Taking pluralism seriously
Which rights, which criminal justice? ()

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I.

I.1.

> People everywhere want to be able to speak freely; choose who will govern them; worship as they please; educate their children-male and female; own property; and enjoy the benefits of their labor. These values of freedom are right and true for every person, in every society-and the duty of protecting these values against their enemies is the common calling of freedom-loving people across the globe and across the ages (The White House 2002).

These claims are contained in the document which expounds the principles of U.S. foreign policy. They express in all their brutality the widespread belief not only among the Superpower's political, economic and military elites but also within a large part of mainstream thought that a more or less broad core of principles and values - generally proclaimed as human rights - should not only be granted to all human beings but that these possess a universal and metatemporal legitimacy - *across the globe and across the ages*. In other words, human rights are considered to have an irrefutable, if not absolute, foundation. There is also the tendency to equate these universal values with the guiding values of the United States (1): to assert, as in the words of Condoleeza Rice, that "American values are universal [...] the triumph of these values is most assuredly easier when the international balance of power favors those who believe in them" (Rice 2000).

On this basis, the United States attributes itself with the unlimited right to the use of military force in order to 'export' human rights or to enforce them, and the defence of human rights justifies exceptional procedures within criminal law as well. The 'pre-emptive war' against rogue states which "reject human values and hate the United States" and 'counterproliferation' are both justifiable. The Patriot Act, Homeland Security Act and other dispositions are also justified as part of the 'war against terrorism'. These acts, violating the very principles of the *Habeas Corpus*, authorise arbitrary arrests investigations and judgements, especially, but not exclusively, against foreigners. The aim of the defence of human rights is perceived in such a way as to justify acts that openly violate international law and the principles of the rule of law (2). The direct outcomes of this doctrine are the refusal to ratify the institutive treaty of the International Criminal Court and the immunity of U.S. citizens and military personnel from its jurisdiction (3).

I.1. So far I have made reference to political documents or 'manifestos'. However, an analogous position is also present in a number of significant theoretical contributions. A particularly relevant case is the position of the progressive intellectual Michael Ignatieff. Adopting a historicist approach, Ignatieff criticises the 'idolatry' of human rights and disputes the claim that these are theoretically founded arguing that foundational claims refer to disputable metaphysical assumptions that ultimately create divisions. However, according to Ignatieff it is possible to distinguish a minimal list of 'hard core' human rights that have universal legitimacy. For Ignatieff, the contents of rights convey the conflicts between individuals and groups. "Human rights is universal [...] as a language of moral empowerment" (Ignatieff 2001, p. 73), in the way they allow the individual "to act against practices [...] that are ratified by the weights and authority of their cultures" (ibid., p. 68). At the same time, according to this definition it follows that such a core of rights is limited to "'negative liberty', the capacity of each individual to achieve rational intentions without let or hindrance" (ibid., p. 57).

Thus reduced to their lowest common denominator, which ultimately corresponds to the list of civil rights of the Western liberal tradition, rights *immediately* justify military actions which defend them. According to Ignatieff "human rights language is also there to remind us there are some abuses that are genuinely intolerable [...]. Hence human rights talk is sometimes used to assemble the reasons and the constituencies necessary for the use of force" (ibid., p. 22). It was along these lines that Ignatieff sided with the Anglo-American intervention in Iraq (Ignatieff 2003a, p. 1; 2003b), arguing that as with every historical empire, the American empire of the 21st century had its *burden*. In any case, states have the 'right' to use force to defend human rights: "The disagreeable reality for those who believe in human rights is that there are some occasions - and Iraq may be one of them - when war is the only real remedy for regimes that live by terror" (ibid., p. 4). The United States' imperial role implies a series of obligations, but also the exemption from further burdens such as those represented by the International Criminal Court or the Kyoto Protocol: "America's allies want a multilateral order that still essentially constrain American power. But the empire will not be tied down like Gulliver with a thousand legal strings" (Ignatieff 2003a, p. 7).

This also reflects one of the most characteristic aspects of this outlook: that the purpose of the protection of human rights and American values is to be exempt from all legal restraints, whether it be the procedures provided by the United Nations Charter for authorising military interventions or the principles of substantial and procedural criminal law, even if these have a constitutional status (4).

II.

II.1. In the contemporary theoretical debate there exists a diametrically opposed approach which sees the development of international law and institutions, in particular international criminal jurisdiction, as the main way of safeguarding human rights. The protection of human rights is, in other words, associated with the tradition of 'legal pacifism' and 'cosmopolitic' law.

