

Escaping Academia:
Transnational Human Rights (of children) in
Political Negotiations.
- The European Commission and Honduras -

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In this article the theoretic approaches on human rights and international law as a *transnational legal constitutionalization process* will be confronted with non-academic and non-scientific glimpses of an atypical reality in order to be able to determine measures necessary for a further development of theoretical approaches. We will focus on the economic cooperation negotiations between Honduras and the European Union, a forum not directly involved in human rights policymaking and, thus, a valid non-specific and atypical forum to evaluate the reality of *transnational legal process* of human rights and rights of the children in particular.

In the **first part (I.)** a theory of the character of contemporary international law will be briefly framed. In the **second part (II.)** the link will be drafted towards a realistic approach in international negotiations followed in the **third part (III.)** by a short introduction to Honduras and applying in the **fourth part (IV.)** the standards elaborated to the negotiations between Honduras and the European Commission². The **fifth part (V.)** will present the concluding remarks.

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² The European Union is a complex institutional structure. For the understanding of this article it has to be clear that the European Council as the institution formed by the member state governments "takes" the decision elaborated previously by the European Commission - with own and permanent officers -and approved by the European Parliament. The negotiations take place within the

I.

Human rights are a mayor issue in international relations. That is an affirmation that can be hardly denied as the world faces the vastest proliferation ever of topics such as democracy, rule of law and human rights.

Since children are a politically correct image of vulnerability, since they cause sweet empathy in former children or potential parents, and since children are the future of every society, it is not very difficult neither brilliant to state that **their rights are especially relevant**. Nonetheless, that is something continually repeated in political debates, election campaigns and all kind of statements. But this non-(disputed) statement has to confront itself with the antithesis of children dying from hunger, preventable diseases, as soldiers in conflicts or due to other unnecessary causes: 13 million children are dying annually due to preventable diseases: 325 million children do not go to school (vid. UNDP³ or World Bank⁴ data): and to guarantee surviving of 6 million children, medical expenses of only 5 billion USD would be enough (Bryce et al. 2005), just to mention some of the numbers out of the vast pool of global injustice (Chossudovsky 1998).

Regarding human rights and more generally international public law, it has been difficult to affirm anything as undisputed. The formal and substantial content and application was in almost every detail academically uncertain, unless their ever growing relevance. Therefore, the famous definition that "almost all nations

European Commission and its Directorate Generals (=Ministries) or Delegations (=Embassies). Thus, from here on, it will only be referred to the European Commission as counterpart in the negotiations.

³ Vid. <http://hdr.undp.org/>

⁴ World Development Report 2006, available at: <http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1127230817535/082136412X.pdf>

observe almost all principles of international law and almost all of their obligations almost all of the time” (Louis Henkin) was for a long time the political reality of international law. But since the last decade of the 20th century, the economic and technological interaction throughout the market orientated world, with its arbitration and dispute settlement panels, as well as the establishment of Ad-hoc war-crime-Tribunals, regional - including supranational - judicial institutions and recently the International Criminal Court have settled an important frame for an active international law. Thus, theories strengthening institutions and system(-s) have gained comparative advantage:

The “truly universal acceptance took place (...) at the World Conference on Human Rights held in Vienna in 1993, where all governments there present (more than 170 in number) expressed their commitment to universal human rights” (Eide 2003, 245⁵). Such a formalistic approach (Bobbio 1990) is valid from a legal point of view and is explained in a context of emerging constitutionalization of international law (Kumm 2004). Regarding human rights and its growing universalization we learn from Eide that three dimensions can be found:

“The first is the process from articulation of ideas of HR in the public discourse (idealisation) through their adoption in international and national law (positivisation) and finally to their realisation through the transformation of social and international order; the second is the broadening of the scope, content of HR, and the third is the geographical diffusion, making it applicable not only in a few countries mainly in the West but to promote its recognition and implementation world wide.” (Eide 2003, 243)

This is *apparently* a reality within liberal democratic entities: societies, states or systems.

