

# RESPONSES TO THE EXPERIENCE OF INJUSTICE: SELECTED EXAMPLES

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## ANTI-DISCRIMINATION AND HUMAN RIGHTS

Human rights refer to the basic rights to which all humans are entitled. Human rights are thus described as “universal.” In contrast to rights that are linked to specific roles or functions in society – such as landlord or tenant, membership in associations and occupational groups, or citizenship – human rights are granted simply by virtue of one’s humanity. They cannot be acquired or given away, and they cannot be enhanced or diminished by individual accomplishments or mistakes. Even today, human rights are still sometimes called “inborn,” drawing upon a metaphor which originated in the 18<sup>th</sup> century. The very first sentence of Article 1 of the 1948 Universal Declaration of Human Rights states: “All human beings are born free and equal in dignity and rights.”<sup>1</sup>

Since human rights are granted simply by virtue of one’s humanity, they must apply equally to all people. This egalitarianism is inextricably linked to the universal nature of human rights. The opening to the preamble of the Universal Declaration of Human Rights, the founding document of international human rights, acknowledges this link. It emphasizes both the “inherent dignity” and the “equal and inalienable rights of all members of the human family.” With only occasional and minor variations, almost all United Nations human rights conventions have adopted this concept of human dignity and the universal equality of human rights. As the preamble to the Universal Declaration suggests, human dignity is the basis for human rights. Respect for human dignity is quintessential to many spheres of ethics and law. Indeed, many of the moral and legal obligations between persons would not exist without this respect.<sup>2</sup> Above all, human dignity bolsters human rights because human rights explicitly acknowledge the dignity of all individuals and provide institutional

<sup>1</sup> UN General Assembly, *Universal Declaration of Human Rights*, accessed on Nov. 23, 2009 from <http://www.un.org/en/documents/udhr/>. All further references to the Universal Declaration of Human Rights are from this document.

<sup>2</sup> Heiner Bielefeldt, *Menschenwürde: Der Grund der Menschenrechte* (Berlin, 2008).

protections.

The egalitarian orientation of human rights is also based on the concept of human dignity, which construes all individuals as equally worthy of respect. The axiomatic and normative quality of the concept precludes basing respect for human dignity on criteria like individual accomplishment, social usefulness, or personal qualities like intelligence or charm. By definition, human dignity requires equal dignity for all persons. In human rights discourse, the term “dignity” is used only in the singular, which contrasts to the premodern usage, in which the term “dignity” mainly referred to inherited or acquired status, and thus was often used in the plural (in the sense of *dignitates*, meaning positions, high offices, or honors).<sup>3</sup> Dignity now refers to the fundamental and equal respect to which every individual is entitled. It provides the very fabric for human relationships and receives institutional and legal support from human rights. The human rights that individuals receive simply because of their inherent dignity are also inherently egalitarian; human rights are equal rights by definition. All comprehensive human rights documents include an anti-discrimination provision, often in one of their first articles. These documents include the Universal Declaration of Human Rights and other UN covenants and agreements on human rights, the 1950 European Human Rights Convention, the European Union Charter of Fundamental Rights (which has not yet officially taken effect), and the basic rights section of the German Basic Law.<sup>4</sup> Several of the UN conventions even include anti-discrimination in their title, such as the 1965 International Convention on the Elimination of All Forms of Racial Discrimination and the 1979 Convention on the Elimination of All Forms of Discrimination against Women.<sup>5</sup>

The principle of non-discrimination is therefore no ordinary human rights norm: it is one of the fundamental principles underlying human rights. In other words, all concrete human rights – for example, freedom of religion, the right to an education, the right to a fair criminal justice system, and the right to marriage and family – must be guaranteed according to the principle of non-discrimination. Otherwise these rights would not be human rights, but privileges.

## Equality as Equal Freedom

The egalitarianism of human rights has periodically spurred anxiety and objections. In his 1790 *Reflections on the Revolution in France*, Edmund Burke condemned the leveling tendencies of the revolution, claiming they could only culminate in violence and loss of freedom.<sup>6</sup> Conservative critiques of human rights from Hegel to Schopenhauer to Nietzsche later echoed Burke’s assessment, as have contemporary theorists arguing from a culturally pluralist perspective. These critiques depict equality as social uniformity and as the denial of individual particularity, including individual preferences, abilities, and life goals. Unsurprisingly, this critique presents equality as the enemy of personal freedom. The alleged opposition between freedom and protection against discrimination also fueled the heated debate on implementing the EU anti-discrimination guidelines in Germany.<sup>7</sup>

3 See the essay titled “Würde,” in *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, vol. 7, eds. Otto Brunner, Werner Conze and Reinhart Koselleck (Stuttgart, 1978): 637-677.

4 Art. 2, Universal Declaration of Human Rights; Art. 2 of the International Covenant on Civil and Political Rights and Art. 2 of the International Covenant on Economic, Social and Cultural Rights, both from 1966; Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The 12th protocol to the European Convention applies the grounds of prohibited discrimination under Art. 14 to the exercise of any legal right and to the actions of public authorities. Germany has not yet signed this protocol. See also Art. 21, European Union Charter of Fundamental Rights; Art. 3, German Basic Law.

5 On the 1979 convention on women, see Beate Schöpp-Schilling, ed., *The Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (New York, 2007).

6 Edmund Burke, *Reflections on the Revolution in France* (Oxford, 2009); originally published in 1790.

7 Heiner Bielefeldt and Petra Follmar, *Diskriminierungsschutz in der politischen Diskussion: Policy Paper of the Deutschen Instituts für Menschenrechte*, Berlin 2005, accessed Nov. 23, 2009 from [http://www2.institut-fuer-menschenrechte.de/webcom/show\\_shop.php/\\_c-488/\\_lkm-618/\\_cat-2/\\_nr-34/i.html](http://www2.institut-fuer-menschenrechte.de/webcom/show_shop.php/_c-488/_lkm-618/_cat-2/_nr-34/i.html).

The principle of equality in human rights therefore only makes sense in conjunction with a *right to freedom*. This right is also derived from the concept of human dignity. The inherent dignity of human beings requires that we treat no individual as the means to an end, but as ends in themselves. Human rights recognize this requirement on an institutional and legal level by defining basic rights to self-determination.<sup>8</sup> This principle of freedom and the principle of equality are both crucial to human rights; all human rights are simultaneously rights to equality *and* freedom. This freedom transcends the liberal concept of civil and political rights, although the names of these rights often signal the centrality of freedom (freedom of conscience, freedom of religion, freedom of expression, freedom of assembly, freedom of association, etc.). Freedom also applies to economic and social rights, which include the right to a livelihood and basic health care, and other fundamental freedoms from fear and want.<sup>9</sup>

In the context of human rights, freedom and equality are two sides of the same coin. A right to freedom that does not apply equally to all is a legal privilege rather than a universal human right. A right to equality that is not based on the principle of freedom is not truly a “right.” Equality as defined by human rights thus does not entail enforced leveling and uniformity or – in Nietzsche’s words – the “degeneration and diminution of man to a perfect herd animal” and the “bestialization of man into a dwarf animal of equal rights and claims.”<sup>10</sup> The principle of equality actually strives for the opposite: all humans should have the freedom and opportunity to pursue their own unique life goals.<sup>11</sup> In this sense, human rights encourage the proliferation of diversity and demonstrate an inner affinity to social pluralization processes. The key factor is that the opportunity to pursue one’s “unique” life goals is not the privilege of the few, but a universal opportunity available to all.

## Anti-Discrimination “By Example”

The prohibition against discrimination is the concrete expression of the principle of equality in human rights. Thus Article 2, Paragraph 1 of the Universal Declaration of Human Rights states: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” This list is not comprehensive, but defines discrimination by example. As the wording implies, the prohibition against discrimination is explicitly open to the potential changes of increases in social awareness.

The (deliberately open-ended) list of characteristics that are protected against discrimination reflects the history of social protest movements, whose struggle for equality also contributed to the elaboration of the universalism of human rights. This universalism is necessary because the universal claims of human rights have always fallen and continue to fall short, in political and social reality, as well as in historical formulations of human rights norms and conventions. For example, in the late 18<sup>th</sup> century, the abstract subject of the first human rights declarations was for the most part unquestioningly imagined as male. Beyond his gender-specific attributes, this male subject was endowed with particularistic qualities such as education, class and race. Even today, the right to marriage and family is limited in many places to heterosexual couples, to the detriment of other forms of partnership. The history of human rights has always been characterized by the fundamental contradiction between particularism and universality. Again and again, social movements have mobilized

8 See also Kant’s categorical imperative: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.” See Immanuel Kant, *Grundlegung zur Metaphysik der Sitten* (Berlin, 1900): 429.

9 Michael Krennerich, “Soziale Rechte sind Freiheitsrechte! Plädoyer für ein einheitliches Verständnis wirtschaftlicher, sozialer und kultureller Rechte,” in *Jahrbuch Menschenrechte 2007* (Frankfurt a.M., 2006): 57–66.

10 Friedrich Nietzsche, *Jenseits von Gut und Böse*, (Stuttgart, 1976): 117.

11 Susanne Baer, “Geschlecht und Recht – zur rechtspolitischen Steuerung der Geschlechterverhältnisse,” in *Gender Mainstreaming: Konzepte, Handlungsfelder, Instrumente*, eds. Michael Meuser and Claudia Neusüß (Bonn, 2004): 71–83.

around these contradictions, extending the theoretical elaboration and material development of the universal claim of human rights. In what follows, I will provide a few contemporary and historical examples.

The titles of some of the most important human rights declarations demonstrate that the subject of 18<sup>th</sup> century democratic revolutions was generally understood to be male. Thomas Paine's *Rights of Man* and the French *Déclaration des droits de l'Homme* are emblematic in this respect. Olympe de Gouges was probably the first author to point out the linguistic ambiguity of the French declaration. Only two years after the 1789 *Déclaration des droits de l'Homme*, de Gouges published the *Declaration of the Rights of Woman and Female Citizen*, which states in its first article that "Woman is born free and lives equal to man in her rights."<sup>12</sup> Although it echoed the title and wording of the famed 1789 declaration, this first statement of the human rights of women was no mere addendum to the "male version." De Gouges' treatise did not advocate special rights for women, but equal rights between the sexes: "The purpose of any political association is the conservation of the natural and imprescriptible rights of woman and man."<sup>13</sup> These natural rights and the natural union of man and woman were in turn the foundation of sovereignty and the state: "The law must be the expression of the general will; all female and male citizens must contribute either personally or through their representatives to its formation; it must be the same for all: male and female citizens, being equal in the eyes of the law, must be equally admitted to all honors, positions, and public employment according to their capacity and without other distinctions besides those of their virtues and talents."<sup>14</sup> In arguing against the deliberate or unconscious equation of humanity with "man," Olympe de Gouges made an argument in favor of universalism over particularism. Her declaration of human rights for women implicitly criticized the false universalism of late 18<sup>th</sup> century notions of human rights and marked a watershed moment toward truly universal and equal rights.

Social commentators in the late 18<sup>th</sup> century also pointed out another blatant contradiction in the universal claims of human rights. Several of the Founding Fathers of the United States were also slaveholders, including Thomas Jefferson, who wrote the Declaration of Independence, one of the foundational human rights documents of the new nation.<sup>15</sup> Both slavery and racism, which established a hierarchy of value on the basis of skin color and origin, directly contradict the principles of the Declaration of Independence, which stated "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights." Only a few years after the Declaration of Independence, black slaves began to sue the courts for their freedom in a number of US states, sometimes with success. In 1783, a state supreme court ruling abolished slavery in Massachusetts.<sup>16</sup> Known as the Quock Walker trial, this case marked the beginning of the long struggle for emancipation in the United States. Moreover, the trial reflects the fundamental insight that the universalist claims in the Declaration and other human rights documents were only credible if accompanied by a willingness to challenge and overcome racial inequality and exclusion.

One recent example of the expansion of anti-discrimination protection is the Convention on the Rights of Persons with Disabilities, which the United Nations General Assembly adopted in December 2006.<sup>17</sup> The 1948 UN declaration on anti-discrimination did not include this category of discrimination. At the time, there was

12 Olympe de Gouges, "The Declaration of the Rights of Woman," reprinted in *The Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Times to the Present*, 2nd ed. (New York, 2007): 177. De Gouges's manifesto went unnoticed by the National Assembly.

13 *Ibid.*, 177: Article 2.

14 *Ibid.*, 177: Article 6.

15 Charles L. Griswold Jr., "Rights and Wrongs: Jefferson, Slavery, and Philosophical Quandaries," in *A Culture of Rights: The Bill of Rights in Philosophies, Politics and Law – 1791 and 1991*, eds. Michael J. Lacey and Knud Haakenssen (Cambridge, 1991): 144-214, see especially 190ff.

16 Gerald Stourzh, "Die Begründung der Menschenrechte im englischen und amerikanischen Verfassungsdenken des 17. und 18. Jahrhunderts" in *Menschenrechte und Menschenwürde: Historische Voraussetzungen – säkulare Gestalt – christliches Verständnis*, eds. Ernst-Wolfgang Böckenförde and Robert Spaemann (Stuttgart, 1987): 78-90, see especially 87.

17 Theresia Degener, "Menschenrechtsschutz für behinderte Menschen," in *Vereinte Nationen* 3 (2006): 104-110.

little sensitivity that the widespread practice of segregating persons with disabilities as “invisible minorities” constituted a form of discrimination. In the decades that followed, organizations for disabled persons succeeded in raising awareness of disability issues and overcoming the barriers (including physical, organizational, and psychological barriers) to full inclusion and self-determination for disabled persons. At the same time, anti-discrimination for people with disabilities has become a centerpiece of human rights in general, and the Convention on the Rights of Persons with Disabilities reflects the call to overcome barriers to full inclusion and self-determination. As a result, anti-discrimination under the UN guidelines now also includes comprehensive accessibility for persons with disabilities.<sup>18</sup>

Unlike persons with disabilities, sexual minorities do not yet have an international convention for their equal treatment. This absence stems largely from the ongoing and widespread homophobia of many societies, and even today some states sponsor the persecution of sexual minorities. A universal and worldwide acceptance of the principle of non-discrimination on the basis of sexual orientation and gender identity, similar to the one in the EU Charter of Fundamental Rights, appears unlikely at present. Nevertheless, a group of international human rights experts, including some with high-ranking positions in the UN human rights organizations, have systematically analyzed international human rights law in relation to sexual orientation and gender identity. The so-called Yogyakarta Principles, named after the place they came into being, are not legally binding.<sup>19</sup> However, they do have a legal relevance because they summarize the recent changes in the interpretation of the human rights convention by the relevant UN treaty committees. Since the mid-1990s, the UN treaty committees have been moving toward incorporating the criteria of sexual orientation and gender identity in the anti-discrimination provisions.