Kant's *Zum ewigen Frieden* is the classic work of this theoretical current. In this work, Kant sets out the idea that only with the replacement of the 'state of nature' in international relations through transition to a *Rechtszustand* - a condition where international relations are regulated by law - can lasting peace be guaranteed. One and a half centuries later, Hans Kelsen, in *Peace through Law*, would also consider law as the priority instrument for the pursuit of peace and would severely criticise the idea that war was a consequence of inequalities and economic conflicts (Kelsen 1944, pp. 16-18). According to Kelsen, "the ideal solution of the problem of world organization as the problem of world peace is the establishment of a World Federal State composed of all or as many nations as possible" (ibid., p. 5). However, Kelsen realised that this was an unrealistic hypothesis. The project for a 'Permanent League for the Maintenance of Peace', established through a treaty signed by a large number of states and open to all others, was instead entirely workable. Unlike the League of Nations, which had failed miserably, this League's central organ should not be an assembly or an administrative body but a Court of Justice, which would have mandatory jurisdiction. The principle difficulty in international relations is in fact the absence of a recognised and impartial authority that is able to settle controversies and resolve legal questions.

Kelsen was clearly aware that the major problem facing such a court would have been enforcing judgements. He also considered the formation of an international police force as premature because it would have seriously compromised the sovereignty of individual states. However, Kelsen saw an alternative: "The decisions of the international court can be executed against a reluctant State only by the other States, members of the international community, if necessary by the use of their own armed forces" (ibid., p. 20). The Court would have distinguished between such an intervention - the only acceptable form of *bellum iustum* - and wars of

aggression, which since the Briand-Kellog pact had constituted a crime according to international law.

Kelsen stresses that this would represent the 'natural evolution' of law: in individual national communities courts applied the law in specific cases long before parliaments were established; in primitive society courts were little more than tribunals of arbitration and only later would executive power be centralised. It should be noted that in Kelsen's project, the Court would not only have the power to determine the rights and wrongs in the case of a dispute between States, but also the ability to punish the violations of international law on the behalf of individuals.

Kelsen proposes a sort of extension of his interpretation of the legal system - the *Stufenbau* - to a global level: there is no dualism between international and national law but a single global legal system. Sovereignty corresponds to the subjection of a State only to international law which "cannot mean an absolutely, but only a relatively supreme authority" (ibid., p.35).

II.2. This sort of approach is re-proposed today less with the aim of preserving peace than with protecting human rights. For example, Jürgen Habermas argues that human rights are entitled to all individuals and are universally founded (Habermas 1992, pp.109-65). However Habermas is opposed to the idea that there is a direct transition from the universal foundation of rights to a justification of interventions to protect them. Although they are universal, human rights are *not* moral rules: "an *immediate* moralization of law and politics would effectively break down those 'protected zones' that we [...] wish to safeguard for legal persons" (Habermas 1996, p. 233) and would lead to a *Menschenrechtfundamentalismus* (see ibid., pp. 235-36). Instead the replacement of the pre-legal condition at a global level would finalise the legal character of human rights and make it possible to protect them.

> If we were indeed to establish a situation of cosmopolitic law, then the violation of human rights would no longer be judged and opposed *immediately* from a moral perspective, rather they would be pursued in the same way as criminal actions are pursued within the context of a state's legal system: in other words through institutionalised legal procedures. In order to prevent law being confused with morals all we need to do is transform the current state of nature [*Naturazustand*] into a juridical situation of legality. Only in this way will we be able to guarantee the accused [...] full legal protection (ibid., p. 226).

Today this would mean, beyond the limits of the Kantian project, "*binding* individual governments. The sanctions of the international community must be able to oblige it members to respect [...] laws" (ibid., p. 208), establish an international jurisdiction for the protection of human rights and constitute "an executive power that, if necessary, is able to impose upon nation states - through interventions aimed at their authority - the observation of the Declaration of Human Rights" (ibid., p. 212).

By adopting this perspective Habermas has not always been able to take a clear view or to avoid making a series of significant errors of judgement. In 1991 Habermas was one of many intellectuals who saw in *Desert Storm*, given that it was an intervention authorised by the Security Council, the embryonic form of *Weltinnenpolitik*, rather than considering it the first act in deploying the imperial strategy of the *New Global Order*. In contrast, legal cosmopolitanism and fear of *Menschenrechtsfundamentalismus* did not prevent Habermas in 1999 from coming out in favour of the NATO intervention in Kosovo. The blatant violation of international law then in force, both in terms of *ius ad bellum* as of *ius in bello*, was justified by the greater need to punish the violation of the human rights of

Kosovan citizens (Habermas 1999). However, Habermas led a coherent and militant intellectual campaign against the Anglo-American occupation of Iraq (Habermas 2003 a). In this campaign, where foundationalist and universalistic arguments were sidelined, Habermas ended up digging out the old Frankfurt instruments of the critique of ideology (Habermas 2003 b).

The position of Habermas is paradigmatic of a certain approach which resumes the Kantian-Kelsenian project of legal pacifism. This is radicalised towards cosmopolitanism, and developed towards a supranational protection of human rights. Habermas takes Kelsen's theorem to its jurisdictional corollary: the authority of the International Court of the Hague "should be expanded to incorporate the proposals forwarded by Hans Kelsen half a century ago. International criminal jurisdiction [...] should be institutionalised in permanent forms" (Habermas 1996, pp. 218-19).