⁵ Critical on legitimating character of such events: Kumm 2004, 913.

Koh defines the growing interaction of national and international law between public and private actors as “transnational legal process” (Koh 1996, 2004). This terminology seems appropriate to identify the intensification of interaction between international and national private and public decisions, acts and policies. Domestic courts can review, and be reviewed by, foreign courts, executives and legislatures, for their commitment to meta-constitutional norms (Reichman 2001, 41).

Political omissions rather than criminal acts are the apparent causes of the lack of distribution and the mortal inequity of the “golden curtain”, which divides the society of states and the states’ societies. Responsibility is hereby legally hard to define. This makes a practical acknowledgement of children rights with legal terms very difficult and seldom, and its access to transnational legal process, to consideration as meta-constitutional norms, etc. almost impossible⁶.

II.

The high developed doctrines surrounding theory of international law and international relations face a huge gap in the facts assembled throughout the world towards their practical effect. The boundary of sovereignty and lack of coactivity of international judicial instruments is a problem perceivable by theory. Recent developments seem to establish a new doctrine of *conditional sovereignty*, at least within the UN (Slaughter, 2005: 631)⁷. It is to

⁶ Also because it would be difficult to trace a separation line between human rights granted for children but not for adults.

⁷ "In signing the Charter of the United Nations states not only benefit from the privileges of sovereignty but also accept its responsibilities. These responsibilities include both the obligation of a State to protect the welfare of its own peoples and its obligation to meet its obligations to the wider international community. [...]in contrast to whatever perceptions may have prevailed when the Westphalian

be asked, whether the organization "reformed" in 2005, has the capacities to achieve any substantial changes.

For this article and its realistic⁸ approach it is far more relevant to focus on non perceivable issues within transnational legal process and international relations as hidden interests, actors inclinations or secret forecasts on economic, political or social effects. These factors do not have a scientific value, but understanding the objective world without acknowledging subjective inclinations of the actors framing it, is a blind and dangerous task.

- To implement an economic model following its theoretic formula, clashes with power interests, immeasurable poverty and other outside factors.

- To implement a political promise, stated on whatever arena, clashes with power interests, secret strategic preferences and other outside factors.

- To implement the eternal togetherness sworn at a wedding, clashes with the balance between secret and honesty, shame, belief, basic instincts and other outside factors.

In none of these cases, the theoretic model of a self imposed norm has to fail necessarily, but also, in none of these cases, its failure due to one of the mentioned outside factors can be understood using the conditions imposed within them. The political approach for example of a two-level game (Putnam, 1988) is not enough if we argue that a transnational legal process exists.

The Worldwatch Institute states that "All of the wars of the twentieth century are estimated to have resulted in the deaths of an average of 1.1 million combatants and civilians per year. But at

system first gave rise to the notion of State sovereignty." [vid. "A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change", UN Doc. A/59/565, at 8 (2004), available at <http://www.un.org/secureworld/report.pdf> .

⁸ Understanding realism as a critique of normative or formal approaches with a look on non-public and hidden facts and interactions.

present, communicable diseases are killing fourteen times that number of people annually" (Worldwatch Institute 2005⁹). We have mentioned that it seems pretty simple to avoid deaths from preventable diseases and is it not done. On the other hand, the theory on *jus ad bellum*, *jus in bello* and recently even *jus post bellum* (Stahn 2004) is a flourishing academic area, even though implementation of peaceful behavior and respect for human rights or humanitarian law in conflicts is hardly achievable.

The danger that an overdoes of human rights as a theoretic discourse not within an effective judicial or political implementation may harm its normative content is to be taken seriously.