The EU Charter on Fundamental Rights represents yet another example of the expansion of the definition of anti-discrimination. Although the EU Charter has not yet come into force (and is not binding on the international level), it is nonetheless instructive to compare its anti-discrimination provisions with those of the 1948 Universal Declaration of Human Rights. For example, Article 21, Paragraph 1 of the EU Charter states: “Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”<sup>20</sup> However, even this expanded list of protections, which is substantially more inclusive than the 1948 protections, remains unfinished, as the words “such as” imply. The principle of equality within human rights is not exhausted by the list of protected categories, but takes it one step ahead. As such, it remains the driving force for potential expansions. It is likely that new threats to equality, such as technological developments in the field of genetics, as well as continued increases in social awareness, will lead to new changes and expansions in our understanding of discrimination.

## Direct, Indirect and Structural Discrimination

Our expanded understanding of discrimination is evident not only in the additional personal characteristics protected under anti-discrimination legislation. In the past decades, there has also been a growing awareness of the types of indirect and structural forms of discrimination that often accompany direct and intentional discrimination. Although these latter forms of discrimination may be less apparent at first glance, they can have equally far-reaching effects on their victims. However, human rights enforcement also means that states

<sup>18</sup> Art. 3 f, UN Convention on the Rights of Persons with Disabilities.

<sup>19</sup> On the Yogyakarta Principles, see Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles,” in *Human Rights Law Review* 8:2 (2008): 207-248.

<sup>20</sup> EU Charter on Fundamental Rights, [http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf), accessed on Nov. 23, 2009.

are expected to actively oppose all forms of discrimination. A simply formal, legal equality is not enough. Rather, the state has to ensure that every individual can fully take advantage of these rights.

Indirect discrimination includes forms of inequality that are perpetuated or maintained despite the existence of formal equality. For example, labor market reforms like professional development and training programs can have unintended consequences. Such programs can lead to de facto systematic discrimination by under-representing women and other groups, even when laws are formally egalitarian. Indirect discrimination can be intentional or unintentional, and it can take place knowingly or unwittingly. The decisive factor is factual discrimination against specific categories of individuals. Given the importance of anti-discrimination to human rights, indirect discrimination is equally unacceptable.

Although the term indirect discrimination takes on meaning only in relation to direct discrimination, the concept of structural discrimination occupies a conceptually distinct level. Structural discrimination relates to forms of discrimination that are not carried out (at least directly) by an individual or group of “perpetrators.” Instead, structural discrimination arises from existing social structures. The exclusion of persons with disabilities from public life was not only the result of deliberate discrimination and segregation, but stemmed in large part from the lack of accessibility to public buildings and public transportation.<sup>21</sup> As another example, in the last decades, multiple empirical studies have demonstrated that selection mechanisms in Germany limit the access of children and youth from immigrant and minority families to educational opportunities, which is also a major form of structural discrimination. Yet a third example is the under-representation of women in the higher echelons of academia, and the concurrent over-representation of women in elementary education.<sup>22</sup>

Indirect and structural forms of discrimination are not always obvious at first glance, and may be extremely difficult to verify. However, statistical data can help prove that specific groups are disadvantaged. The UN committees which monitor the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women have long advised states – including Germany – to publish meaningful empirical data in order to promote social awareness and actual equality for all persons.<sup>23</sup>

Effective equality policies may also require the adoption of temporary special measures, which are designed to combat existing structures of discrimination. These measures may appear to entail (or are commonly misunderstood to entail) special privileges. However, they are intended to undo existing structures of privilege and thus pave the way for true equality. Both the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women have expressly allowed for such measures.<sup>24</sup>

21 Sigrid Arnade, “Zwischen Anerkennung und Abwertung; Behinderte Frauen und Männer im bioethischen Zeitalter,” in *Aus Politik und Zeitgeschichte* 8 (2003): 3-6.

22 Mona Motakef, *Das Menschenrechte auf Bildung und der Schutz vor Diskriminierung: Exklusionsrisiken und Integrationschancen* (Berlin, 2006) accessed on Nov. 23, 2009 from [http://files.institut-fuer-menschenrechte.de/488/d50\\_v1\\_file\\_4472c3f75f94b\\_IUS-010\\_S\\_RAB\\_RZAnsicht\\_ES.pdf](http://files.institut-fuer-menschenrechte.de/488/d50_v1_file_4472c3f75f94b_IUS-010_S_RAB_RZAnsicht_ES.pdf).

23 See the recommendations for Germany by the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) of Feb. 6, 2009; <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/236/50/PDF/N0923650.pdf?OpenElement>, accessed Nov. 23, 2009.

24 See Art. 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and Art. 4 of the Convention on the Elimination of All Forms of Discrimination against Women. The UN Committee on the Elimination of All Forms of Discrimination against Women states that the convention “targets discriminatory dimensions of past and current societal and cultural contexts which impede women’s enjoyment of their human rights and fundamental freedoms. It aims at the elimination of all forms of discrimination against women, including the elimination of the causes and consequences of their de facto or substantive inequality. Therefore, the application of temporary special measures in accordance with the Convention is one of the means to realize de facto or substantive equality for women, rather than an exception to the norms of non-discrimination and equality.” See Article 14 of the UN Committee on the Elimination of All Forms of Discrimination against Women General Recommendation No. 25 (2004), accessed on Oct. 1, 2009 from <http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20%28English%29.pdf>.

## An Ongoing Project

Discrimination is still a problem in contemporary Germany – a free and democratic society with a highly developed legal system and a sophisticated human infrastructure. People from immigrant communities still experience hurdles in the housing and labor market; even those with equivalent educational attainment have greater difficulty obtaining an apprenticeship or trainee position compared to young people with more traditionally “German-sounding” names. Even today, men and women do not receive equal pay for equal work; in fact, the wage discrepancy is substantial and has remained largely unchanged over the past several decades, despite numerous corrective policies and measures. Persons with disabilities who wish to marry and establish families often confront a lack of understanding and many practical obstacles; this applies in particular to people with developmental disabilities. Moreover, Germany lags far behind other European nations in the integration of children with disabilities into regular schools. The educational system also relegates a disproportionate number of children from immigrant backgrounds to schools for children with learning disabilities. In turn, these children suffer serious and permanent disadvantages through their segregation from the mainstream at such a young age. Despite some progress, lesbian women and gay men are still stigmatized. Muslims and other religious minorities often face significant obstacles to participation in established state and religious structures, such as religious instruction in schools. Furthermore, there has been little systematic investigation of age discrimination in Germany, and the topic is still largely unknown to the general public. Even less discussed is the complex issue of discrimination on the basis of genetic features, such as the insurance industry’s discrimination against persons with certain genetic predispositions for disease. This list of unsolved questions and problems is by no means exhaustive.

For reasons of space, I cannot describe the many different legislative, administrative, social work, and educational measures needed to enact effective anti-discrimination policies in detail here. Instead, I will close by indicating an irresolvable tension that all anti-discrimination policies face: the challenge of paying equal attention to all forms of discrimination, while paying special attention to each.

On the one hand, all forms of discrimination deserve equal attention. Any attempt to establish a hierarchy of discrimination – for example, by arguing that racial discrimination is more serious than discrimination against persons with disabilities (or the reverse) – would be contrary to the universalist principle of human rights.<sup>25</sup> The term “horizontal approach” is now being used to describe the practice of combating all potential reasons for discrimination under a single anti-discrimination provision. The horizontal approach makes it possible to address in systematic fashion multiple forms of discrimination, such as the dual discrimination of women with disabilities or the status of homosexuals from migrant communities.

On the other hand, we must also continue to pay special attention to the unique character of each form of discrimination. For example, it would be a mistake to conclude that the horizontal approach precludes focused measures like gender mainstreaming. In order to effectively combat discriminatory practices and structures, we must thoroughly analyze the social conditions which gave rise to them. This analysis requires that we assess and understand each specific form of discrimination. Only a systematic analysis of society allows us to recognize the wide range of social effects due to gender, for example, or the many obstacles that still prevent the full accommodation of persons with disabilities of mobility or vision. This specificity will allow us to devise targeted and precise anti-discrimination policies. The horizontal approach therefore does not imply the end of gender mainstreaming, disability mainstreaming, or other focused measures in favor of a kaleidoscopic

<sup>25</sup> Of course, experiences of discrimination can vary greatly, from a verbal attack to structural discrimination on the housing or employment market to violence and even genocide.

human diversity, as some anti-discrimination advocates have worried.<sup>26</sup>

Devising anti-discrimination policies that do justice to the goal of human rights requires substantial energy and commitment from both the state and society. But these policies do not only benefit the victims of discrimination. Overcoming discrimination is ultimately a process of humanizing society as a whole. It requires absolute respect for the inviolability of the human dignity of every individual.

<sup>26</sup> Beate Rudolf, "Gender und Diversity als rechtliche Kategorien: Verbindungslinien, Konfliktfelder und Perspektiven," in *Gender und Diversity: Altraum oder Traumpaar?*, eds. Sünne Andresen, Mechthild Koreuber and Dorothea Lüdke (Wiesbaden, 2009): 155-173.

# FREEDOM OF EXPRESSION AS A HUMAN RIGHT: THE ROLE OF HATE SPEECH IN THE PUBLIC SPHERE

Prohibitions against discrimination are one of the centerpieces of human rights. Indeed, our contemporary international human rights framework owes much to the struggle against racial discrimination across the globe. However, as Heiner Bielefeldt has noted, “Anti-racism was not intrinsic to the human rights agenda from the start, at least not explicitly.”<sup>1</sup> On closer examination, human rights progress in the area of anti-discrimination has often been uneven and contradictory, shaped by the interaction between universal norms and concrete historical developments. Within this context, a central dilemma has been the ongoing tension between freedom of expression and the limits placed on this freedom in the name of combating racial incitement. Most countries view racism and hate speech as morally reprehensible, and they are as such subject to legal sanctions in many nations. In Germany, for example, racial discrimination has become less overt and openly racist remarks are rarely heard in public speech as a result. However, the ongoing effort to eliminate hate speech in the public sphere continues to impose limits on the freedom of expression, a key human right that is traditionally construed as unlimited in scope. The recent trend for individuals and groups to invoke freedom of expression in the defense of their right to disseminate racist propaganda further complicates this picture.

Prohibitions on discrimination are rooted in the protection of human rights and dignity for all. From the human rights perspective, freedom of expression and the avoidance of discrimination and racism are not inherently contradictory concepts. In fact, robust anti-discrimination policies support and protect individual freedom, while racist ideologies undermine freedom, subjugating individual freedom to the needs of the collective. Indeed, as the German Institute for Human Rights has argued, “all human rights – whether freedom of religion, freedom of expression, the basic rights to justice, the right to an education or the right to participation in the labor market – are always grounded in the ideal of human equality and anti-discrimination.”<sup>2</sup>

In what follows, I will elucidate various points of tension between freedom of speech and anti-discrimination. Anja Zimmer’s *Hate Speech im Völkerrecht* describes the debates surrounding hate speech and racist acts as

1 Heiner Bielefeldt, “Rassismusbekämpfung im Streit der internationalen Menschenrechtspolitik,” in *Policy Paper No. 13* of the Deutschen Instituts für Menschenrechte (2009): 4, accessed Nov. 25, 2009 from [http://files.institut-fuer-menschenrechte.de/488/d89\\_v1\\_file\\_49c23ff23902d\\_PP\\_Rassismus\\_bekaempfung\\_Maerz\\_2009.pdf](http://files.institut-fuer-menschenrechte.de/488/d89_v1_file_49c23ff23902d_PP_Rassismus_bekaempfung_Maerz_2009.pdf).

2 Petra Follmar-Otto and Hendrik Cremer, “Der Nationale Aktionsplan der Bundesrepublik Deutschland gegen Rassismus - Stellungnahme und Empfehlungen,” *Policy Paper No. 12* of the Deutschen Instituts für Menschenrechte (2009): 5, accessed on Nov. 25, 2009 from [http://www.institut-fuer-menschenrechte.de/uploads/tx\\_commerce/policy\\_paper\\_12\\_der\\_nationale\\_aktionsplan\\_der\\_bundesrepublik\\_deutschland\\_gegen\\_rassismus.pdf](http://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/policy_paper_12_der_nationale_aktionsplan_der_bundesrepublik_deutschland_gegen_rassismus.pdf).

well as the legal restrictions on hate speech under international law.<sup>3</sup> As such, I do not discuss state prohibitions on racial and ethnic discrimination or the legal prosecution of discriminatory acts in detail. Instead, I focus on several of the central legal and political controversies involving hate speech and freedom of expression in the United States and Germany. I explore whether free public speech that disrespects individuals and groups or incites racial hatred or genocide should be curtailed or punished. This argument will ultimately form the basis of a human rights education project that analyzes the relationship between history in human rights education and broader historical processes, above all in Germany.

## A German Sonderweg?

Human rights theorists often argue that human rights transcend national boundaries, and the historical development of human rights largely bears out this claim. However, the impulse for formulating and implementing human rights always derives from concrete experiences within a particular time and place. The right to the free expression of opinion and the limitations placed on this right are a prime example with deep historical roots. Freedom of expression, understood as freedom of assembly, the arts, and the press, played a central role early in the history of human liberty, starting with the American and the French constitutions. Anti-discrimination struggles, excluding those involving religious freedom, began much later in the anti-slavery and women's movements. The ideal that "all men are created free and equal" had to be transformed into a political and social reality through concrete struggle and negotiation. After 1945, the struggle to define anti-discrimination and freedom of expression as human rights was powerfully shaped by the crimes of the Nazis, both within Germany and abroad. As Rainer Huhle notes, the lessons learned from this experience are far from straightforward, and have inevitably been shaped in each country by their encounter with existing legal and political traditions.<sup>4</sup> Both before the war and after, each generation of human rights activists has grappled to define the necessary limitations on human rights.