II.3. However this grand philosophical-legal project faces significant difficulties. First of all, the plausibility of a monistic model of law that this project presupposes is questionable: is a global legal system, in the strong way that Kelsen seen it, thinkable in the absence of a monopoly of legitimate physical force?

Kant already recognised the impracticability and danger of a hypothetical world state. The federal or confederate solution does not solve the key problem either: is it conceivable that the major powers would confer to a third party - say a federal executive or a police force serving an international court - the power to intervene in order to punish the violations of international law, in particular human rights? On the other hand, if this happened, would we not see a concentration of military force leading to an absolute power that can neither be controlled nor counterbalanced? It should be noted that in such a situation, the global executive would not only have to have at its disposal 'conventional' weapons but also a strategic nuclear arsenal, without which it would be powerless in the face of other nuclear powers. It should also be remembered that a hypothetical multilateral nuclear disarmament would not destroy the knowledge required to build weapons of mass destruction: technological innovations can not be 'disinvented'.

Kelsen replies to these sorts of problems by alluding to the origins of modern law and to the fact that for a long period courts were limited to exercising the power of arbitration or to passing sentences without ever having executive power. Could this model be reproduced at a global level? In particular, which power or coalition of powers would be able to punish violations of international law committed by a nuclear superpower? On the other hand, the Kelsenian idea that war may be considered a legal punishment appears difficult to sustain. War, by its very nature, creates innocent victims; its ability to discriminate between combatants and civilians is very limited, while it provokes devastating consequences and chain reactions. The resort to war in order to punish the violation of human rights underlines the paradox whereby the human rights are violated - starting with the right to life - of those whose human rights are supposed to be protected.

Studies of the legal institutions of globalization indicate tendencies which, rather than going towards the construction of a global legal order along the Kelsenian model, seem to head in a completely opposite direction. Under the inducement of transnational economic processes, law tends instead to lose its prescriptive and sanctionable characteristics as well as its certainty. As power shifts from public institutions to private agencies, from politics to the economy, a new *lex mercatoria* establishes itself the logic of which increasingly contaminates the traditional bounds of public law. As a result, constitutional law loses its ability to 'close' and found the system, becoming 'interactive' and 'fluid' (Ferrarese 2002). Instead of an extension of the *Stufenbau* towards a higher level, we witness the subversion of the structure of the individual national legal systems.

However, these processes do not imply a disappearance of 'strong' sovereignties

which, on the contrary, as we have seen, reaffirm themselves and proclaim themselves *superiorem non recognoscens*. The limitations to *ius ad bellum* introduced by the Briand-Kellog Pact and later by the United Nations Charter no longer seem to be recognised by the United States which considers itself entirely *legibus soluti* with regard to legal restraints. In the present 'imperial' context, where dramatic differences in income, development and power affect the whole of humanity, it is not surprising that the ICC project faces deep problems. As is well known, its statute presents a serious aporia: the Security Council - dominated, as is also known, by the principal nuclear powers - has the power to prohibit or suspend the initiatives of the prosecutor's office. Moreover, the possibility of accepting 'voluntary contributions' not only from governments but also from public and private organisations, and what this would mean in terms of financial support, is extremely dangerous. Linked to this is the serious limit which arises from the need to resort to the military force of the supporting powers in order to carry out criminal investigations. For their part, the United States have not only obtained immunity for their citizens involved in *Peacekeeping* operations, by appealing to the ambiguous article 98 of the Statute, but they are making every effort to secure as many bilateral treaties as possible that constantly guarantee the immunity of their military personnel.

III.

III.1. There is a common element among the positions examined so far: the idea that human rights are universally founded. Conversely, Norberto Bobbio has argued that it is impossible to determine an 'absolute foundation' of rights. What we have variously defined as 'natural', 'human' and 'fundamental' rights transform over history, are not analytically definable, are heterogeneous and antinomic: not only can the rights of specific subjects be set against those of other subjects, but some rights bestowed on the same subject may be in conflict with other rights. However, Bobbio asserted that with the approval of the *Universal Declaration of Human Rights* in 1948 the question of foundation is no longer relevant. There is now a general consensus, a *consensus omnium gentium*, regarding the *Universal Declaration* and therefore this system of principles can be considered generally recognised and therefore founded (Bobbio 1992, p. 13). In this direction, Bobbio places himself in the tradition of legal globalism and takes on board the Kantian-Kelsenian project of the development and assertion of international law.

