of humanitarian intervention–this time accompanied by the security concerns on terror which could strip the victim of his rights if necessary.

"The moment the human rights discourse moves into the realm of good and evil is the moment when it has fatally compromised its integrity."[310] If, by these words, Greaty proposed the separation of moral realm from the political within discourse of human rights, he ignored the arguments present study tried to convey.

From the beginning, the study focused on the tensions within traditions that would give way to the idea of human rights. Through the transition from natural law to natural rights, and then to individual rights, the emergence of the human rights has conceptualized not as a point of resolution, but as a new source of conflicts and paradoxes. One way of understanding human rights as such is to emphasize the

[308] Gearty quoting from Ignatieff, *Ibid.,* 93.

[309] *Ibid.,* 93.

[310] *Ibid.,* 94.

points of divergences between moral and political realms. That is why it is possible to discuss about the fundamental paradox of human rights.

Moreover, the international order as the possible sphere of realization of a full-blown human rights regime failed to become so exactly for this reason, but that is not the whole of the story. The fragmentation of human rights system and Cold War period interlocked United Nations and turned human rights into a hollow rhetoric. However, human rights enjoyed a renewed appreciation through rights movements on national level.

After the Cold War, once again, human rights became relevant in international area, and 1990s witnessed the "golden era" of humanitarianism which replaced by the security doctrine in 2000s. It was argued that the rising concern of security made human rights the target of lesser evil for the greater good of the community. As I discussed in the previous chapter, this line of argumentation misses the core of the discourse of human rights which is a distinct blend of moral and political ideas. Thus, one should avoid clear-cut distinctions between moral and political, security and liberty, norms of human rights and ethics of state of exception. Any acclamation of human rights as the standards of civilization, or as the ideal expression of liberties, or as the grounds of emancipatory projects should take into consideration their place within the framework of power relations.

BIBLIOGRAPHY

Agamben, Giorgio, *Homo Sacer: Sovereign Power and Bare Life* (Stanford, California: Stanford University Press, 1998).

Aquinas, Thomas, *Treatise on Law* (Indianapolis/ Cambridge: Hackett Publishing Company, Inc., 2000).

Arendt, Hannah *The Origins of Totalitarianism* (San Diego, New York, London: Harvest Book, 1966).

Aristotle, *Nichomachean Ethics* (Oxford: Oxford University Press, 2009).

Badiou Alain, *Ethics: An Essay on the Understanding of Evil* (London, New York: Verso, 2001).

Badiou, Alain, "Plato, Our Dear Plato" *Angelaki* vol. II no:3 (2006):39-41.

Brown, Wendy, "'The Most We Can Hope For…': Human Rights and the Politics of Fatalism" *South Atlantic Quarterly* 103: 2/3 (2004): 451-463.

Brown, Wendy, *Politics Out of History* (Princeton and Oxfrod: Princeton University Press, 2001).

Chesterman, Simon, *Just War of Just Peace? Humanitarian Intervention and international law* (Oxford: Oxford University Press, 2001).

Copleston, Frederick S.J. *A History of Philosophy: Volume V – Modern Philosophy: The British Philosophers from Hobbes to Hume* (London, New York: Image Books, 1993).

Copleston, Frederick S.J., *A History of Philosophy: Volume II – Medieval Philosophy* (London, New York: Image Books, 1993).

Covell, Charles, *Hobbes, Realism and the Tradition of International Law* (New York: Palgrave MacMillan, 2004).

Covell, Charles, *The Law on Nations in Political Thought: A Critical Survey from Vitoria to Hegel* (New York: Palgrave MacMillan, 2009).

Dews, Peter, "States of Grace: The Excess of the Demand in Badiou's Ethics of Truths" *Think Again: Alain Badiou and The Future of Philosophy* (ed. Peter Hallward) (London,New York: Continuum, 2004): 106-120.

Douzinas, Costas "*Adikia*: On Communism and Rights" *The Idea of Communism* (ed. S. Žižek and C. Douzinas) (London: Verso, 2010).

Douzinas, Costas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (New York: Routledge-Cavendish, 2007).

Douzinas, Costas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford: Hart Publishing, 2000).

Foucault, Michel, "Nietzsche, Genealogy, History" in *Aesthetics, Method and Epistemology* (London: Penguin Books, 2000): 369-391.

Foucault, Michel, *Security, Territory, Population: lectures at the College de France 1977-78* (New York: Palgrave Macmillan, 2009).

Friedrich, Carl Joachim, *The Philosophy of Law in Historical Perspective* (Chicago: Chicago University Press, 1963).

Gearty, Conor, "Human Rights in an age of counter-terrorism " in *'War on Terror' The Oxford Amnesty Lectures 2006* (Manchester: Manchester University Press, 2009): 83-104.

Gibbs, David N., *First Do No Harm: Humanitarian Intervention and the Destruction of Yugoslavia* (Nashville: Vanderbilt University Press, 2009).