The 1948 Convention on Genocide had already criminalized the direct and public incitement to genocide as a preparatory act. Three years earlier, the International Military Tribunal of Nuremberg sentenced the Nazi propagandist Julius Streicher to death for the same crime. The history of National Socialism in Germany demonstrated that the path from hate speech to genocide could be a short one. In postwar Germany, therefore, it seemed necessary to provide legal backing to the effort to shape public opinion and ensure that history would never again be repeated. On the other hand, strict guidelines for limiting freedom of expression are necessary to prevent abuses by an oppressive state. Thus the human rights organization ARTICLE 19 argues that any restrictions on freedom of expression must conform to narrowly defined guidelines, which include the stipulations that "no one should be punished for statements that are true," that "no one should be penalized for the dissemination of hate speech unless it can be shown that they did so with the intention of inciting discrimination, hostility and violence," and that criminal sanctions and imprisonment should be applied only as a last resort. Finally, they propose that any restrictions on freedom of expression should make it clear that the goal is to "protect individuals from hostility and violence" and not to protect belief systems and institutions from criticism, scrutiny, or debate, even when these are harsh or unreasonable.<sup>5</sup>

3 Anja Zimmer, *Hate Speech im Völkerrecht: Rassendiskriminierende Äußerungen im Spannungsfeld zwischen Rassendiskriminierungsverbot und Meinungsfreiheit* (Frankfurt a.M. and Berlin, 2001).

4 Rainer Huhle, "Wie weit geht die Meinungsfreiheit? Ein Rückblick aus Anlass des 60-jährigen Bestehens der Allgemeinen Erklärung der Menschenrechte," in *Zeitschrift für Menschenrechte* 2 (2008): 123.

5 Agnès Callamard, "Freedom of Speech and Offense: Why Blasphemy Laws are not the Appropriate Response," accessed on Nov. 25, 2009 from <http://www.article19.org/pdfs/publications/blasphemy-hate-speech-article.pdf>. See also the contribution by Callamard in this volume.

These strict guidelines for limiting freedom of expression are based on the distinction between individuals and their belief systems. However, while they may be juridically necessary, they are not always suited to the reality of contemporary disputes. Individuals are also members of groups, including religious and ethnic minorities, or other groups that face victimization or discrimination. This raises the question of whether hostility toward an entire group, or offenses to the dignity of a group, also affect those who identify (or are identified) as members of it.<sup>6</sup>

In all likelihood, a group's historical experiences and its collective memory of those experiences determine the extent to which it perceives discrimination and hate speech as a violation of its dignity. These experiences have also shaped contemporary German law. For example, Article 9 of the Basic Law bans the formation of "associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding."<sup>7</sup> Sections 86, 86a, and 130 of the German Criminal code also prohibit inciting hatred against segments of the population and disseminating symbols of unconstitutional organizations.<sup>8</sup>

In Germany, political groups that have been shaped by the legacy of opposition to National Socialism have demanded further restrictions on freedom of expression to protect victims of hate speech and curtail the activities of far-right political groups. Their calls to ban the NPD and impose additional restrictions on the right to demonstrate pose a number of complex issues. Most centrally, from a human rights perspective, we must ask whether these additional restrictions are an attempt to impose sanctions on speech that does not fall under the German constitution's definition of hate speech. In one well-known case of 2004, the German Federal Constitutional Court reversed a decision by the Higher Administrative Court of Münster to ban a neo-Nazi demonstration in the city of Bochum. The respected information service *Blick nach Rechts* criticized the Constitutional Court's verdict:

We are left with the memory that at least the higher administrative court took a clear stand: gatherings which have National Socialist affiliations can be banned as an offense to public order. And that neo-Nazi ideas and teachings are more than just politically unpopular opinions; they are opinions that have been decisively rejected by the Basic Law itself. And that freedom of dissent must be limited at the point where an attempt is being made to revive the barbaric ideas and teachings of the Third Reich. And that, as the Higher Administrative Court President Bertram said, "the right to freedom of assembly and opinion does not mean *carte blanche* for neo-Nazis." If we follow the Karlsruhe precedent, this is legally incorrect. But it was and is politically correct.<sup>9</sup>

A broad social movement in Germany denies the right to freedom of expression for groups who use this right for neo-Nazi political agitation, even if they do not explicitly use Nazi symbols and slogans. Indeed, some activists regard the repressive measures of the state as an essential supporting instrument. The social movement is still in part influenced by the legacy of anti-fascism, which was one of the most important leftist ideals of the 20<sup>th</sup> century. This brand of anti-fascism often clashed with the largely liberal conception of human rights. Although the anti-fascist left has become less doctrinaire in recent years, it has been slow to accept that even Nazis are to be accorded freedom of speech. On the other hand, local activists who are battling the

<sup>6</sup> For reasons of space, I will not be able to consider the legal distinction between hate speech and hate crimes, which is another important issue raised by the guidelines for restrictions on freedom of expression as formulated by Callamard and other free speech advocates.

<sup>7</sup> Basic Law for the Federal Republic of Germany, accessed on Nov. 3, 2009 from <http://www.iuscomp.org/gla/statutes/GG.htm>.

<sup>8</sup> Federal Republic of Germany Criminal Code, accessed on Nov. 3, 2009 from <http://www.iuscomp.org/gla/statutes/StGB.htm>.

<sup>9</sup> The Federal Constitutional Court is located in the city of Karlsruhe; quoted in Tomas Sager, "Grenzen der Meinungsfreiheit," in *Blick nach Rechts* (Aug. 3, 2004), accessed on May 12, 2009 from <http://www.bnr.de/content/grenzen-der-meinungsfreiheit-0>.

rising neo-Nazi tide occasionally feel abandoned by the global human rights movement. According to a slogan popular with the anti-fascist activists, the priority is “contesting every inch of ground” in their battle against the far right.

### Traditional Anti-Fascism and Civil Resistance against the Far Right

The regional anti-fascist movement and the campaign against the radical right in northern Bavaria typify the anti-fascist ideas and activities in Germany since 1990. The towns of Wunsiedel and Gräfenberg, where regular neo-Nazi demonstrations have taken place, are also centers of this anti-fascist movement. The Wunsiedel activists successfully spearheaded tighter restrictions on the right to assembly by the German Bundestag. Every year on the anniversary of the death of Hitler’s deputy Rudolf Hess, who was sentenced as war criminal at Nuremberg, Hess’s followers joined to march to his grave in Wunsiedel. In March 2005, the governing Social Democratic (SPD) and Green Party coalition joined with the Christian Democratic opposition in the Bundestag to vote in favor of tightening the right of assembly and making changes to the existing criminal code. The goal was to prevent rallies by far-right extremists at historically sensitive sites like concentration camp memorials and the Holocaust Memorial in Berlin. The opposition Free Democratic Party (FDP) voted against tightening the law, arguing that freedom of expression and assembly were fundamental to democracy, and criticizing the Bundestag for being increasingly prepared to violate basic rights.<sup>10</sup> The legislation let the individual state governments decide which sites should be protected from demonstrations and rallies glorifying the Nazi dictatorship. Arguing in favor of the new restrictions before the parliament in February 2005, Minister of Justice Brigitte Zypries noted that the original purpose of the law on “protected zones” was to “safeguard the integrity of our constitutional bodies and their members.” Extending this ban on demonstrations to sites like the Brandenburg Gate and Hess’s burial site in Wunsiedel, Zypries continued, would protect the “dignity and memory of the victims of the National Socialist regime.”<sup>11</sup> Speaking one year later, Zypries returned to the topic of the proposal and attempted to locate it within the development of development of international law. According to Zypries, the majority of EU states have followed the American and English conception of freedom of expression, which has limited their ability to enact criminal penalties for racist and xenophobic expressions of opinion. Germany, however, had “followed a different path,” enacting a law on incitement to hatred that was sharpened with a ban on Holocaust denial. Germany’s change to the law on assembly, which restricted demonstrations at important Holocaust memorial sites, Zypries noted, had withstood scrutiny by the German Federal Constitutional Court.<sup>12</sup> What Zypries failed to note, however, is that the new law circumvented one of the basic principles of German constitutional law: that the state cannot limit freedom of expression solely on the basis of the content of opinions, even if the ideas involve fundamental legal values connected to Germany’s historical experience.

The central demand in the legal battle against the far-right has long been a ban on the NPD party. While the proposed ban is not actually a question of freedom of expression, it is explicitly justified with the claim that preventing far-right demonstrations and rallies will also prevent the spread of far-right ideas. In reality then, the proposed ban attempts to limit the freedom of expression. In addition to this “traditional anti-fascist” position, there are also a number of more nuanced positions in the political battle against the radical right that do not rest upon restrictions of freedom of expression. For example, the Berlin anti-Semitism scholar

<sup>10</sup> dpa news report of March 11, 2005.

<sup>11</sup> Brigitte Zypries, Feb.18, 2005, speech accessed on May 12, 2009 from <http://www.bmj.bund.de>.

<sup>12</sup> Brigitte Zypries, 2006, speech accessed on May 12, 2009 from <http://www.bmj.bund.de>.

Michael Kohlstruck has urged us to use demonstrations as an opportunity for public relations work and political education:

“We will not budge an inch in the battle against fascism” is a historical slogan. But respect for basic rights and respect for the rule of law means that activists who oppose rallies and demonstrations by the far right should aim at protest rather than prevention. This protest should initially be directed against the rally itself. But we must also extend this immediate protest to a broader critique of the social and political ideals and agenda of the radical right.<sup>13</sup>

In addition to the “anti-fascist” approach, a second strain of activism derives its call for fundamental human rights and civil liberties from the political and civil deficits of German history. According to this tradition of civil and human rights activism, both the “bourgeois” and the socialist state were structurally repressive by nature. Any laws that grant the state even more repressive power thus infringe on civil rights. Civic organizations like the Humanistische Union (Humanist Union) and the Komitee für Grundrechte und Demokratie (Committee for Basic Rights and Democracy), which have been active in human rights for several decades, oppose limitations on public rallies and demonstrations by groups like the NDP. One of the most important spokespeople for the Komitee für Grundrechte und Demokratie, Wolf-Dieter Narr, has argued against bans, and for public debate that would be a “demonstration of democracy in action, and of the sincerity of the state’s commitment to human rights.”<sup>14</sup> Narr’s argument was echoed by Federal Constitutional Court’s disagreement with the Higher Administrative Court of Münster. As the Federal Constitutional Court argued in its verdict:

Basic rights and democracy must be more than a horse-drawn carriage which we mount and dismount as circumstances decree. They must be a true “normative foundation” with real power to shape the actions of our institutions and citizenry. As such, basic rights and democracy can only be limited or obstructed under exceptional circumstances, as the outcome of a cost-benefit analysis of equally important norms, of a conflict between fundamental norms. And even in that case, we must ensure that our basic rights are restricted or modified to the least extent possible. Our liberal and democratic polity is not protected by enacting bans or limiting debate, even when the opinions in question are repulsive and advocate discrimination and xenophobia (a xenophobia that is in part also supported by official policy). The “lessons” of the Weimar Republic do not require that we limit the exercise of democracy and basic rights. In fact, quite the opposite. The opinions of extremists on the far right are terrible, but we cannot win the battle by banning the expression of opinions. Instead we must acknowledge these opinions, engage with them, and attack their underlying causes.<sup>15</sup>

In contrast to the arguments advanced by Justice Minister Brigitte Zypries and the advocates of bans on far-right assemblies, Narr and the Federal Constitutional court have thus argued that limitations on the expression of democracy and free speech do not honor the victims of National Socialism; moreover, the history of National Socialism should not determine the interpretation of the German constitution and contours of German democracy.

13 Michael Kohlstruck, “Thesen zu Workshop III: Auseinandersetzung um geschichtliche Fragen (Jahrestage, Gedenkort),” presented at the conference “Praxisorientierter Umgang mit rechtsextremistischen Aktivitäten” on Feb. 9 and 10, 2007 in Potsdam, accessed on May 14, 2009 from [zfa.kgw.tu-berlin.de/lehrrmaterial/dateien/Kommunaltagung\\_Thesen.pdf](http://zfa.kgw.tu-berlin.de/lehrrmaterial/dateien/Kommunaltagung_Thesen.pdf).

14 Komitee für Grundrechte und Demokratie, “Der Umgang mit der Versammlungs- und Meinungsfreiheit offenbart den Zustand bundesdeutscher Demokratie,” (2005) accessed on Oct. 29, 2009 from [http://www.grundrechtekomitee.de/ub\\_showarticle.php?articleID=149](http://www.grundrechtekomitee.de/ub_showarticle.php?articleID=149).

15 Wolf-Dieter Narr, “Demokratie und Demonstration Notizen zur unendlichen Demonstrationenkontroverse,” accessed on May 12, 2009 from [www.CILIP.de/ausgabe/2/2002-72/demo.htm](http://www.CILIP.de/ausgabe/2/2002-72/demo.htm).

## Holocaust Denial

In Germany, publicly trivializing, condoning, or denying the crimes committed under the National Socialist dictatorship is a criminal offense. These acts can also be prosecuted as an incitement to hatred and a disturbance of the peace.<sup>16</sup> Section 130, Paragraph 1 of the German criminal code defines incitement to hatred as follows:

Whosoever, in a manner capable of disturbing the public peace incites hatred against segments of the population or calls for violent or arbitrary measures against them; or assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be liable to imprisonment from three months to five years.<sup>17</sup>

Holocaust denial has been illegal in Austria since 1945, and some 20 other nations have similar laws.<sup>18</sup> In its 2003 decision on the appeal of Roger Garaudy, a philosopher convicted of Holocaust denial in France, the European Court of Human Rights emphasized that Article 17 of the European Convention on Human Rights did not provide protection to the attempt to rehabilitate the National Socialist regime.<sup>19</sup> Jürgen Zarusky has noted that Holocaust denial was an international phenomenon from the start.<sup>20</sup> Thus there has been what might be termed a French tradition of Holocaust denial, beginning with Paul Rassinier, who was incarcerated in the Buchenwald concentration camp as a pacifist and Communist, to Robert Faurisson, who was defended by a number of notable liberal thinkers and politicians, to the philosopher Roger Garaudy.<sup>21</sup> And in recent years, the internet has provided an international forum for a veritable explosion of Holocaust denial. The legal response to the dissemination of the “Auschwitz lie,” in one of the favored phrases of Holocaust deniers, illustrates the tension between the concept of freedom in Anglo-Saxon countries and the willingness of other European states, many of which were occupied by Germany during the Second World War, to limit these freedoms when it comes to National Socialist propaganda.<sup>22</sup> Thus in 2006, British historian David Irving was found guilty in Vienna of denying the Holocaust and sentenced to three years in prison. Among the reasons given by the advocates of Irving’s prosecution was the effect that his statements might have on the dignity and rights of Holocaust victims, survivors, and their families: “Contrary to the claims of the so-called revisionists, and even the claims of some serious commentators on the topic, the purpose of legal prosecution of Holocaust denial is preventing hatred and not enforcing a single and authoritative view of history.”<sup>23</sup> Nonetheless, the Holocaust is a historical fact, and Holocaust denial is a claim that in Germany is not protected by the right to freedom of opinion.<sup>24</sup> These historical facts include the existence of a plan for the murder all Jews in the territories under National Socialist control, and the use of gas chambers to carry out these murders.<sup>25</sup>

16 On the definition of the crime of Holocaust denial and glorifying the National Socialist regime, see § 6 Par. 1 of the German International Criminal Code; on the crime of disturbing the peace, see §130 Par. 3 of the German Criminal Code.