The critique of the absolute foundation of rights can be considered one of the most invaluable elements of Bobbio's intellectual legacy. However, a characteristic limitation of his intellectual prowess alsocomes to light. For decades, Bobbio relentlessly highlighted the limits, contradictions and paradoxes of Western philosophical, legal and political thought, but he never dealt with the relationship between this tradition of thought and other cultural experiences. This becomes clear if one examines in what sense a *consensuns omnium gentium* has had upon the *Universal Declaration*. Not only has almost every state entered into the sphere of the United Nations, but the drawing up of documents, such as the *African Charter of Human and People's Rights* adopted by the OUA in 1981 or the various Islamic declarations, clearly demonstrates the expansive force of the language of rights that is 'spoken' among legal and cultural traditions which are extremely different to the Hellenic-Judaic-Christian-Enlightenment tradition. However, the way in which this language is received - the emphasis of social rights, the assertion of 'collective' rights, the protection of morality, the family and traditional values, the limits to religious freedom - has yielded a series of principles and values that are significantly different to those of the liberal tradition (Belvisi 2000; Zolo 1995). Think, on the other hand, about the paradigmatic case of the resistance to the spreading of the language of rights which is at the heart of the debate on *Asian Values* (Bauer, Bell 2000).

III.2. Pluralism is 'taken seriously' by Ottfried Höffe, who closely links the intercultural foundation of human rights to those of criminal law. According to Höffe, there are cultural-specific aspects both in the conception of human rights as defended by the West as in 'non-Western' conceptions. However, it is for this very reason that there needs to be an accurate analysis of the different elements and a distinction made between the universal and the particular in order to identify 'real human rights'. By doing so it is possible to single out, over and above thehistorical transformations and cultural connotations, a supratemporal and transcultural core of human rights. In fact, there exist inalienable conditions of agency for every human being, such as life and physical integrity, language and reason, a general social capacity and a more specific political and legal capacity.

On the basis of this common *conditio humana* the justification of human rights refers to what Höffe defines 'transcendental exchange': every man can cause violence and be a victim. It is for this very reason that there "exists a subjective claim to not become the victims of others' capacity to use violence; formulated positively, this means the right to life and physical integrity". Furthermore - and this is the crucial point - this interest can only be protected when it is respected by others who, in turn, have the same interest. Not only does an 'inalienable interest' exist, but this can only be accomplished when respected by others.

> In order to justify human rights as subjective rights it is therefore necessary to demonstrate the reciprocity that characterises the sheer fact of being a human being. It exists only where man is able to realise an inalienable right only in and through reciprocity. In this case, where interests are inalienable and at the same time linked to reciprocity, inalienability is transmitted to reciprocity; the corresponding exchange is at the same time inalienable. Human rights do not exist simply because human beings possess interests of the highest 'transcendental' order, for life and physical integrity, but only in the moment when interests can be realised only reciprocally, and in the 'system of reciprocity' everyone already demands a consideration, the renouncement of violence by others which takes place exclusively under the condition of reciprocal consideration, in other words the actual refusal of violence. An exchange accordingly takes place at a higher or rather 'transcendental' logical level. (Höffe 1998, pp. 55-56).

Moreover, criminal law, in some form or another, is present in almost all cultures and its principles have an intercultural validity. This holds true for the fundamental criteria of the procedure - as *in dubio pro reo*, *audiatur et altera pars*, *nemo sit judex in causa sui* - but also at the level of substantive criminal law: if indeed there are strong differences in the typology of crime, most of what is understood as a crime is universal. This indicates, according to Höffe, a relationship of implication between human rights and criminal law.

Indeed, argues Höffe, "asserting that one has the right to something - for example to life and physical integrity - means that the fulfilment of this right is due to everybody and in case of the opposite it is possible to obtain this fulfilment through force" (ibid., p. 60). From this perspective, the prohibitions, the infringement of which leads to a penal sanction, represent the opposite of legitimate needs, founded on human rights and hence universally valid. The fact that Höffe 'takes seriously' the problems of intercultural dialogue also comes to light in his argument that the philosophical idea of human rights does not coincide with a specific list. Here he recommends 'modesty' and 'caution': "other legal cultures have the same right as the West to recognise themselves in human rights, completing the processes of learning and transformation that are needed for this purpose, starting from themselves" (ibid., p. 79). This conception of the link between human rights and criminal law is conveyed in a retributivist theory of punishment,

which according to Höffe's argument is also able to take into account moments of prevention and social rehabilitation.

On the basis of this approach, Höffe argues that the encounter of different peoples does not lead to a situation in which it is possible to evoke the specificity of one's culture: from a criminal point of view 'foreigners' do not exist in a strong way. "International criminal law thus corroborates a fundamental rule of intercultural legal discourses: what we pursue with force can also be traced in other cultures; moreover, the things that outrage us provoke the same outrage in our fellow human beings elsewhere" (ibid., pp. 107-08). Along these lines, Höffe hopes for the formation of a transcultural penal code, which goes beyond the restricted number of criminal offences provided by the statute of the ICC, the timidity and limits of which he criticises (see ibid., pp. 110-11).