The founding fathers of the United States of America have been pioneers in human rights, democracy and constitution. Nowadays, the scientifically most sophisticated scholars work in the worlds best universities in the same country. And still it was not until ***Atkins v. Virginia*** (US Supreme Court 2002), for example, that the practice of implementing the death penalty on mentally retarded was rejected. Since 1989, the US has carried out more publicly reported executions of juvenile offenders than any other country in the world. In 1999, the only other country in the world to admit to executing a juvenile offender was Iran¹⁰. From 1999 to 2003 Amnesty International only recorded 20 executions of child offenders in 5 countries: DR of Congo, Iran, Pakistan, Nigeria and – the leader with 13 - the United States: Koh includes the United States in his "axis of disobedience" (Koh 2004)¹¹. It is evident that denying the right to life is the most immediate denial of all.

⁹ Available at <http://www.worldwatch.org/features/security/tf/4> .

¹⁰ <http://web.amnesty.org/library/index/engact/500042003> .

¹¹ Prof. Koh teaches at Yale University and worked as a government advisor and a lawyer in the United States.

What could we then probably expect from a poor country like Honduras, governed by narrow elites, in a region failing to grant full citizenship and participation (UNDP 2004)?

It will be interesting to see, whether Honduras or the European Commission defend human rights, and especially children human rights in a non-public political arena regarding cooperation negotiations. We have to see whether a glimpse of transnational legal process or meta-constitutional rights appear in the political discourse towards the European Union and from the European Union on occasion of budget planning for forthcoming economic cooperation.

III.

Three historic facts have positioned Honduras on the international map:

- (1) In 1969, the 100-hours War, also known as "War of football" since a sport encounter between Honduras and El Salvador was used to make the conflict explode (Haggerty/Millet 1995),
- (2) the presence of the US military and "Contra"-rebels during the conflict in Nicaragua and
- (3) the fatalities caused by Hurricane "Mitch" in 1998, killing 20.000 only in Honduras.

Domestically, Honduras has been for long the most classical of the "Banana Republics", since Military Regime leader López Arellano had to resign in 1975 in what is known as *Banagate*, after it became public that the United Brand Company (before United Fruit, now Chiquita) had paid high sums to foment own regional business interests through political decisions. The further political developments are common to the regional experience: After military

regimes, Presidential elections were held in 1981 in an ongoing formally democratic regime which - in late 2005 - elected Miguel "Mel" Zelaya as President¹². In the 1980s, neighbour countries which had been immersed in civil wars were slowly pacified. Consequently, the national and regional concept of democracy and human rights guarantees flourished rather shyly.

It was not until 1999 that the military was repositioned independently from the political institutions of Honduras. In economic matters, Honduras has shaken the (visible) hand of the international finance institutions as may be seen in the *Ley de Ordenamiento Económico*. Privatisation was accounted in the budget plans and its economic system is now one of the most liberal of the continent (Thorp, 1998). But also, Honduras is one of the poorest countries in the region and even worldwide. International Monetary Fund and World Bank have incorporated Honduras in their Program for High Indebted Poor Countries (HIPC), conceding - as well as G8 - depth release in 2005. The impossibility of reducing poverty with slow economic growth, problems like malnutrition, child work, HIV/AIDS, no access to ground property, massive tree cuts and exposition to natural disasters, destabilize a country with a highly unequal distribution of wealth. Increasing security trouble due to adolescent gangs, *maras*, which have spread from US neighbourhoods to the whole region supplying drugs, weapons, extreme violence and extra-social codes, has lead to a newer internal instability. Harsh reactions by security services, including alleged extrajudicial killings, and lack of effective political reaction¹³ show the seriousness of this recent social challenge.

¹² From the Liberal Party, which replaced the National Party government of Ricardo Maduro. Honduras has these two mayor parties and a bunch of not very relevant others.

¹³ Reinsertion of the death penalty was a top rank electoral proposal by the Nationalist Party.

The budget roof imposed by the international finance institutions weakens the political manoeuvrability. A regional Free Trade Agreement has been signed and ratified with the US, which has to prove being a positive step, since in a rural country, small agricultural production will have to face even more subsidized mass production, including genetic manipulated products. The Central American Union SICA (*Sistema de Integración Centroamericana*¹⁴) is about to establish a Custom union and has signed a political compromise with the European Union, probably to be extended to an Association Agreement which would include free trade (Pérez 2005). Together with a common passport with El Salvador, Nicaragua and Guatemala, this proves, at least, regional political stability.