17 Federal Republic of Germany Criminal Code, accessed on Nov. 3, 2009 from <http://www.iuscomp.org/gla/statutes/StGB.htm>.

18 See Joachim Neander, “Mit dem Strafrecht gegen die ‘Auschwitz-Lüge’: Ein halbes Jahrhundert § 130 Strafgesetzbuch ‘Volksverhetzung,’” accessed on May 22, 2009 from <http://aps.sulb.uni-saarland.de/theologie.geschichte/inhalt/2006/19.html>.

19 See the European Court of Human Rights judgment, accessed on Nov. 25, 2009 from <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=672116&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

20 Jürgen Zarusky, “Die Leugnung des Völkermords: ‘Revisionismus’ als ideologische Strategie,” in Wolfgang Benz, *Auf dem Weg zum Bürgerkrieg?: Rechtsextremismus und Gewalt gegen Fremde in Deutschland* (Frankfurt a.M., 2001): 63-86, esp. 65.

21 Lothar Baier, *Französische Zustände Berichte und Essays* (Frankfurt a.M., 1985).

22 The term “Auschwitz lie” refers to a well-known text by a Nazi apologist, Thies Christophersen, a former SS officer. According to Christophersen, the claim that Jews were gassed at Auschwitz was a “lie.” Despite the falsity of Christophersen’s claims, the term “Auschwitz lie” has become a shorthand description for Holocaust denial and mitigation in many countries. See Richard S. Levy, ed. *Antisemitism: A Historical Encyclopedia of Prejudice and Persecution*, vol. 1 (Santa Barbara, 2005): 45.

23 Zarusky, 81.

24 Verdict of the German Constitutional Court of April 13, 1994, Az. 1 BvR 23/94.

25 Neander, 277.

## “State Speech – Hate Speech”

The issue of hate speech also has a long and controversial history in the United States. Under US law, a hate crime is defined as a crime in which the perpetrator targets the victim for his or her perceived membership in a specific social or ethnic group. Judith Butler has analyzed the concept of hate crimes from a Foucauldian perspective that explores the subtle relationship between speech and power in juridical discourse, and criticizes state power from a left-wing standpoint. In a 1997 essay, she argues that “By ‘suspending’ the state action doctrine, proponents of hate speech prosecution may also suspend a critical understanding of the state power, relocating that power as the agency and effect of the citizen-subject. Indeed, if hate speech prosecution will be adjudicated by the state, in the form of judiciary, the state is tacitly figured as a neutral instrument of legal enforcement.”<sup>26</sup> As a feminist, Butler draws a parallel between the social power to define gender and the state’s power to define racial identity. Because the state is not a neutral party, she argues, society must take on the task of confronting racist ideologies. Any attempt to prosecute hate speech will necessarily confront the productive and definitional power of the state.

Butler’s arguments rest on a particular understanding and skepticism toward the nation state that may be seen as refuting the concept of the nation state as the protector of human rights. One proponent of this latter ideal of the nation state was Hannah Arendt. Writing several decades before Butler, Arendt argued that the destruction of the nation state by totalitarianism would culminate in the destruction of human rights. For Arendt, therefore, the power of the state is separate from violence; the state does not promote the violence that exists in society. Quite the contrary: the state can be called on to exercise its power to protect the individual from social violence.<sup>27</sup> More recent theorists of democracy like Jürgen Habermas and John Rawls, in turn, have developed nuanced theories of the power of the state, linking state power to constitutional law, which is seen as an expression of the democratic will of the people. This link generates the requirements and criteria for legal and state intervention. For these recent democratic theorists, the law is not part of the “state apparatus,” but functions in tension with other state institutions. In these formulations, the power of the state – conceived as executive power or the “power to act” – may be used to achieve discriminatory laws or actions, but it may also be expressed in anti-discriminatory behavior. As the German Institute for Human Rights has noted, “power is always dependent on context... . The power to act is not fundamentally negative, but can also be used to protect human rights.”<sup>28</sup>

## Establishing International Human Rights Norms

Human rights issues are also central to the international lawmaking process, particularly in the area of discrimination. As noted briefly above, current international law includes numerous anti-discrimination regulations, ranging from United Nations statutes, to UN resolutions (for example, the 1970s resolutions on apartheid in South Africa), to the International Convention on the Elimination of All Forms of Discrimination.<sup>29</sup> In light of the existing international framework, when is it necessary to enact anti-discrimination legislation on a national level? Pointing to the examples of Rwanda and Yugoslavia, Zimmer stresses that the International Convention on the Elimination of All Forms of Discrimination permits “no margin of discretion. Racist speech and actions can be the start of a racist movement within a state” and therefore states must be required to

26 Judith P. Butler, *Excitable Speech: A Politics of the Performative* (New York and London, 1997): 47.

27 Hannah Arendt, *Elemente und Ursprünge totalitärer Herrschaft*, vol. 2 (Frankfurt a.M., Berlin and Vienna, 1951).

28 Oliver Trisch, *Der Schutz vor Diskriminierung: ein Strukturprinzip der Menschenrechte Unterrichtsmaterialien zur Menschenrechtsbildung* (2006): 2.

29 Zimmer, 37ff. and 212ff.

criminalize the spread of racist ideas.<sup>30</sup> International anti-discrimination legislation thus also appears to follow Cicero's aphorism to "resist the beginnings."

In the same vein, UN High Commissioner for Human Rights Navanethem Pillay recently reminded the countries who signed the resolutions at the Durban Review Conference on racism in Geneva of their obligations. Article 59 of the closing document of the Durban II Conference states: "The conference invites Governments and their law enforcement agencies to collect reliable information on hate crimes in order to strengthen their efforts to combat racism, racial discrimination, xenophobia and related intolerance." But the document also takes a notably liberal stance toward freedom of opinion when it states: "... the right to freedom of expression and expression constitutes one of the essential foundations of a democratic, pluralistic society and stresses further the role these rights can play in the fight against racism, racial discrimination, xenophobia and related intolerance worldwide."<sup>31</sup> The German penal code meets the standards set forth in the closing document with respect to its anti-discrimination provisions, and even exceeds them in its clause on Holocaust denial. However, a number of organizations have made additional recommendations for anti-discrimination policy and measures. For example, the European Monitoring Center on Racism and Xenophobia issues periodic reports on legislative developments in the area of anti-discrimination.<sup>32</sup> On the basis of these reports, the German Institute for Human Rights also issued a statement of recommendations to the German government, although the latter did not include any legislative measures, which the Institute agreed were not necessary.<sup>33</sup> Other organizations, in contrast, have continued to call for stronger legal measures against racism: thus in December 2008 the European Commission on Racism and Intolerance presented a report to the Council of Europe urging the German government to pay greater attention to racial motivations in criminal prosecutions and increase penalties for crimes with a racial component.<sup>34</sup> However, in her comparative analysis of 2003, Silvia Seehafer expressed skepticism about this line of argument. In her conclusion, she argues that "considering the perpetrator's views and beliefs when assessing the crime would blur the fundamental legal distinction between the crime itself, illegality, guilt, and the sentence. We run the risk of letting our emotional outrage become the determining factor."<sup>35</sup>

Current sentencing practices already permit the court to take exacerbating circumstances into account when issuing a criminal sentence, and racial motivations can be considered an exacerbating factor. However, in my view the courts should not be required to assess every crime for racial motivation. Any legislation that required the courts to consider the defendant's racial attitudes would in effect also require the unlawful violation of the defendant's private sphere.

## Lessons from Different Legal Systems

The Austrian journalist Eva Menasse observed the legal battle that followed David Irving's libel suit against historian Deborah Lipstadt. According to Irving, he sought to protect his honor and reputation. However, as

30 *Ibid.*, 219.

31 Outcome Document of the Durban Review Conference 2009, accessed on Oct. 29, 2009 from [http://www.un.org/durbanreview2009/pdf/Durban\\_Review\\_outcome\\_document\\_En.pdf](http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf).

32 Beate Winkler, "Bestrebungen zur Bekämpfung von Rassismus und Fremdenfeindlich in der Europäischen Union," in *Jahrbuch Menschenrechte 2002*, eds. Gabriele von Arnim, Volkmar Deile, Franz-Josef Hutter, Sabine Kurtenbach and Carsten Tessler (Frankfurt a.M., 2002): 262-270, see esp. 270.

33 Follmar-Otto and Cremer.

34 ECRI Report on Germany, December 19, 2008, accessed on June 20, 2009 from <http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Germany/DEU-CbC-IV-2009-019-DEU.pdf>.

35 Silvia Seehafer, *Strafrechtliche Reaktionen auf rechtsextremistisch / fremdenfeindlich motivierte Gewalttaten – Das amerikanische "hate crime" Konzept und seine Übertragbarkeit auf das deutsche Rechtssystem* (Berlin, 2003): 16, accessed on May 20, 2009 from <http://edoc.hu-berlin.de/dissertationen/Seehafer-silvia-2003-04-28/HTML/front.html>.

Menasse noted, the court concluded that Irving was a “racist, an anti-Semite, a Holocaust denier, and a deliberate falsifier of historical facts.”<sup>36</sup> Menasse closes her description of the Irving trial with a useful suggestion for confronting the tension between freedom of expression and restraining that freedom in order to curtail hate speech:

Many questions remain about the legal treatment of “Irving and company.” However, a diverse approach would seem to offer more possibilities than a single, uniform solution. Banning Irving from visiting Germany and Austria and disseminating his remarks there is a valid solution in light of the weight and the obligations of history. Perhaps not forever, but for a long time to come. Letting him preach his ideas and incite hatred in the United States, and then reap the punishment of civil society, is perhaps the best solution of many bad ones. The British legal system that even made it possible for Irving to “defend his honor” before the Queen’s court also provided a useful opportunity for education and democratic debate.<sup>37</sup>

The literature on human rights education and memorial work has not adequately discussed the tension between the right to freedom of expression and the need to curtail that right.<sup>38</sup> However, there is widespread skepticism among scholars and practitioners in the field about legal and punitive measures to limit freedom of expression. In particular, many young people express skepticism about whether sterile legal arguments do justice to the moral component of human rights issues. Nonetheless, the tension that I have discussed is central to human rights and political education. Indeed, an appreciation and understanding of the law is also an important pedagogical goal, particularly because right-wing extremists in these educational programs increasingly legitimize their politics on the basis of freedom of expression, academic freedom and open debate. Those who hope to counter the far-right with the principles and practice of “democracy in action” must also engage with the issue of the human right to freedom of expression. And by the same token, those who analyze the history of human rights as a response to National Socialism and incorporate this analysis into educational work must consider the experiences of activists who work to eliminate right-wing extremism. Taking the tension between freedom of expression and the desire to limit it into account would provide a better basis for educational programs on human rights.

<sup>36</sup> Eva Menasse, *Der Holocaust vor Gericht: Der Prozess um David Irving* (Berlin, 2000): see esp. 12, 157.

<sup>37</sup> *Ibid.*, 178.

<sup>38</sup> See for example, Barbara Schäuble and Hanne Thoma, “Ergebnisse des europäischen Workshops ‘Antisemitismus – Eine Herausforderung für die politische Bildungsarbeit: Eine Dokumentation,” in *Neue Judenfeindschaft?: Perspektiven für den pädagogischen Umgang mit dem globalisierten Antisemitismus*, eds. Fritz Bauer Institut and Jugendbegegnungsstätte Anne Frank (Frankfurt a.M., 2006): 233-244.

Agnès Callamard

## FREEDOM OF EXPRESSION AS A CORNERSTONE HUMAN RIGHT

Behind every right, there is a history of oppression. Every human right plays a role in the construction of our common humanity and what it means to be human, but it is the indivisibility of these rights and their synergy that makes up human dignity. The importance of non-discrimination to human rights is well known and understood: human history is replete with instances of racism and intolerance that have given rise to genocide and crimes against humanity. The international community has identified discrimination and racism as an abuse of human dignity and equality, and a major cause of other massive violations, including genocide.

Less well known is the fact that national and international bodies and courts worldwide have insisted and demonstrated that the right to freedom of expression is central to the international human rights regime and to human dignity. They have done so because the greatest man-made calamities in history involved full control over expressions, opinions and, at times, conscience: the slave trade and slavery, the Inquisition, the Holocaust, the genocide in Cambodia or Rwanda, the Stalin regime and the gulag.

Control over freedom of expression is “the handmaiden of power, without which power is inconceivable. It is an instrument to assist in the attainment, preservation or continuance of somebody’s power, whether exercised by an individual, an institution or a state. It is the extension of physical power into the realm of the mind and the spirit...”<sup>1</sup> Such control encompasses all interferences with the right of individuals to hold opinions and to express them without fear. It can be pursued via multiple routes, both direct and indirect, making censorship particularly complex and difficult to confront and defeat.<sup>2</sup>

For these reasons, on numerous occasions international courts and bodies have emphasized the importance of freedom of expression. As early as 1946, at its very first session, the UN General Assembly adopted Resolution 59 (I), which states that “freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated.” This has been echoed by other courts and bodies. For example, the UN Human Rights Committee has said: “The right to freedom of expression is of paramount importance in any democratic society.”<sup>3</sup> Also, the European Court of Human Rights has recognized the vital role of freedom of expression as an underpinning of democracy: “Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the develop-

1 Michael Scammell, “Censorship and its History – A Personal View,” in *ARTICLE 19, 1988 World Report, Information, Freedom and Censorship* (London, 1988): 5.

2 See the reports, for example, in *ARTICLE 19, 1988 World Report, Information, Freedom and Censorship* (London, 1988).

3 *Tae-Hoon Park v. Republic of Korea*, Oct. 20, 1998, Communication No. 628/1995, para. 10.3.

ment of every man.”<sup>4</sup>

The Inter-American Court of Human Rights also underscored the democratic significance of freedom of expression:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.<sup>5</sup>

Freedom of expression is guaranteed under Article 19 of the Universal Declaration on Human Rights (UDHR), and more or less in similar terms under Article 19 of the International Covenant on Civil and Political Rights (ICCPR): “Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.” Freedom of expression is also protected in all three regional human rights treaties, in Article 10 of the European Convention on Human Rights (ECHR), in Article 13 of the American Convention on Human Rights and Article 9 of the African Charter on Human and Peoples’ Rights.