III.3. It is possible to question, both at a historical and anthropological level, the effective metatemporal and transcultural universality of the core of 'real' human rights which Höffe refers to as the solid foundation of its argument. Our species, during a certain phase of its evolution, clearly displays a number of common and typical characteristics. It is probable that these characteristics respondto the need to harness and protect certain resources, in particular through the elaboration of social norms. A convinced legal positivist such as Herbert Hart (Hart 1961), on the other hand, spoke in these terms about a 'minimal natural law'. However, depending on different historical experiences, different cultures and different moral codes in pluralistic and 'polytheist' societies, the interpretation of these resources and values changes radically and hence the meaning assigned to them alters notably. Moreover, the same definition of who belongs to the 'human', of who is *homo*, in other words *optimo jure*, has changed over history and is still subject to discussion and interpretation. Now, the point is that in multicultural societies (and not only, as Max Weber's reflection on the 'polytheism of values' has taught us) it is these different interpretations which are in conflict. Nobody disputes, for example, the fact that human life is of immense value; but there are radical divergences over the interpretation of the meaning of life and the relative 'weight' of different values: consider, for instance, the debate over the right of the embryo to life versus the mother's right to choice, or the dispute between the 'sacredness' of life and the 'quality' of life in the case of euthanasia.

Secondly, again in the presence of a pluralism of cultures and values, one needs to ask what is meant by 'human *rights*' rather than human 'principles' or 'values': in other words, what does the specific characteristic of subjective rights consist of with respect to other deontic concepts. If it is indeed possible to indicate a (relatively) metatemporal and transcultural core of values, it is only in very recent times that there has been a general agreement in expressing such values in terms of 'human rights'. This is all the more so in the case of intercultural confrontation. Think, for example, of how the notion of subjective rights, understood as the entitlement or power of individual humans, is difficult to accommodate in traditional Indian culture which is pervaded by the notion of *Dharma*, is distant from both individualism and anthropocentrism and which tends to connect the *humanum* with the network of relations that are common to all entities of the cosmos (Panikkar 1982). If it is not obvious that the transcultural and metatemporal core of values constitutes a set of subjective rights, as well as a series of entitlements and powers of individuals, then the connection established by Höffe between universal human rights and the justification of the claim that who violates them be punished becomes far more problematic. In fact, this relationship is based on giving to those values the status of subjective rights.

One can still question the relationship between norms and sanctions. Höffe clearly distinguishes the definition of the criminal offence/violation of a human right from the establishment of the punishment. Perhaps it is not necessary to agree with Kelsen's theory of the legal norm, whereby a norm is given to the extent

in which the sanction is defined for a particular conduct, in order to ask oneself: can an offence variously punished, be it with torture, the electric chair or a prison sentence, be considered *the same offence*? One need not be a committed follower of Michel Foucault to recognise that through the modification and the 'softening' of sentences the function, space and very meaning of criminal law radically changes (Foucault 1975).

Above all, one must question whether a retributivist view of punishment is the most appropriate in the case of cultural confrontation. Is regarding criminal justice as ultimately the allocation of the right punishment for acts considered in themselves (and therefore universally) unlawful, the best way to effectively prevent the violation of fundamental rights, to limit the suffering of individuals and to promote peace? Does the idea that the punishment of a *peccatum* not risk making tolerance more difficult to sustain and the process of reciprocal learning more problematic? Does this not mean tending toward a sort of *fiat justitia, pereat mundus* position which disregards the victims' point of view and general collective interests (Henan 2003)? Note that the procedures and forms of punishment differs radically in different cultures. In certain recent cases non judicial and also traditional forms of justice - very far from the typical criminal process - have been reintroduced and adapted to deal with genocide and crimes against humanity such as apartheid (Lollini 2003, 2004).

Perhaps Höffe's invitation to caution and foresight should be kept in mind when considering the potential and effectiveness of criminal law. Without going over a debate which saw, among others, abolitionists and supporters of a 'minimal criminal law' pitted against each other (Ferrajoli 1989), one can not help but recognise that also within individual national legal systems, the effectiveness of criminal law is anything but absolute. While purely repressive politics, such as those inspired by the principle of 'zero tolerance', may enjoy widespread approval, criminal law alone does not appear enough to maintain order and guarantee the security of citizens. Integration and social cohesion require interventions at a range of levels, from social services to education to employment policies. The criminal apparatus and its penitentiary sub-apparatus produce conspicuous levels of stigmatisation and while they may reinforce social cohesion, they do so at the expense of the exclusion of 'deviants' (Parsons 1951). One needs to ask therefore whether this is true *a fortiori* in the presence of intercultural confrontation and above all on a world scale. In particular, the Kelsenian theorem of peace through law and its judicial corollary seem to overestimate the possibilities of law, and especially criminal law, compared with other instruments for the preservation of peace. The same can be said for the project of 'human rights through law'.

IV.