IV.

The European Union is the biggest donor in economic cooperation with Latin America and the Caribbean. Although the economic weight of Central America is rather marginal for the European Union (0,4% of its foreign commerce), in the last 7 years the European Commission has donated around 70 mio. € each year, only to Honduras. The next budget period of the European Union (2007-2013) will include direct budget support for Honduras¹⁵. This budget period has been on the political floor throughout 2005.

First, the Desk Officer (for Honduras) at the Directorate General (DG) External Relations receives a report from a neutral expert mission, which has analyzed the ongoing budget period, the results and the perspectives from data and personal meetings with representatives of the civil society, private economy and the

¹⁴ Vgl. www.sgsica.org

¹⁵ Until now it had been related to Projects (so called Project Cycle Management within the European Commission).

authorities. The internal procedure in the European Commission requires approval of an initial draft - written by the Desk - by EuropeAid (in charge of the cooperation), the Delegation (in this case for Central America in Nicaragua) and receives comments from other DG's, such as Environment or Trade. Since it is a declared aim to reach harmonization with other cooperation institutions and always respecting policy intentions of the addressee's government, these are heard throughout the process, most directly on a mission from the Commission to the reception country. After the Commission reaches a final draft, it is presented to the European Parliament and the Member States (for which the European Council has partially accompanied the process).

One of the most relevant issues presented by the Honduran side was the nutrition and health of new-born children and their mothers and one of the biggest concerns of the European Commission was the electoral propaganda of the reinsertion of the death penalty and NGO claims of extrajudicial killings including juvenile delinquents. The Honduran side presented the grown street violence imposed by the *maras* as not possible to be understood by the European side, which argued that the abolition of the death penalty is a principle inherent in the European spirit and impossible to support denying anywhere else. The Honduran side made strong effort on illustrating the violence spread by the *maras*.

The internal evaluation for the Commission of the cooperation in the period 1992-2002 stated, regarding the coherence and complementation with national public policies, that these were "only little developed, not having favoured the poor, especially not the peasants, therefore the cooperation continued its objectives (fight poverty, defend human rights) basing it on or deviating from the Honduran public policies. This has conditioned the impact of the cooperation, limiting its influence over policy." (ESP Honduras 2004)

Social and Economic Human Rights were therefore not appropriately incorporated in national policies, which in elite ruled countries with weak democratic structures turns possible legal demands close to inexistence¹⁶. In the negotiations, weakness in this regard was defended by the Honduran authorities with the imposed budget roof. New models of cooperation utilities were presented claiming improve on the impact of economic cooperation politically on the Poverty Reduction Strategy and practically on the poor. Even though only few poverty targets were achieved, economic performance, positive results in regional integration and probably lack of alternatives from the European Commission seem to have predetermined a positive approach from the European Commission. The health of newborn and their mothers was rejected as a too specific issue since cooperation will be delivered to the national budget, and targets are set on results in general policy sectors such as judicial system and security, natural resources or regional economic integration.

International Law was not a relevant issue. Ratifying certain basic UN Conventions had been previously a condition for receiving donations or gaining access to privileged trade status¹⁷, but the negotiations relevant here seemed to have only intended a formal harmony between policy intents in Honduras and the European Commission's own policies.

In fact, both parties could deny such a simplifying affirmation and would "proof" their view with the prepared documents and its complex content. But as a senior human rights officer at the Secretariat General of the European Council stated: "Human rights are never a priority. It is hard work to put them on the agenda." In

¹⁶ For an analysis of the right to education in a middle income country of the region (Chile), see Klode (2006).

¹⁷ For example "System of General Preference Plus" to balance problems due to drug traffic with better access for traditional goods to the Common European market.

the negotiations here mentioned, the only relevant human rights argument faced the Minister for Government and Justice of Honduras regarding the worry of European public opinion on extra-judicial killings of juvenile offenders; and it was presented as an outsider concern that *has* to be dealt with on the diplomatic level.