Freedom of expression, including the right to access information, is therefore a fundamental human right, central to achieving individual freedoms and meaningful electoral democracies. It is a cornerstone or an empowering right: it safeguards the exercise of all other rights and underpins legitimate government. Without the right to speak and the right to know, many other human rights cannot be exercised and respected. Freedom of expression increases the knowledge base and participation within a society. At the same time, it provides the external checks on state accountability necessary for combating the corruption that thrives on secrecy and closed environments.

It forms a central pillar of the democratic framework that protects all rights and ensures the exercise of full citizenship. In turn, a robust democratic framework helps create the stability necessary for society to develop in a peaceful and prosperous manner. Through freedom of expression, politics can unfold in an unfettered and constructive manner.

Free expression also allows people to demand the right to health, to a clean environment and to effective implementation of poverty reduction strategies. It makes electoral democracy meaningful and builds public trust in administration. Access to information strengthens mechanisms to hold governments accountable for their promises, obligations and actions.

The free flow of information increases the capacity of all to participate in the life of their nation or community and in policy-making. Political processes require the freedom to participate in public life, to advance ideas and to advocate for their realization. Individuals and groups must have the right to demand, without fear of recrimination or discrimination, that governments uphold their obligations. Freedom of expression enables individuals and groups to become active the political process.

The media has a specific task to inform the public; it can enhance the free flow of information and ideas to individuals and communities, which in turn can help them make informed choices for their lives. A free, independent and professional media, using investigative methods, plays a key role in providing knowledge

<sup>4</sup> *Handyside v. United Kingdom*, Dec. 7, 1976, Application No. 5493/72, para. 49.

<sup>5</sup> *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts 13 and 29 American Convention on Human Rights)*, Advisory Opinion OC-5/85, Nov. 13, 1985, Series A, No. 5, para 70.

and in giving voice to the marginalized. An independent media highlights corruption and develops a culture of criticism where people are less apprehensive about questioning government action. Undue restrictions on freedom of expression undermine the realization of many other rights.

## Freedom of Expression and Memory: The Right to Truth

Freedom of expression, including access to information, is also essential to the realization of what is commonly referred to as the “right to truth.” In its 61<sup>st</sup> session, the UN Commission on Human Rights adopted Resolution 2005/66, which “recognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights.” From a focus on information about missing or disappeared persons, the right to truth quickly evolved to include details of other serious violations of human rights and the context in which they occurred. The right to the truth imposes an obligation on the state to disclose information about the circumstances and reasons that led to “massive or systematic violations.”

A 1997 report by the French expert Louis Joinet to the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities includes an important definition of the right to know:

This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember,” which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved. These then, are the main objectives of the right to know as a collective right.<sup>6</sup>

In essence, the argument in favor of disclosing the truth about past human rights violations is no different than the broader argument in favor of freedom of information. Information should be routinely available to the public so that they can hold those in power to account for their actions. This accountability clearly applies, for example, to the government committees. Surely it applies *a fortiori* to gross human rights violations.

By their very nature, human rights violations are obscured by misinformation and untruths. Sometimes, the perpetrators and victims are the only witnesses. Surviving victims and relatives are entitled to a full explanation of the events because excavating the truth of the past helps prevent future abuses. This process may entail punishing those responsible.

Uncovering the truth is also a precondition for redressing the victims. In many instances, the process of speaking the truth may itself be a way to repay the victims of human rights violations. It may also serve to remove the stigma that is often attached to victims of human rights violations and is a way of declaring that the innocence of the victim. Speaking the truth about acts of brutality can be a first step in empowering the victim and restoring him or her to a respected place in society.

While the right to truth is most commonly and logically associated with the right to justice, it is also profoundly connected to freedom of expression: people must have the right to express themselves by reporting or recalling incidents, or acting as witnesses without fear. The media must be able to carry out its function and report freely on investigations, truth telling, and amnesties.

As importantly, the right to truth presupposes access to government-held information – without it, “truth” about past events is bound to be one-sided and lacking in evidence. The success of efforts to uncover the truth about the past depends on the extent of access to public information for those who undertake investigations.

<sup>6</sup> See the revised final report prepared by Louis Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1, para. 17.

Fundamental reform of the legal regime governing freedom of expression is therefore an essential precondition for meaningful efforts to uncover the truth about the past. From this standpoint, it may be argued that the right to truth derives from the more general right of access to information, contained within the right to “seek, receive and impart information” which is guaranteed by Article 19 of the Universal Declaration of Human Rights.

Both legal practice and jurisprudence around the world have increasingly insisted that the truth be made public. Indeed, the right to “truth” is first and foremost a right to an official statement about what happened, or “to an authoritative version of events, over and above partisan considerations.”<sup>7</sup>

As Yasmin Naqvi argues, “such ‘statements’ by the state need not be in a particular form but could be expressed aurally, visually, musically, pictorially or through sculpture. This could mean that the right to the truth could also be, at least partially, satisfied through such actions by the state as erecting monuments dedicated to victims or works of art or musical compositions that explain what happened.”<sup>8</sup>

The right to truth does not preclude the rights of victims to compensation or punishments for perpetrators. Over the last 20 years, myriad approaches to the right to truth have evolved, that include criminal prosecutions, reconciliation and amnesties. All have requested freedom of expression and demand that the state to uncover and publicize the truth.

## Limitations to the Right to Truth

In spite of its multiple functions, the right to truth is not absolute; it is limited by the same exceptions that apply to the right of expression more generally under Article 19 of the International Covenant on Civil and Political Rights. Framed in general terms, these exceptions allow governments to withhold certain types of information from the public. For example, the right to freedom of expression may be restricted in order to protect the rights of others, or public order, if it is “necessary in a democratic society” and is done by law.

The European Court has established a strict three-part test for the restriction of freedom of expression. For a restriction to be legitimate, it must meet all three parts of the test: a restriction must indeed pursue the legitimate aim that it claims to pursue; the restriction must be imposed in a democratic framework (i.e., either by parliament or pursuant to powers granted by parliament); and the restriction must be “necessary in a democratic society.” The word “necessary” must be taken quite literally and means that a restriction must not be merely “useful” or “reasonable.” States maintain discretion over the exact measures, but above all their restrictions must be “necessary in a democratic society.” There should be a clear presumption in favor of the right to information about serious human rights violations. The onus falls on the authorities to justify a refusal to make information available upon request.

International law imposes one clear positive duty on states: as stated in Article 20(2) of the UN Covenant on Civil and Political Rights: “Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>9</sup> Yet there are vastly different regional or national approaches to hate speech. At one end of the spectrum, the US approach protects hate speech unless the speech actually incites violence or is likely to give rise to imminent violence. It is a stringent standard which means that even speech advocating violence and filled with racial insults is protected if there is no evidence that physical violence is likely to occur. At the other hand of the spectrum are tight restrictions on hate speech,

7 José Zalaquett, quoted in *ARTICLE 19: Moments of Truth in Sierra Leone* (London, August 2000): 10-11, accessed on Oct. 29, 2009 from <http://www.article19.org/pdfs/publications/sierra-leone-moments-of-truth.pdf>.

8 Yasmin Naqvi, “The Right to the Truth in International Law: Fact or Fiction?” in *International Review of the Red Cross* 88 (June 2006): 862 ff.

9 United Nations, *International Covenant on Civil and Political Rights*, accessed on Jan. 31, 2010 from <http://www.hrweb.org/legal/cpr.html>.

as well as on denying the Holocaust or other genocides. Nowhere are the substantial differences in the ways states will restrict hate speech clearer than in the European Union. EU countries have approached hate speech in a variety of fashions, from strong restrictions in France and Germany, to the greater protections offered to different types of speech in the UK or Hungary.

## Holocaust Denial Policies

Holocaust denial laws proliferated in Europe through the 1990s to the present. In early 2007, Germany pushed for an EU-wide ban on denying the Holocaust. In 2006, the French National Assembly passed, by a vote of 106-19, a draft law that made it an offense to deny the existence of the 1915 Armenian genocide, punishable by five years in prison and a € 45,000 (\$56,400) fine. In 2006, Holocaust denier David Irving was arrested and detained in Austria, adding further confusion and tension to the question of criminal speech. Whether these Holocaust denial laws are responses to a genuine incitement to genocide is highly debatable. It may be more appropriate to see them as political statements, primarily against anti-Semitism. However, from this standpoint existing hate speech regulations would serve the purpose of setting boundaries and common values.

A blanket ban on denial of the Holocaust, or, for that matter, any other genocide or historical event, raises multiple issues and its actual impact is highly questionable. First, this type of ban goes beyond the established international law standard of incitement to hatred by elevating a historical event to dogma and by prohibiting a category of statement, regardless of the context or impact. The French Armenian genocide draft bill, for example, would create taboos and stifle potentially dissenting or controversial research and publications. Second, prosecutions under Holocaust denial laws actually augment the appeal of “revisionist historians,” providing them with high-powered platforms and casting them as dissidents against the state, which loses its moral high ground. The arrest of British Holocaust denier David Irving gave him a level of international prominence that he had not previously enjoyed. It also made him a martyr in the eyes of his followers.<sup>10</sup> Third, government use of genocide denial laws to stifle critics should also be cautionary. In Rwanda, charges of “negationism” (in essence genocide-denial) or incitement to hatred are frequently launched against perceived opponents and critics of the government, including journalists, in order to silence them.<sup>11</sup> Fourth, there is the difficult challenge of defining precisely and narrowly in law what constitutes Holocaust denial, a requirement under international law for any legitimate restriction on freedom of expression. Most Holocaust denial laws go beyond the key facts recognized by leading courts, such as the existence of the gas chambers and the genocide against the Jews. For instance, the European Court of Human Rights found France in breach of its obligation to respect freedom of expression when it convicted two citizens who had contested the legitimacy of the judgment against wartime leader Marshal Pétain for collusion with the Nazis. The European Court of Human Rights specifically noted:

[The impugned statements form] part of the efforts that every country must make to debate its own history openly and dispassionately. The Court reiterates in that connection that ... freedom of expression is applicable not only to “information” or “ideas” that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.<sup>12</sup>

Finally, where instances of Holocaust or genocide denial do willfully incite racial hatred, general hate speech

<sup>10</sup> In Britain itself, which does not have a Holocaust denial law, David Irving was thoroughly and dramatically discredited when he unsuccessfully sued historian Deborah Lipstadt for describing him as a Holocaust denier in 1998.

<sup>11</sup> Amnesty International, *Report 2008*, accessed on Jan. 18, 2010 from <http://www.amnesty.org/en/region/rwanda/report-2008>.

<sup>12</sup> *Lehideux and Isorni v. France*, para. 55. Although the events took place before the Gayssot Law was passed, and so the case did not formally involve France's Holocaust denial law, they clearly fell within its scope.

laws can be used to prosecute the perpetrators.

In November 2008, the French parliament recognized that “memory laws” were not an appropriate mechanism for national memory. A report made public in November 2008 indicated that it is not the role of Parliament to adopt laws which pre-judge the relative importance or value of historical facts, particularly when such laws include criminal sanctions. The report was commissioned by the French National Assembly as part of the work of a mission of inquiry (*Mission d’information sur les questions mémorielles*) and was adopted unanimously.<sup>13</sup>

Historians and other scholars have also maintained that it is not the business of any political authority to define historical truth and to restrict the liberty of historians through penal sanctions. The *Appel de Blois*, adopted by internationally recognized historians, called on politicians not to adopt, through legal means, “state-led truths” which undermine intellectual freedoms.<sup>14</sup> Memory laws too often end up elevating history to dogma, thus preventing and punishing research and debate. They legally silence potentially dissenting or controversial research and publications, create taboos, and reinforce an overall atmosphere that effectively stifles controversial research. The risks inherent in criminal laws on “historical” truths are particularly evident in Turkey, where a large number of authors, journalists and academics have been prosecuted for their writings on the Armenian genocide. Some of these individuals have been murdered. For instance, many writers, including the Nobel laureate Orhan Pamuk, have been tried for insulting “Turkishness” under Article 301 of the Turkish penal code, which prohibits a range of criticisms. The cases rest on statements or publications explicitly or implicitly recognizing the 1915 Armenian genocide, a major taboo under both Turkish law and within the country’s political culture.

In January 2007, Hrant Dink, a Turkish journalist of Armenian descent, was murdered in front of his office, allegedly by an extreme nationalist. He was the editor of the bilingual weekly *Agos* and one of the most insightful commentators on Armenian-Turkish relations. In October 2005 Mr. Dink had been convicted under Article 301 and received a six-month suspended sentence. In the month preceding his murder, Dink had strongly criticized the French bill on the denial of the Armenian genocide:

We should not be a pawn for the irrational attitude between the two states. I am being sued in Turkey, because I said that there was genocide, which is my own belief. But I will go to France to protest against this madness and violate the new French law, if I see it necessary, and I will commit the crime to be prosecuted there.<sup>15</sup>

In fact, these “memory laws” have very little to do with the right to truth. The duty to memory requires full disclosure of official and historical archives and access to information on human rights violations without restriction. It does not require criminalizing what may be considered “untruths” unless these incite hatred or violence.

## Striking the Balance: Freedom of Expression and Hatred

Fundamental to the protection of human rights are the principles of the inherent dignity and equality of all human beings and the obligation of all Member States of the United Nations to take measures to promote “universal respect for, and observance of, human rights and fundamental freedoms for all, without distinc-

<sup>13</sup> For a French version of the report on the memory laws, see [http://www.assembleenationale.fr/13/dossiers/mi\\_questions\\_memorielles.asp](http://www.assembleenationale.fr/13/dossiers/mi_questions_memorielles.asp), accessed on Jan. 18, 2010.

<sup>14</sup> See <http://www.lph-asso.fr/actualites/50.html>, accessed on Jan. 18, 2010.

<sup>15</sup> See <http://www.democracynow.org/article.pl?sid=07/01/23/1530254>, accessed on Jan. 18, 2010.

tion as to race, sex, language or religion.”<sup>16</sup> There is no denying that certain forms of hateful expression can threaten the dignity of targeted individuals and create an environment in which the enjoyment of equality is not possible. Therefore reasonable restrictions on freedom of expression may be necessary or legitimate to prevent advocacy of hatred based on nationality, race, or religion that constitutes incitement to discrimination, hostility or violence.