My argument is that in order to tackle these problems it is useful to question the specific character of rights as subjective rights and to place greater importance on the cultural particularities and the difference between different normative systems. Bobbio, himself, argued that

> Human rights however fundamental are historical rights and therefore arise from specific conditions characterized by the embattled defence of new freedoms against old powers. They are established gradually, not all at the same time, and not for ever. It would appear that philosophers are asked to pass sentence on the fundamental nature of human rights, and even to demonstrate that they are absolute, inevitable and incontrovertible, but the question should not be posed in these terms. Religious freedom resulted from the religious wars, civil liberties from the parliamentarian struggles against absolutism, and the political and social freedoms from the birth, growth and

> experience of movements representing workers, landless peasant and smallholders. The poor demand from the authorities not only recognition of personal freedom and negative freedoms, but also protection against unemployment, basic education to overcome illiteracy, and gradually further forms of welfare for sickness and old age [...] (Bobbio 1992, p. xi)

One could add that it is not only rights that originate from conflictual processes: in order to identify the specific characteristics of the deontic figure of the subjective right it is also worth referring to the processes and instances in which claims for rights are made. According to Joel Feinberg what characterises subjective rights is "the activity of *claiming*". The "characteristic use" of rights, "and that for which they are distinctively well suited, is to be claimed, demanded, affirmed, insisted upon" (Feinberg 1970, p.151):

> Having rights, of course, makes claiming possible; but this is claiming that gives rights their special moral significance. This feature of rights is connected in a way with the customary rhetoric about what is to be a human being. Having rights enables us to "stand up like men", to look others in the eye, and to feel in some fundamental way the equal of anyone [...] and what is called "human dignity" may simply be the recognizable capacity to assert claims (ibid., p. 151).

Within this perspective it is possible to place the 'republican' conception of rights proposed by Frank Michelman. Rights are seen as "a relationship and a social practice" (Michelman 1986b., p. 91). They emerge from and are founded in a process of elaboration and transformation of legal principles: the process which Michelman calls *political jusgenesis* (Michelman 1988, pp. 1404-05). This process of *political jurisgenesis* includes the participation of the institutionalised deliberative bodies, jurisdiction (*in primis* constitutional jurisdiction) and all arenas of political debate open to citizens who conduct a "potentially transformative dialogue" (5).

This conception of rights can still be adopted in a pluralistic approach to law. The tradition of antiformalist and institutionalist theories of law insisted on the need to recognise the 'juridical' feature of non-state systems and the existence of a plurality of legal systems. Even if more restrictive criteria are used to characterise a system as 'juridical', one can not help but notice that there exist different systems and different sets of norms - more or less recognised by one legal system or another - which regulate the life of individual people. This approach reveals a significant heuristic validity in the era of globalisation. In multicultural societies individuals are strongly invested with normative pluralism. They belong to different groups and are affected by different rules and normative systems, deriving from a plurality of legal and other sources. These rules may be in conflict with each other, to the extent that they unload on the individual the burden of choice and/or reconciliation. All this is of particular significance in the case of individual migrants and migrant communities who not only have to deal with the legal system of their country of origin but also with the country of immigration, as well as the religious rules and the traditional normative codes in force in their original communities, which in turn are often reformulated and integrated with those of the societies of immigration (Facchi 2001, pp. 43-44). All this excludes a clearly defined hierarchy; in particular some prescriptions and rules are perceived as more restrictive than the legal regulations in force, including criminal rules. It is evident that, *mutatis mutandis*, analogous considerations can be made regarding the global situation.

All of this directly regards criminal law. The criminal courts of European countries have shown a tendency not to ignore normative pluralism. That a specific act, deemed a criminal offence in the country of immigration (and in certain cases also in the country of origin) is vice versa considered permissible, or more often

obligatory, in the value-system of the individual, has often been considered an extenuating circumstance. Using the categories of criminal law, the will to provoke a specific event is not associated with the consciousness or the will to cause damage, but rather to the certainty of carrying out a duty. In certain cases, social constraint towards certain practices has led to 'the state of necessity' (Facchi 2001, pp. 66-70).

An approach to human rights which is both pluralist and 'conflictual' should therefore make a number considerations.