Like donations between individuals, the economic cooperation funds fixed by the European Union are somehow a unilateral act, which needs the will and consent of the receiving state. It cannot be in the interest of the receiving entity to deal with tough issues and would be, thus, a duty of the European Commission to do so. On the other hand, the European Union has a strategic interest in promoting its "effective multilateralism"-strategy in a way that shall not give the impression of intervention in domestic affairs. Therefore, trust is one of the basic values that officials are urged to build up in their counterparts. As we have pointed out for this case, legal impositions or human rights conditions are only relevant *in extremo* (death-penalty, extra judicial-killing of juveniles).

The Convention on the Rights of Children is the most successful of the UN human rights conventions¹⁸ but none of the rights expressed in it was mentioned during the negotiations attended, or analysed with *Aid Memoires* from different diplomatic levels. It is true – of course -, that these negotiations mostly occur on a technical level which has to deal with specific diplomatic and formal matters.

From the European side, the political decisions were taken with a valid strategic perspective of presence and trust in the

¹⁸ With 191 ratifications (only the US and Somalia have not ratified it). The history of children's rights began in 1924 with the Geneva Declaration. Afterwards, the Declaration on the Rights of the Children from 1959 (Doek / Detrick, 1992) was the first step under the guidance of the United Nations which articulated the actual status with the Convention on the Rights of the Children, approved unanimously by the General Assembly on November 20th, 1989 and entering into force on September 2nd, 1990 (UN, 1989).

region, provoked by compromising efforts and acting professionally as addressing what was adequate to address.

But, as one could argue, since the European budget is paid by the consumers (Value Aggregate Tax: charging proportionally high the poor consumers), money will be donated into a budget administrated by rich elites (with corrupt history as all reports of the European Commission state) without a convincing approach on values as human rights or children rights, not even mentioning a right at all (except orally the prohibition of the death penalty, as set in the Additional Protocol to the European Convention on Human Rights obviously not valid for Honduras).

V.

It has been shown that during the negotiations on future economic cooperation between the European Commission and Honduras, human rights, the rights of children or international law in general have not played a role at all.

These negotiations are an atypical forum for dealing with legal issues. They deal with an issue not specifically in the technical human rights arena, even though injustices in poor societies always mean lack of human rights. Furthermore, it has been a non-scientific delivery of information since the negotiation content is non-public information.

And still, we have seen that neither the poor country Honduras nor the rich and powerful European Union prioritize international human rights law in economic cooperation negotiations. The *transnational legal process* regarding human rights or the rights of children does not appear in such a "political-norm-setting-forum". We could only guess if this is due to diplomatic tact, inappropriateness, or lack of interest, knowledge or consideration. It might also be true, that in a country like Honduras,

human rights discourse still has a character of emancipation and counter structure, which would mean that the authorities do not identify themselves with it.

Koh, Slaughter and others (Koh, 1996; 2004; Slaughter, 2004; Kumm, 2004; Reichman, 2001) have presented the developments of meta-constitutional values and transnational legal process in a convincing way. But we have shown that it is not a self-fulfilling prophecy. It can not be left to the international economic law, meetings of international legal scholars or some brave judicial courts.

There are some ways to advance on the path of this process within the legal system, within the political system and, even better, through comity within the whole social system:

- The process can be catalysed through coercive judicial instruments on supranational and international level, reform of the United Nations towards what some call World Republic (Höffe 2002) or other approaches to the well recognized norms of human rights and rights of children as obligatory mandates.
- The process has to be analysed within the complete picture impossible to be limited to small extracts. Therefore the theory of systems offers a comprehensive frame (Luhman 1997, Fischer-Lescano 2005).

This is a serious task not free from dangers. But otherwise, the mentioned contradictions between humanist discourse and death penalty on juvenile offenders, the universal recognition of rights of children and the social reality of millions, the academia and power politics, etc., will lead towards an emptiness of human rights impossible to understand while analyzing a transnational-system consolidation.

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