Hate speech laws, unlike blanket memory laws, meet an essential human rights objective: they aim at protecting human rights including the right to equality, the right to mental and physical integrity, the right to be free from discrimination, and ultimately the right to life. Hate speech has too often been associated with ethnic cleansing, wars, and genocide. As a 2009 ARTICLE 19 publication argues, “freedom of expression and equality are foundational rights, whose realization is essential for the enjoyment and protection of all human rights. They are also mutually supporting and reinforcing human rights. It is only when coordinated and focused action is taken to promote both freedom of expression and equality that either can effectively be realized.”<sup>17</sup>

The Camden Principles on Freedom of Expression and Equality identify key principles on the positive relationships between respect for freedom of expression and the promotion of equality. They argue that:

... rules prohibiting hate speech should be narrowly defined to prevent any abuse of restrictions, including for reasons of political opportunism. Effective steps need to be taken to ensure that such rules are applied equitably for the benefit of all protected groups. In this regard, a case-by-case approach which takes into account context and patterns of vulnerability is important, especially on the part of judicial authorities. Such rules should be used only to protect individuals and groups.<sup>18</sup> They should not be invoked to protect particular beliefs, ideologies or religions.

An effective response to vilifying expression requires a sustained commitment on the part of governments to promote equality of opportunity, to protect and promote linguistic, ethnic, cultural and religious rights, and to implement public education program about tolerance and pluralism. All of these depend on respect in practice for the right to freedom of expression:

Problems of discrimination and negative stereotyping are deeply rooted socio-economic and political phenomena. Their eradication requires sustained and wide-ranging efforts, including in the areas of education, social dialogue and awareness-raising. Limiting debate about contentious issues, including religion, will not address the underlying social roots of the prejudice that undermines equality. In many contexts, restrictions on freedom of expression target disadvantaged groups, undermining rather than promoting equality. Instead of restrictions, open debate is essential to combating negative stereotypes of individuals and groups and exposing the harm created by prejudice.<sup>19</sup>

## Media Self-Regulation: Positive Action, not Censorship

In the current global and regional context, there is a serious escalation of intolerance and discrimination against Muslims in Western societies and against religious minorities all over the world, including in the Middle East. This national, regional and global context cannot be ignored when assessing and discussing the ethical obligations of journalists and media organizations.

Independent media organizations, media enterprises and media workers have a moral and social obligation

<sup>16</sup> Article 55(c) of the Charter of the United Nations.

<sup>17</sup> See ARTICLE 19, *Camden Principles on Freedom of Expression and Equality* (London, 2009), accessed on Oct. 29 2009 from <http://www.article19.org/pdfs/standards/the-camden-principles-on-freedom-of-expression-and-equality.pdf>.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

to make a positive contribution to the fight against racism, discrimination, xenophobia and intolerance. They must combat intolerance and ensure open public debate about matters of public concern. As far as public service broadcasting is concerned, they have a legal obligation to play this role.

Media organizations could design and deliver media training programs that promote a better understanding of issues related to racism and discrimination and foster a sense of the moral and social obligations of the media to promote tolerance. Likewise, media employers could take measures to ensure that their workforce is diverse and reasonably representative of society as a whole. Ensuring that effective ethical and self-regulatory codes of conduct prohibit the use of racist terms and prejudicial or derogatory stereotypes, as well as unnecessary references to race, religion and related attributes, would help work against intolerance. If media outlets reported factually and sensitively on acts of racism and discrimination, while ensuring that they are brought to the public's attention; if they ensured that reporting on specific communities promoted a better understanding of difference while reflecting the perspectives of those communities; these actions would give members of those communities a chance to be heard. These courses of action by the media would make great contributions to the fight against intolerance.<sup>20</sup>

<sup>20</sup> This call for action is based on the 2001 Joint Statement on Racism and Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.

Patrice G. Poutrus

## THE RIGHT TO ASYLUM: REFUGEE POLICIES IN THE FEDERAL REPUBLIC OF GERMANY, 1949–1975

The West German Basic Law, adopted by the Parliamentary Council in 1949 and valid in the Federal Republic until its 1993 amendment, stated that “persons persecuted on political grounds shall enjoy the right of asylum.” Impressive in its conciseness and simplicity, the constitutional provision granted protection from expulsion and extradition to foreign citizens and stateless persons seeking asylum in West Germany.<sup>1</sup> In its wording, the constitutional right to asylum owed much to the recent experience of National Socialism and was deliberately generous in its formulation.<sup>2</sup> The constitutional protection under the asylum law was two-fold in nature. First, the Federal Republic as a sovereign nation guaranteed protection to foreign citizens who were the targets of political persecution on their own territory. In addition, the Basic Law guaranteed victims of political persecution the subjective right to asylum within the Federal Republic of Germany. As a result, officially recognized victims of political persecution were granted similar rights to West German nationals in many areas, including labor, social and family law.<sup>3</sup> The unusually broad right to asylum under Section 16 of the Basic Law was unprecedented within both the German constitutional tradition and international politics and practices of the time. Indeed, from the 19<sup>th</sup> century until the end of the First World War, the German states, and later the German Reich, had more often been a departure point than place of sanctuary for political refugees in Europe.<sup>4</sup> Even under pressure from the wave of Eastern European refugees following the Russian Revolution, the new democratic constitution of the Weimar Republic contained no provisions for a secure right to asylum.<sup>5</sup>

1 Ursula Münch, *Asylpolitik in der Bundesrepublik Deutschland: Entwicklung und Alternativen*, 2nd ed. (Opladen, 1993): 22-35; see also Bertold Huber, *Ausländer- und Asylrecht* (Munich, 1983): 151.

2 Hans-Peter Schneider, “Das Asylrecht zwischen Generosität und Xenophobie: Zur Entstehung des Artikels 16 Absatz 2 Grundgesetz im Parlamentarischen Rat,” in *Jahrbuch für Antisemitismusforschung* 1 (1992): 217-236; see also Hans Kreuzberg, ed., *Grundrecht auf Asyl: Materialien zur Entstehungsgeschichte* (Cologne, 1984); and “Der Parlamentarische Rat und das Asylrecht in der Bundesrepublik Deutschland [documentation],” in *Asyl bei den Deutschen: Beiträge zu einem gefährdeten Grundrecht*, ed. Herbert Spaich (Reinbek, 1982): 18-37.

3 “Die Rechtsstellung nach der Anerkennung, Abschnitte Aufenthaltsrecht und Arbeiterlaubnis,” in *Handbuch des Asylrechts*, vol. 2, eds. Wolfgang Beitz and Michael Wollenschläger (Baden-Baden, 1981): 586-601 and 618-622.

4 Herbert Reiter, *Politisches Asyl im 19. Jahrhundert: Die deutschen politischen Flüchtlinge des Vormärz und der Revolution von 1848/49 in Europa und den USA* (Berlin, 1992).

5 Jochen Oltmer, “Flucht, Vertreibung und Asyl im 19. und 20. Jahrhundert,” in *Migration in der europäischen Geschichte seit dem späten Mittelalter*, ed. Klaus J. Bade (Osnabrück, 2002): 107-134.

## The 1953 Asylum Ordinance

Although the Basic Law was enacted in 1949, procedural rules governing the Federal Republic's asylum law did not take effect until the Asylum Ordinance of January 1953. The initiative for drawing up binding regulations on asylum came from the Allied occupation authorities in West Germany, who had given clear signals to the federal government that it would be required to live up to its obligations under the Basic Law.<sup>6</sup> In July 1950, for example, the Allied High Commission instructed the German federal government to take in all foreign refugees who requested asylum at the border.<sup>7</sup> At that point, however, the admission of foreign refugees was at best a secondary priority for the Federal Republic, which was still focused on the needs of German refugees and expellees.<sup>8</sup> Hoping to forestall the Allied demand for new asylum regulations, the West German authorities claimed that the 1938 Police Decree on Foreigners, which still remained in effect after the war, was sufficient to address the right to asylum. In any case, the West German authorities argued that admitting large numbers of foreign refugees was not feasible because of the difficulties surrounding the influx of German refugees.<sup>9</sup>

Despite its reluctance to divert resources to the issue of asylum, the ratification of the United Nations Convention Relating to the Status of Refugees (CRSR) in Geneva was a key foreign policy priority for West Germany. In their negotiations with the Allied High Commission, West German authorities therefore downplayed the constitutional right to asylum and instead emphasized that any future asylum ordinance would comply with the CRSR. The West German authorities acknowledged the CRSR would grant the United Nations High Commissioner for Refugees a voice in the Federal Republic's refugee and asylum policies.<sup>10</sup> However, West German officials assumed that doing so would not require the repeal of the Police Decree on Foreigners, which included no specific provisions on asylum. Instead, the Police Decree on Foreigners granted local authorities broad discretion in granting residency permits, which had the desirable effect of preserving the primacy of domestic interests. This primacy is also apparent in the first section of the decree, which stated that foreigners would only be granted residency if their personality and reason for staying in West Germany "deserved hospitality."<sup>11</sup> Under National Socialism, this formulation had justified the exclusion of foreigners on racial grounds. In the early 1950s, the category of "deserving" foreigners could in theory be used to limit residency to persons who were deemed acceptable to the Federal Republic's constitutional order, foreign policy interests, or demographic policies. In any case, the legal basis for asylum under the 1938 decree was diametrically opposed to the right as it was formulated under the Basic Law, which emphasized the subjective right to asylum on the basis of political persecution.

In the early 1950s, a new and more expansive asylum policy still seemed a distant prospect. As a result of the negotiations with the Allies, however, the new asylum ordinance of 1953 made reference to the CRSR, which granted refugee status to foreigners who were persecuted for reasons of race, religion, or political opinion.

6 Ulrich Herbert and Karin Hunn, "Beschäftigung, soziale Sicherung und soziale Integration von Ausländern," in Bundesministerium für Arbeit und Soziales, *Geschichte der Sozialpolitik in Deutschland seit 1945*, vol. 3 (Baden-Baden, 2005): 788-790.

7 Allied High Commission from July 14, 1950, "Admission and treatment of non-German refugees in the Federal Republic," Bundesarchiv Koblenz (BArch), B 106, No. 47453.

8 Letter from the Federal Ministry of the Interior to the Federal Chancellery, Liaison Office to the Allied High Commission, dated Sep. 21, 1950, regarding a memorandum to the Allied High Commission of July 14, 1950 concerning the admission and treatment of non-German refugees in the Federal Republic, BArch, B 106, No. 47453.

9 The Police Decree on Foreigners (*Ausländerpolizeiverordnung*, or APVO) was passed on Aug. 28, 1938. For a discussion of the West German government's attitude toward German refugees, see Klaus J. Bade, *Europa in Bewegung: Migration vom späten 18. Jahrhundert bis zur Gegenwart* (Munich, 2000): 284-305. See also the letter from the Liaison Office to the Allied High Commission to the Secretary-General Joseph E. Slater, dated Nov. 10, 1950, BArch, B 106, No. 47453.

10 DBMdl (BMI), MR Kleberg, annotation to discussion with the refugee department of the AHC at Petersberg on Sep. 27, 1951, BArch, B 106, No. 47453.

11 Bernhard Santel and Albrecht Weber, "Zwischen Ausländerpolitik und Einwanderungspolitik. Migrations- und Ausländerrecht in Deutschland," in *Migrationsreport 2000: Fakten, Analysen – Perspektiven*, eds. Klaus. Bade and Rainer Münz (Bonn, 2000): 111.

However, even under the CRSR, the definition of political asylum remained vague, and in any case, the right to political asylum applied only to events that had taken place before January 1, 1951. As a result, foreign asylum seekers in West Germany could follow one of two paths to asylum. Either the asylum seeker could invoke the CRSR, in which case the Federal Office for the Recognition of Foreign Refugees handled their application, or the asylum seeker could invoke the constitutional right to asylum, in which case the local immigration police would have sole discretion over the decision on residency.<sup>12</sup> The 1953 asylum ordinance also afforded a broad right to appeal, allowing two levels of administrative appeal and three tiers of appeal to the courts. The asylum procedure was originally intended to take no longer than two or three months. During the first years of the asylum ordinance, the number of asylum seekers totaled only two to three thousand refugees per year, with the majority coming from the Eastern bloc.<sup>13</sup> Despite the relatively low number of applicants, however, the asylum process often took between two and three years. As West German jurists of the early 1950s astutely observed, the concise language of the constitutional right to asylum under the Basic Law ultimately worked to the detriment of foreigners who sought asylum on the basis of political persecution, as the practical implementation of the law was both arbitrary and restrictive. Despite the expansive constitutional right to asylum, in the early years of its implementation the Asylum Ordinance of 1953 thus served to deter rather than guarantee the right to asylum.<sup>14</sup>

## The Political Transformation of the Right to Asylum in the Early Federal Republic

In 1959, the Federal Constitutional Court ruled that asylum for political refugees should not be guaranteed exclusively on the basis of the Geneva Refugee Convention.<sup>15</sup> This ruling sparked a legal conflict whose significance extended far beyond the debate on the liberality or restrictiveness of West German asylum policies and practices. Ultimately, the issue of asylum became a tool in a fundamental constitutional debate that centered on the issue of state sovereignty and the question of whether state interests and actions took precedence over constitutional norms.<sup>16</sup> In 1975, the Federal Administrative Court ruled that the right to asylum under Article 16 of the Basic Law was not limited to persons who had proven to be “deserving” of asylum. The ruling affirmed that the fundamental right to asylum inhered in the person, and that foreign citizenship could not place an asylum seeker at a disadvantage either during the asylum proceedings or once asylum had been granted.<sup>17</sup> The decision on asylum therefore had to be granted solely on the basis of political persecution, and not on the basis of state interest and state security.

More than 25 years after the constitutional right to asylum was established in West Germany, this high court decision finally ensured that the right to asylum was expansive in both intent and practice. In striking fashion, the ruling also demonstrated that foreign asylum seekers frequently sought legal recourse in West German courts, with varying success.<sup>18</sup> Moreover, as the early practice of asylum makes clear, the constitutional right

12 The Federal Office for the Recognition of Foreign Refugees was based in Valka, a former DP camp in Nuremberg, and in 1961 moved to the nearby town of Zirndorf. See also the letter from the Federal Office for the Recognition of Foreign Refugees to the Interior Ministry on May 16, 1953, “Admission and Accommodation of Further Offices in Future Refugee Camps,” BArch, B 106, No. 47472.

13 See Regine Heine, “Ein Grundrecht wird verwaltet,” in Amnesty International, ed., *Bewährungsprobe für ein Grundrecht* (Baden-Baden, 1978): 413; and Otto Kimminich, *Grundprobleme des Asylrechts* (Darmstadt, 1983): 111.