a. The contextual origin of the language of rights needs to be recognised in two ways: firstly, the recognition that certain values and principles - or, if it is preferred, that the interpretation of certain values and principles - are not universal and are not easily rendered universal; and secondly the recognition that the subjective form of rights has its origins in history and a distinct cultural connotation. This does not mean relativism, if relativism is to be understood as the acceptance of any moral culture; rather I believe it is worth recommending what Richard Rorty defined as a 'frankly ethnocentric' approach (Rorty 1993, 1996): we must assign high value to certain principles and strive to assert them, but in the knowledge that such principles are not founded in an absolute way, that there is not a universal consensus about them (or about their interpretation) and that the language in which they are expressed needs to be translated.
b. If rights are conceived in these terms, a series of 'paternalistic' forms of presumed protection are excluded. 'Humanitarian' military interventions not only violate the human rights of the subjects that they wish to protect as well as being legally uncontrollable (Zolo 2000, pp.111-17), but if human rights are the result of historical processes set in motion by subjects who claim 'new freedoms against old powers', then this means that they can not be imposed *manu militari*, that their universalisation requires a patient operation of confrontation, mediation and translation, and can not be imposed through violence.
c. The project to protect rights through law must reckon with the changes that have occurred in contemporary legal systems: if the hierarchical and statist model of the legal system is by now inadequate for individual national systems, the same is true *a fortiori* at a supranational level. However, while it may not be possible to talk of a 'global civil society', it is also at a transnational level that the flow of themes, questions, values and principles are produced, political and social issues are defined and forms of mobilisation are organised. Taking into account the necessary differences, a reconstruction of the *jurisgenesis* proposed by Michelman could also be deployed at this level. At this transnational level it would be possible to identify a sort of 'triangulation' between the action of movements, jurisdiction (both in its national and supranational forms), the political action between states, regional organisations and supranational institutions. A triangulation of this type does not lead to a monistic model of the international order but to the idea of an articulate plurality of social, political and legal subjects. It is a case of guaranteeing the multiplicity of subjects in question, of promoting the plurality of cultures, values, requests and claims so as to establish controls and counterbalances.
d. Within this perspective it possible to consider the supranational dimension of criminal jurisdiction. In the global legal space, the domain of jurisprudential law can be nothing other than broad, and this particularly holds true for human rights and their protection. Nevertheless, there is a clear difference if judges are de facto the mere executors of the will of imperial powers or whether they act as interlocutors with individuals and groups striving to claim rights. International courts, in short, have a key role in certifying, defining and protecting rights. But it is unthinkable that they are a substitute

for political and diplomatic action or even for social processes. For this reason, the institution of an ICC is positive *as far as* its role as a clearly defined and partial instrument is recognised. In other words, the ICC can not be thought of in the terms in which Kelsen conceived the Permanent Court of International Justice as the head of a global confederal organisation. The autonomy of the ICC constitutes its principal value in comparison with its objectives such as the search for wider domain of enforcement of laws, the extension of the range of criminal offences within its jurisdiction and the need to set up an investigative and efficient repressive apparatus.

e. However, the problem of the relationship between human rights, criminal law and normative pluralism is raised also with regard to individual national legal systems. In this case as well, the recognition of the 'particularism' of human rights, of the existence of a plurality of rules and normative systems that permeate individuals and communities and of the limits of criminal law must inform penal politics. This is by no means a way of delegitimizing fundamental rights or of considering them principles that can be derogated. Recognising that certain principles are prone to different interpretations does not mean not considering it a inalienable duty to claim and defend them. On certain fundamental principles it is justifiable to declare "here we do it like this" (Taylor 1994). However, normative pluralism requires wisdom, foresight and astuteness in identifying aggravating and extenuating circumstances as well as justifications, in introducing categories of criminal offences, in questioning whether the criminal law approach is the most adequate to obtain certain results. It also induces us to assume the point of view of the offended individual, the victim of violence, torture, marginalization and cultural conditioning.

An exemplary case in order to verify the fruitfulness of these approaches is the issue of the mutilation of female genitalia. This is a clear, extremely serious violation of fundamental human rights to physical integrity and health. It is a violation which involves minors: it denies them all freedom of choice; jeopardises the possibility of an affective as well as a free and gratifying sexual life and perpetuates an age-old oppression of the minds and bodies of women. Within a universalistic and retributivist perspective this violation would immediately lead to a serious penal sanction against whoever carried out the mutilation, against the family and perhaps the community itself for the sorts of pressure it exerts. Within the perspective of imperial humanitarianism, perhaps it would even justify a military intervention.

However, in African and Asian communities where such mutilations are widespread, such practices are perceived as an obligation; not as the violation of the child's body, but on the contrary as a rite of passage that is necessary for her to become a responsible adult as well as a true 'woman'. There is no doubt that these cultures attribute great value to life and health, but the interpretation that they give to such values does not presuppose the prohibition of these practices, on the contrary it favours them. The pressure of traditional normative codes, in most cases, continues to be exerted on immigrant communities in Europe and North America. In this situation, even the most undisputable and completely founded (both at a legal and moral level) criminal conviction is not enough (Facchi 2001, pp. 78-110).

In traditional communities the attempts, already implemented by colonial powers and later by independent governments, to prohibit mutilations through penal repression have proved unsuccessful. It would therefore be unrealistic to adopt supranational criminal law (not to speak of military action even in the case of repeated, systematic and serious violations of human rights). There seems to be no alternative to the pressure of international public opinion that is able to avoid forms of cultural imperialism, that assumes the viewpoint of the victim and that supports indigenous, and in particular women's, movements for the abandonment of these practices (replaced in certain cases by harmless rituals).