Grossi, Paolo, *A History of European Law* (Malde: Wiley-Blackwell, 2010).

Grotius, Hugo, *Commentary on the Law of Prize and Booty* (Indianapolis: Liberty Fund, Inc., 2006).

Hardt, Michael and Negri, Antonio, *Empire* (London: Harvard University Press, 2000).

Heidegger, Martin, *Early Greek Thinking* (San Fransisco: Harper & Row, 1984).

Hobbes, Thomas, *Leviathan* (Oxford, New York: Oxford University Press, 1996).

Kant, Immanuel, *Perpetual Peace and Other Essays* (Indianapolis: Hackett Publishing, 1983).

Kierkegaard, Søren, "Is there a Teleological Suspension of the Ethical?" *Continental Ethics Reader*(ed. M. Calarco and P. Atterton) (New York, London: Routledge, 2003).

Lesaffer , Randall, *European Legal History: A Cultural and Political Perspective* (Cambridge: Cambridge University Press, 2009).

Locke, John, *Two Treatises of Government and A Letter Concerning Toleration*(New Haven, London: Yale University Press, 2003).

Marcus Aurelius Antonius, *The Communings with himself of Marcus Aurelius Antonius* (London: William Heinemann, New York: G.P. Putnam's Sons, 1916).

Mayall, James, "Humanitarian Intervention and International Society: Lessons from Africa" in *Humanitarian Intervention and International Relations* (ed. J.M. Welsh) (Oxford: Oxford University Press, 2004): 120-142.

Neocleous Mark, "Security, Liberty and the Myth of Balance: Towards a Critique of Security Politics" *Contemporary Political Theory* 6 (2007): 131-149.

Newman, Michael, *Humanitarian Intervention: Confronting the Contradictions* (London: Hurst & Company, 2009).

Normand, Roger and Zaidi, Sarah, *Human Rights at the UN: The Political History of Universal Justice* (Indianapolis: Indiana University Press, 2008).

Paker, Evren Balta, *Küresel Güvenlik Kompleksi* (Istanbul: Iletisim, 2012).

Plato, *Complete Works* (ed. Cooper, J.M.) (Cambridge: Hackett Publishing, 1997).

Plato, *Republic* (Cambridge:CambridgeUniversityPress,2005).

Ranciére, Jacques, "Who is the Subject of the Rights of Man?" *South Atlantic Quarterly*103:2/3 (2004): 297-310.

Roberts, Adam, "The United Nations and Humanitarian Intervention" in *Humanitarian Intervention and International Relations* (ed. J.M. Welsh) (Oxford: Oxford University Press, 2004): 71-98

Schmitt, Carl, *The Concept of the Political* (Chicago: Chicago University Press, 2007).

Sriram, C.L., Martin-Ortega, O. and Herman, J., *War, Conflict and Human Rights: Theory and Practice* (London and New York: Routledge, 2010).

Thornhill, Chris, *German Political Thought: The Metaphysics of Law* (London and New York: Routledge, 2007).

Tuck, Richard, *The Rights of War and Peace: Political thought and International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001).

Wilson, Richard Ashby, "Human Rights in the 'War on Terror'" in *Human Rights in the 'War on Terror'* (ed. R.A. Wilson)(Cambridge: Cambridge University Press, 2005): 1-37.

Internet Sources

ICISS The Responsibility to Protect Report:
http://responsibilitytoprotect.org/ICISS%20Report.pdf

Somalia: Civil War, Intervention, Withdrawal 1990-1995:
http://www.unhcr.org/refworld/country,,WRITENET,,SOM,,3ae6a6c98,0.html

The Millennium Report of Secretary General:
http://www.un.org/millennium/sg/report/ch3.pdf

The Universal Declaration of Human Rights: http://www.un.org/en/documents/udhr/

The Virginia Declaration of Rights: http://www.constitution.org/bcp/virg_dor.htm

UN Charter: http://www.un.org/en/documents/charter/chapter1.shtml

UN ECOSOC Resolution 75(V): http://daccess-ods.un.org/TMP/3300687.96873093.html

UN General Assembly Resolution 543: http://daccess-ods.un.org/TMP/2547453.64189148.html

UNSC Resolution 794: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/772/11/PDF/N9277211.pdf?OpenElement

UNSC Resolution 771: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/379/72/IMG/N9237972.pdf?OpenElement

UNSC Resolution 1199: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/279/96/PDF/N9827996.pdf?OpenElement

UNSC Resolution 713: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/596/49/IMG/NR059649.pdf?OpenElement

UNSC Resolution 743: http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/011/02/IMG/NR001102.pdf?OpenElement

UNSC Resolution 770: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N92/379/66/IMG/N9237966.pdf?OpenElement

UNSC Resolution 814: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/226/18/IMG/N9322618.pdf?OpenElement

Dumbarton Oaks Proposal: http://www.ibiblio.org/pha/policy/1944/441007a.html