14 Heinrich Meyer, “Neues vom Asylrecht,” in *Monatsschrift für Deutsches Recht* (1953): 534–536.

15 BVerfGE 9, 174 (181) on Feb. 2, 1959; see also Münch, 53.

16 Kimminich, 99–106.

17 BVerwGE 49, 202 on 7.10.1975.

18 Erhard Schüller and Peter Wirtz, eds., *Rechtsprechung zur Ausländerpolizeiverordnung und zum Ausländergesetz* (Berlin, 1971).

to asylum was highly contested from its inception.<sup>19</sup> The Federal Administrative Court's 1975 ruling confirmed that the constitution took precedence over lesser regulations such as the Police Decree on Foreigners and the 1965 Aliens Act, as well as political considerations, and especially policies on foreigners. Because the liberal right to asylum clashed with West Germany's restrictive immigration policies, the ruling did not bring an end to the debate on political asylum in West Germany.<sup>20</sup> Nonetheless, the Federal Administrative Court's 1975 ruling was a significant break with prevailing refugee and asylum policies. As such, the ruling was not simply the outcome of a process of legal transformation, but also an expression of the transformations in political attitudes towards foreign refugees and asylum seekers since the 1950s.<sup>21</sup>

## The Hungarian Refugees and Asylum Policies

After the Asylum Ordinance of 1953, the revolutionary uprising in Hungary and the wave of refugees that followed its suppression by Soviet troops in the fall and winter of 1956 marked a new turning point. West German asylum policy increasingly moved from a straightforward rejection of foreign refugees to a pragmatism that was inflected by the vicissitudes of the Cold War.<sup>22</sup> Hungarian refugees were met with great sympathy in neighboring European countries, including the Federal Republic of Germany. News coverage and pictures of the Soviet military intervention in Hungary, a former German ally, raised awareness among the West German population and led to public displays of solidarity that reflected longstanding anxieties about the Soviet Union and a sense of belonging to the "democratic West."<sup>23</sup> Within the context of an ever-worsening confrontation between the Eastern and Western blocs in Europe, the West German public and parliament regarded the Hungarian refugees as allies in the fight against Communism.<sup>24</sup>

At the same time, West German federal ministries initially reacted to Austria's request for help in absorbing Hungarian refugees with considerable caution. The Interior Ministry in particular took pains to maintain its defensive stance in accepting foreign refugees. As it had in 1952, the Interior Ministry pointed to the burden of postwar expellees and ongoing internal immigration from the GDR. However, the steady flow of refugees from Hungary and the dramatically deteriorating humanitarian situation in Austrian refugee camps soon undermined the West German position.<sup>25</sup> The cautious attitude toward Hungarian refugees also encountered little understanding in the emotionally charged political atmosphere of West German society at the time. In late November 1956, the federal government decided to admit over 10,000 Hungarian refugees.<sup>26</sup> As a result, local immigration police authorities could no longer reject individual asylum appeals by Hungarian refugees, even in the case of refugees who had entered West Germany from the safe refuge of Austria. The legal basis for this new policy was justified with the argument that the Hungarian revolution was the result of the Communist power grab of 1948 and 1949 – in other words, before the deadline of January 1, 1951. As a result, the Hungarian

19 See Simone Wolken, *Das Grundrecht auf Asyl als Gegenstand der Innen- und Rechtspolitik in der Bundesrepublik Deutschland* (Frankfurt a.M., 1988): 37; and Simone Klausmeier, *Vom Asylbewerber zum "Scheinasyllant": Asylrecht und Asylpolitik in der Bundesrepublik Deutschland seit 1973* (Berlin, 1984): 3-16.

20 Klaus J. Bade, *Normalfall Migration: Deutschland im 20. und frühen 21. Jahrhundert* (Bonn, 2004).

21 Peter Nicolaus, "Der Flüchtlingsbegriff in der obergerichtlichen Rechtsprechung," in *Asylrecht und Asylpolitik – eine Bilanz des letzten Jahrzehnts*, ed. Gustav-Stresemann-Institut e.V. (Bonn, 1986): 79-100.

22 Sándor Csik, "Die Flüchtlingswelle nach dem Ungarn-Aufstand 1956 in die Bundesrepublik," in *Almanach II, 2003-2004*, ed. Deutsch-Ungarische Gesellschaft (Berlin, 2005): 207-246.

23 "Stille Demonstration gegen Terror": Überfüllte Kirchen in Budapest – Über 191000 Flüchtlinge," in *Die Welt*, Oct. 25, 1956; "Mehr Flüchtlinge aus Ungarn: Österreich gewährt jedem Hilfesuchenden Asyl," in *Frankfurter Rundschau*, Oct. 31, 1956.

24 Commemorative address given by the vice president of the German Parliament at the 168th meeting of the German Parliament, Bonn, on Nov. 8, 1956, in *Verhandlungen des Deutschen Bundestag, 2. Wahlperiode, Stenografische Bericht*, vol. 32, 9259 B.

25 Telegram sent by the German Embassy in Vienna on Nov. 16, 1956, "Admittance of Hungarian Refugees," BArch, B 106, No. 47465.

26 Federal Chancellery, IA2, Cabinet Matter on Nov. 22, 1956, "Aid for Hungarian Refugees," BArch, B 106, No. 47465, see. 161; cabinet meeting on Nov. 28, 1956, in *Die Kabinettsprotokolle der Bundesregierung 9 (1956)* (Munich, 1998): 746.

refugees officially fell under the provisions of the CRSR.<sup>27</sup>

The West German public gave the Hungarian refugees a warm welcome, as did advocacy associations for expellees and the Federal Ministry of Expellees, Refugees and War Victims, which took a special interest in these non-German immigrants.<sup>28</sup> In the West German parliament, the delegates who represented the expellee associations, which included delegates from all the government and opposition parties, now started speaking on behalf of all refugees, whether German or foreign citizens.<sup>29</sup> At the same time, the Ministry of Expellees began acting as a federal integration authority for expellees and “homeless foreigners.” The ministry provided a range of services, including language courses, integration aid, housing assistance, business loans, assistance reuniting families abroad, and hardship aid for refugees who were unable to work.<sup>30</sup> The extensive assistance offered to this new influx of refugees is remarkable in its own right and also highlights the considerable scope for social and political action on behalf of a favored group of foreign refugees.

Despite the claims of numerous historical commentators, the improved labor market conditions of the late 1950s cannot fully explain the comparatively smooth and untroubled integration of Hungarian refugees in West Germany.<sup>31</sup> Instead, the favorable reception and economic opportunities accorded to German refugees and expellees and foreign refugees stemmed in large part from an active federal policy to promote their integration into West German society.<sup>32</sup> Ten years after the Hungarian refugees were granted admission, the Ministry of the Interior decided not to deport Eastern European asylum seekers whose applications had been rejected, even though West Germany was in the grip of one of the first economic recessions of the postwar period. Here again, the political desirability of this class of foreign refugees played a significant role in policy decisions. Moreover, during the Cold War, West German officials in charge of immigration were loathe to insist on policies that would require repatriating refugees to Communist dictatorships.<sup>33</sup>

After its initial hostility to foreign refugees, the shift in West German asylum policy reflected the general liberalization of West German society that began in the late 1950s.<sup>34</sup> The early fear expressed by federal authorities that uncontrolled admission of foreign refugees could undermine domestic stability receded in the face of the imagined threat of communism. This made it possible to gradually bring West German asylum policies in line with the expansive constitutional rights outlined in the Basic Law. The 1968 invasion of Czechoslovakia and the 1973 coup d'état against Chile's leftist government elicited further impassioned declarations of solidarity for victims of political persecution by the West German public and the parliament.<sup>35</sup> Refugees from both

27 Arpad von Klimó, *Ungarn seit 1945* (Göttingen, 2006): 33–37. See also Federal Interior Ministry to State Interior Ministries, “Legal Status of Hungarian Refugees,” Dec. 20, 1956, BArch, B 106, No. 47476. See also Reinhardt Marx, “Vom Schutz vor Verfolgung zur Politik der Abschreckung: Zur Geschichte des Asylverfahrensrechtes in der Bundesrepublik Deutschland,” in *Kritische Justiz* 18:4 (1985): 380ff.

28 “Viel Hilfe für Ungarn: Die ersten Flüchtlinge in der Bundesrepublik – Letzte Augenzeugenberichte,” in *Stuttgarter Nachrichten*, Nov. 20, 1956. See also “Federal Ministry for Expellees to all State Refugee Bodies,” in *Care of Hungarian Refugees*, Nov. 29, 1956, BArch, B 106, No. 24545, 62f.

29 Parliamentary Committee for Expellees to Federal Government, Nov. 7, 1956, BArch, B 106, No. 47465.

30 Foreign Ministry to Federal Ministry for Expellees on Jan. 8, 1958, “Formation of a Special Hardship Fund for Foreign Refugees,” BArch, B 106, No. 25038, 3.

31 See Eugen Deterding, *Asyl: Anspruch und Wirklichkeit* (Berlin 1987): 9.

32 Michael Schwartz, “Zwangsheimat Deutschland’: Vertriebene und Kernbevölkerung zwischen Gesellschaftskonflikt und Integrationspolitik,” in *Nachkrieg in Deutschland*, ed. Klaus Naumann (Hamburg, 2001): 114–148.

33 Standing Interior Ministers’ Meeting, Aug. 26, 1966 in Hannover, BArch, B 106, No. 60299.

34 Ulrich Herbert, “Liberalisierung als Lernprozeß: Die Bundesrepublik in der deutschen Geschichte – eine Skizze,” in *Wandlungsprozesse in Westdeutschland: Belastung, Integration, Liberalisierung 1945–1980*, ed. Ulrich Herbert (Göttingen, 2002): 7–49.

35 Federal Office for the Recognition of Foreign Refugees to Federal Interior Ministry, “Admission of Czech Refugees in Refugee Camp for Foreigners in Zirndorf,” Nov. 18, 1968, BArch, B 106, Nr. 25086, 143f.; BMI to the Foreign Ministry, “Acceptance of politically persecuted persons from Chile in the federal republic of Germany,” Oct. 17, 1973, BArch, B 106, No. 69037.

nations were admitted to West Germany, where they applied for asylum under the liberalized procedures.<sup>36</sup> The admission of Hungarian and Czech refugees to West Germany also reflects the anti-Communist leanings of Cold War asylum policies in Europe. In contrast, the admission of Chilean refugees was based on the universal principle of providing asylum from dictatorships on both sides of the political spectrum. The political controversies of 1974 and 1975 that surrounded the admission of Chilean political refugees reflected the disintegration of the anti-totalitarian consensus of the 1950s and 1960s and exposed the fault lines in West Germany's liberalized asylum policies. The Chilean controversy ultimately rested on the issue of whether communists could also be granted asylum in West Germany.<sup>37</sup> The decision to admit Chilean refugees irrespective of their political leanings testifies to the domestic stability and transformed political culture of West Germany, and marks the high point of West German asylum policy.<sup>38</sup>

By the late 1960s, the official debate on asylum was shaped by arguments about its burdens and risks, although such rhetoric would not dominate public opinion on immigration in West Germany until the asylum debate of the 1980s.<sup>39</sup> However, in the 1960s these arguments were still not capable of casting doubt on the constitutional framework of West German asylum law. Despite considerable pressure from the executive branch, neither the Bundestag nor the Bundesrat was willing to amend asylum law to reflect such political misgivings.<sup>40</sup> The proposal to sharply restrict the right to asylum was also highly controversial among legal scholars, and ultimately deemed unconstitutional.<sup>41</sup> The federal courts also consistently opposed limitations on the admission of refugees and restrictions on asylum.<sup>42</sup> The decision to admit Chilean asylum seekers in 1974 and 1975 and the 1975 Federal Administrative Court decision were important milestones within a long and ongoing debate about asylum policies and practice.<sup>43</sup> What later appeared as the high point of West German asylum policy was always historically contingent and contested, a fact that was often overlooked by those who harked back to the "good old days" of liberal asylum during the 1980s.<sup>44</sup>

## 1975 and Beyond

The reform of West German asylum law in 1993 took place against a backdrop of domestic political tension equaled only by the 1956 reintroduction of compulsory military service and the 1968 decision to pass the emergency laws.<sup>45</sup> The extraordinary public interest in asylum from the late 1970s to the early 1990s had in part to do with the dramatic nature of the political events which spurred successive waves of asylum seekers to leave their homelands, and in part reflected the challenge posed by the asylum seekers to an increasingly

36 Jiri Prenes, "Das tschechoslowakische Exil 1968: Exilanten, Emigranten, Landleute: Diskussion über Begriffe," in *Unfreiwilliger Aufbruch: Migration und Revolution von der Französischen Revolution bis zum Prager Frühling*, ed. Dittmar Dahlmann (Essen, 2007): 187-196; on the issue of Chilean asylum seekers, see Irmtrud Wojak and Pedro Holz, "Chilenische Exilanten in der Bundesrepublik Deutschland, 1973-1989," in *Exile im 20. Jahrhundert*, eds. Claus-Dieter Krohn, Erwin Rotermund, Lutz Winckler and Wulf Koepke (Munich, 2000): 168-190.

37 Standing Interior Ministers' Meeting on Dec. 9, 1974 in Bonn, Point 14 "Acceptance of Chilean nationals in the Federal Republic of Germany," BArch, B 106, No. 39858.

38 Fred Balke, Norbert Kreuzkamp, Diane Nagel and Thomas Seiterich, eds., *Mit dem Kopf hier – mit dem Herzen in Chile: Zehn Jahre Diktatur – zehn Jahre Exil. Chilenen berichten* (Reinbek, 1983).

39 Martin Wengeler, *Topos und Diskurs: Begründung einer argumentationsanalytischen Methode und ihre Anwendung auf den Migrationsdiskurs, 1960-1985* (Tübingen, 2003): 442-514.