In countries of immigration, the politics of solely penal repression, as well as proving powerless (immigrants frequently resort to trips to their countries of origin to carry out mutilations), risks causing damage for the victim, as in the case of a prison sentence for the parents. Indeed, in many cases judges have taken into account the existence of a *de facto* normative pluralism, granting the parents extenuating circumstances and avoiding the removal of the care of the child which would have lead to devastating consequences. Many studies indicate the important role of education and training and above all the steps taken to guarantee the integration of a community into an immigrant society and satisfactory conditions of employment, income and education for women and children. At this moment in time opposite strategies are being propounded: on the one hand there are strategies which combine intercultural activity and public awareness with 'damage reduction' policies and on the other, there are those which forward harsher sentences. The question is which are the more far-sighted.

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Notes

. *Human Rights and Criminal Justice*, Saarbrücken, March 27-29, 2004.

1. A paradigmatic example of this attitude is the well-known document *What We Are Fighting For*, signed in the aftermath of September 11th by a group of important U.S. intellectuals, including the likes of Francis Fukujama, Samuel Huntington and Michael Walzer. In this document the idea that "All human beings are born free and equal in dignity and rights" is presented as one of "five fundamental truths that pertain to all people without distinction". Meanwhile "the conviction that universal moral truths (what our nation's founders called 'laws of

Nature and of Nature's God') exist and are accessible to all people" is presented as one of those *American values* which constitute "the shared inheritance of humankind" (Aird *et al.*, 2002).

2. It is worth noting that at the heart of the document *What We Are Fighting For* is a criticism of 'realism' and metaethical noncognitivism and the reassertion of the theory of 'just war': "To seek to apply objective moral reasoning to war is to defend the possibility of civil society and a world community based on justice". The historical moment in which Al Qaeda threatens "a foundational principle of the modern world, religious tolerance, as well as those fundamental human rights, in particular freedom of conscience and religion, that are enshrined in the United Nation Universal Declaration of Human Rights" is one of those moments "when waging war is not only morally permitted, but morally necessary" (Aird *et al.*, 2002).

3. "We will take the actions necessary to ensure that our efforts to meet our global security commitments and protect Americans are not impaired by the potential for investigations, inquiry, or prosecution by the International Criminal Court (ICC), whose jurisdiction does not extend to Americans and which we do not accept. We will work together with other nations to avoid complications in our military operations and cooperation, through such mechanisms as multilateral and bilateral agreements that will protect U.S. nationals from the ICC. We will implement fully the American Servicemembers Protection Act, whose provisions are intended to ensure and enhance the protection of U.S. personnel and officials" (The White House 2002).

4. John Rawls also arrived at similar positions in the development of his reflections on the *law of peoples*. According to Rawls as well it is possible to identify a set of 'human rights' - a more restricted group in comparison to the rights guaranteed to citizens of liberal democracies which can not be considered human rights. Respecting human rights is a necessary condition for a society and its legal system to be considered decent, and a sufficient condition to exclude economic sanctions or military interventions by other nations. A state which violates human rights therefore places itself, *per definitionem*, beyond the law of peoples, in the domain of 'outlaw states'. However, by virtue of the universality of human rights, it is obliged to respect them. The result, according to Rawls, is that liberal peoples and decent peoples are obliged *not* to tolerate outlaw states and wars against outlaw states aimed at protecting human rights are therefore just wars. This can count also in the case where outlaw states are not especially agressive or dangerous: "If the offences against human rights are egregious and the society does not respond to the imposition of sanctions, such intervention in the defence of human rights would be acceptable and would be called for" (Rawls 1999, p. 94 n). For Rawls, therefore, the theory of the law of peoples with regard to 'outlaw states' *associates itself* with the theory of just war. Liberal peoples have a duty in this respect. Despite references to the principle of selfdefence - the genuine principle of *ius contra bellum* that is pronounced in the United Nations Charter - Rawls here makes a more or less conscious step towards the theory of pre-emptive war. It is also significant that Rawls does not even mention the instrument of international, and in particular penal, jurisdiction.

It could be argued that *nihil sub sole novi*. The first author to theorise explicitly the universal character of subjective rights, possessed by all men and women as a result of *jus gentium*, which coincides to, or derives from, natural law, Francisco de Vitoria, immediately connected this theorisation with the justification of wars that impose the respect of these rights. In *Relectio de Indis* where the enjoyment of rights is obstructed, a war to impose them is a just war (and so the conquest of the Indies is justified). The war that protects the human rights of the Indios (violated through practices such as cannibalism and human sacrifices) is equally just, even if such a war should cause innocent victims (Vitoria 1539).

5. A particularly instructive case regarding this issue is the history of the American movement for civil rights. In the early days of the movement Afro-Americans constituted a marginal section of society which was transforming its self-perception. With the development of their movement - which also saw conflicts within the same community - Afro-Americans opposed their 'partial citizenship' but proclaimed and exerted it at the same time. Judicial power, in this process "drew on interpretive possibilities that the challengers' own activity was helping to create" (ibid., p. 1530).