40 Herbert and Hunn, 808.

41 Otto Kimminich, *Asylrecht* (Berlin, 1968).

42 Schüler and Wirtz.

43 BVerwGE 49, 202 of Oct. 7, 1975, cited in Kimminich (1983), 103.

44 Heiko Kaufmann, ed., *Kein Asyl bei den Deutschen: Anschlag auf ein Grundrecht* (Reinbek, 1986).

45 Peter Graf Kielmansegg, *Nach der Katastrophe: Eine Geschichte des geteilten Deutschland* (Berlin, 2000): 319-332.

beleaguered West German welfare state.<sup>46</sup> However, even more importantly, the refugee issue was always tied to fundamental questions about the political and moral foundations of West German society. For advocates of a liberal asylum policy, generous refugee and asylum conditions were proof of West Germany's decisive rejection of its National Socialist and racist past. For their opponents, the liberal asylum policy undermined their deeply held belief that Germany was not a nation of immigrants, which was seen as central to Germany's historic, cultural and ethnic identity.<sup>47</sup>

Despite impressions to the contrary, the policies and practices of asylum in West Germany were always the subject of negotiation and debate even before the controversies surrounding the 1993 amendment to the Basic Law.<sup>48</sup> These ongoing debates reflected larger social and political developments both within and outside post-war West Germany, as well as fundamental beliefs about the rule of law, democracy, and constitutionality in West German political culture. However, the abiding conflict over the right to asylum also reflects the ongoing and profound tension between the sovereignty of the modern nation state and the development of universal human rights norms, which has historically been inseparable from the issue of state sovereignty.<sup>49</sup>

The conflicts that marked the policies and practices of political asylum after 1975 represent another new stage in the ongoing debate surrounding West German asylum law.<sup>50</sup> This debate culminated in the 1993 reforms popularly known as the “asylum compromise,” in which the right to asylum was significantly restricted through an amendment to the Basic Law.<sup>51</sup> For some advocates of a generous and unlimited right to asylum, the asylum compromise represented a defeat. However, given the vigorous and vocal calls for the abolition of the right to asylum, the fact that a compromise could be reached on this contentious issue is a testament to the vitality of democracy in the newly reunified Germany, and the fundamental importance of human rights in German political culture.<sup>52</sup> Moreover, even after the 1993 compromise, the debate on immigration and asylum continued to be shaped by the ongoing tension between national sovereignty and human rights. The persistence of this conflict suggests that it is likely to continue as a feature of contemporary social and political debate, even as it becomes increasingly negotiated on a European level.<sup>53</sup>

46 Johannes Müller, ed., *Flüchtlinge und Asyl: Politisch handeln aus christlicher Verantwortung* (Frankfurt a.M., 1990); Hans F. Zacher, “Sozialer Einschluß und Ausschluß im Zeichen von Nationalisierung und Internationalisierung,” in *Koordinaten deutscher Geschichte in der Epoche des Ost-West-Konflikts*, ed. Hans Günter Hockerts (Munich, 2004): 103-152.

47 Klaus J. Bade, *Ausländer – Aussiedler – Asyl: Eine Bestandsaufnahme* (Munich, 1994): 91-146.

48 Olaf Köppe, *MigrantInnen zwischen sozialem Rechtsstaat und nationalem Wettbewerbsstaat: Zur Bedeutung von Justiz und Politik bei der Vergabe von “bürgerlichen” und sozialen Rechten an MigrantInnen unter sich verändernden sozialen, politischen und ökonomischen Bedingungen*, Ph.D. Diss. (Duisburg, 2003).

49 Joan Fitzpatrick, “The Human Rights of Migrants,” in *Migration and International Legal Norms*, eds. Thomas Alexander Aleinikoff and Vincent Chetail (The Hague, 2003): 169-184.

50 Konrad H. Jarausch, “Verkannter Strukturwandel: Die Siebziger Jahre als Vorgeschichte der Probleme der Gegenwart,” in *Das Ende der Zuversicht? Die siebziger Jahre als Geschichte*, ed. Konrad H. Jarausch (Göttingen, 2008): 9-26.

51 Günter Renner, “Aktuelle und ungelöste Probleme des Asyl- und Flüchtlingsrechts,” in *Migrationsreport 2002: Fakten – Analysen – Perspektiven*, eds. Klaus J. Bade and Rainer Münz (Frankfurt a.M., 2002): 179-206.

52 Mathias Hong, *Asylgrundrecht und Refoulementverbot* (Baden-Baden, 2008).

53 Elisabeth Haun, *The Externalisation of Asylum Procedures: An Adequate EU Refugee Burden Sharing System?* (Frankfurt a.M., 2007).

Aidan McQuade

## FROM ABOLITION TO ERADICATION: SLAVERY IN THE TWENTY-FIRST CENTURY

The modern world, or more precisely, the relatively few privileged people who live in the modern world, accept the comforting delusion that slavery is a thing of the past. It is not. Despite all the laws passed by diverse nations across the globe, its prevalence remains an open secret of the globalizing political economy. Slavery is one of the key causes of poverty in the world, as well as a consequence of poverty; it is the most extreme manifestation of prejudice and racism, and it is the most powerful indicator of any government's seriousness, or lack of seriousness, about honoring the promises of its laws and cherishing all the children of its nation equally. In this paper I will sketch some of the principle challenges in the contemporary struggle for the eradication of slavery and outline the national and international responses necessary to effectively and sustainably reduce slavery in the world today.

### Understanding Contemporary Slavery

When Anti-Slavery International talks about slavery, it is not using a metaphor. Anti-Slavery International is careful to use the term as defined under international law. When we speak of slavery, therefore, we mean what the 1926 United Nations Slavery Convention describes as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised,” and what the 1930 International Labor Organization (ILO) Forced Labor Convention describes as “all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>1</sup> Even with that precise definition, the ILO estimates that there are a minimum of 12.3 million people in slavery today. Others estimate a figure closer to 27 million.<sup>2</sup> Furthermore, according to the 2005 ILO Global Report on Forced Labor, some 40 to 50 percent of forced laborers are children.

### Debt Bondage

Contemporary slavery has a number of particular manifestations that must be understood if there is to be any hope of its eradication. One of these aspects is the issue of debt bondage. The 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery specifically

<sup>1</sup> United Nations Slavery Convention, signed in Geneva on Sep. 25, 1926 (see esp. Article 1.1) accessed on Nov. 2, 2009 from <http://www2.ohchr.org/english/law/slavery.htm>; and the International Labor Organization Convention Concerning Forced or Compulsory Labour (No. 29), adopted June 28, 1930 (see esp. Article 2), accessed on Nov. 2, 2009 from <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>.

<sup>2</sup> Kevin Bales, *Disposable People: New Slavery in the Global Economy* (Berkeley, 2004).

identifies debt bondage as a slavery-like practice.<sup>3</sup> Debt bondage is a means of coercion whereby individuals take on a loan which they must pay off with their labor, which generally is compensated well below its market value. It is the most common form of slavery in the world today.

Debt bondage is endemic across South Asia despite being illegal in all of countries of the region. It is prevalent in agriculture, gem polishing, cigarette manufacturing, mines and quarries, the sex industry and garment making. For visitors to the region, debt bondage is most visible in the brick kilns at the outskirts of most South Asian towns and cities. These are predominantly staffed by people who have been enslaved by debt bondage. Those who are enslaved are chronically poor. Yet chronic poverty alone is not sufficient to render people into slavery. In Pakistan, for example, 74 percent of the population survives on less than 2 US dollars per day. Not all of these people are enslaved. The Indian anti-slavery organization Centre for Education and Communication notes that those who are enslaved in debt bondage are those “with nothing to sell but themselves.” The landless population is therefore particularly at risk.

#### **Example 1: The Descent into Bondage**

“After my sister got sick, we took her to the hospital, but the doctor said we had to pay more money, so my parents bonded me for 1,700 rupees (\$33). I was seven or eight years old... I only went home once a week. I slept in the factory with two or three other children. We prepared our food there and slept in the space between the machines. The owner provided the rice and cut it from our wages – he would deduct the price. We cooked the rice ourselves. We worked twelve hours a day with one hour for rest. If I made a mistake – if I cut the thread – he would beat me.”<sup>4</sup>

Another crucial factor is the issue of social or minority status. For example, in South Asia, 90 percent of slaves are from scheduled castes, especially the Dalit; in India, many slaves are from the Muslim minority population.<sup>5</sup> These minority groups are subject to widespread and institutionalized structures of prejudice, discrimination and social exclusion. The broad popular support for this discrimination ensures that slavery remains both informally sanctioned and socially tolerated. Even governments collude in tolerating the enslavement of the vulnerable by failing to enforce their own laws or protect their own citizens. For example, India criminalized bonded labor as a result of political pressure from the indigenous protest movement in 1976. Yet today India still has the largest number of bonded laborers in the world. This problem is exacerbated by the recent trend toward lax labor protection in the formal economy and the ongoing failure to address the issue of landlessness across the region.

## **Trafficking**

Trafficking refers to the movement of people from one place to another for the purpose of forced labor and sexual exploitation. This is the most common form of slavery in Europe today, and generally affects migrants. Migrants are vulnerable for a variety of reasons, including their lack of support networks, the tendency of

3 For a discussion of bonded labor, see Krishna Prasad Upadhyaya, *Poverty, Discrimination and Slavery: The Reality of Bonded Labour in India, Nepal and Pakistan* (London, 2008).

4 Human Rights Watch, *Small Change*, 15:2 (2003): 26.

5 The caste system makes distinctions between different sections of society by dividing communities into rigid social groups, determined by birth and occupation. In India the caste system has existed for more than 3000 years and eventually became formalized into four distinct classes. Beneath the four main castes is a fifth group, the Dalits, or so-called untouchables, known in Indian law as scheduled castes. They literally have no caste. Discriminatory, cruel, inhuman and degrading treatment has been justified on the basis of caste. More than 260 million people worldwide continue to suffer under what is often a hidden apartheid of segregation, exclusion, modern day slavery and other extreme forms of discrimination, exploitation and violence. See the Dalit Solidarity Network, accessed on Oct. 29, 2009 from [www.dsnuk.org](http://www.dsnuk.org).

some governments to tie immigration status to employment, and the often high level of prejudice against migrants in many countries of destination. This prejudice encourages toleration for this form of enslavement, similar to the way in which bonded labor is tolerated in South Asia.

Debt bondage is often used to coerce people who are trafficked for labor or sexual exploitation. For example, people from Eastern Europe, Africa and Southeast Asia may be promised a good job in Western Europe, and encouraged to take out a loan to pay for travel. But once they arrive, they often discover that the promised job does not exist. To pay off the loan, they are then expected to submit to forced labor. While media attention tends to focus on trafficking for sexual exploitation, trafficking also affects thousands of people who are tricked or coerced into forced domestic servitude or forced labor in agriculture, food processing, catering, construction, and cleaning services.

The ILO estimates that 2.4 million people are trafficked across the world each year in a trade they estimate as worth some 32 billion US dollars. According to ILO estimates, some 270,000 people are trafficked into industrialized countries in Europe and North America each year; this trade alone is worth 15.5 billion US dollars. In blunt business terms, human trafficking to industrialized countries comprises just over 10 percent of their trade volume, but is worth almost half the global value. Trafficking is also a significant feature of many forms of slavery, including debt bondage in South Asia (see Box 2).

#### **Example 2: Baura's Story**

Baura, from Uttar Pradesh in India, was 35 years old when he was released from bonded labor. The total population of his village is 400, and the entire population belongs to the Chamar caste, which is a scheduled caste.

Baura was a bonded laborer in a stone quarry leased by Navneet Singh, a prominent local landlord belonging to the higher-caste Rajput (Thakur) community. Baura was bonded for a period of 7 years. Prior to this, he was bonded to another quarry leased by Chandan Mishra, a Brahmin landlord. In other words, Baura had been sold from one employer to another. The amount which Baura owed Chandan Mishra was paid as a lump sum by Navneet Singh. Since Baura was unable to repay the bonded debt of 1,200 rupees (approximately \$25), he had to continue to work as a bonded laborer for Navneet Singh. Baura's daily wage was fixed at 20 rupees, but he never received it. He received no holidays and his labor rights were ignored.<sup>6</sup>

The case of Baura demonstrates that trafficking need not be transnational. Nor is it necessarily associated with immigration crime, as is often assumed by the media. Some people who are trafficked internationally enter their country of destination illegally. However, research conducted by Anti-Slavery International in 2006 demonstrated that the majority of people trafficked to the United Kingdom enter legally as European nationals or on a visitor's visa. Often the traffickers force the migrants to give up their legal entry status in order to use the threat of denunciation and deportation to increase their control. These threats are another form of coercion that exploits the human capacity for hope of a better life.

<sup>6</sup> Recorded in Uttar Pradesh, 2005. From the Centre for Education and Communication (CEC), *Analysing the Effectiveness of Eradication Programmes on Bonded Labour: Uttar Pradesh* (Delhi, 2005): 25.

## Worst Forms of Child Labor under ILO Convention 182

As described in ILO Convention 182, the worst forms of child labor are all forms of slavery and slavery-like practices, including trafficking, debt bondage and forced or compulsory labor. These forms of labor may be used in armed conflict, prostitution and pornography, and illegal activities such as the drug trade. The Convention also defines the worst forms of child labor as work that is likely to harm the health, safety or morals of the child; it is left to individual state governments to classify certain types of work as hazardous and unfitting for children. This determination should be made on the basis of relevant international standards and consultation with employer and worker groups. The Convention applies to all children under 18 years of age.

However, as we see from the example in Box 3, children can still be trafficked into debt bondage, even in democratic states.

### Example 3: Guddu's Story

Twelve-year-old Guddu is from the small village of Mehsaul in Bihar, India. Guddu's family is part of the Muslim Indian minority. Guddu's father and his brother work as assistants in a transport company. The family is landless.

Guddu began as an apprentice embroiderer in a Delhi workshop run by a man called Anwar Seth. Anwar brought Guddu to Delhi. He did not pay an advance to Guddu's parents, who may have assumed that Guddu would have better prospects as an apprentice than as the child of a landless family.

Guddu describes his work as an apprentice as filled with abuse and harassment. The apprentices were the youngest and most vulnerable workers. Guddu was beaten often, sometimes with sticks. If the children did not perform their tasks properly, they were burned with matchsticks.

Guddu's father heard about the mistreatment and came to bring Guddu home. However, Guddu's father was turned away by the owner, who said had not yet recovered his "investment."

After a year as an apprentice, Guddu discovered he supposedly owed money to Anwar Seth, even though he had never taken a loan or advance. Guddu works some 14 hours a day. Apart from the 50 rupees Guddu receives each week, ostensibly for expenses, Guddu is uncompensated for his labor. Guddu hopes he will one day work off his accumulated debt and recover his freedom.<sup>7</sup>

## Slavery as a Weapon of War

Slavery remains a brutal but neglected aspect of war. The conscription of children into armed forces is perhaps the most obvious form of this type of slavery, but it is not the only form. According to research conducted by the Darfur Consortium, civilians are systematically kidnapped for sexual slavery and forced labor by both the Sudanese Armed Forces and government-supported militias such as the Janjaweed and the Popular Defense Forces. One woman who managed to escape described how "they used us like their wives in the night and during the day time we worked all the time – preparing food, collecting firewood and fetching water from nearby. The men they abducted with us were used to look after their livestock. We worked all day, all week with no rest. I believe those who I have left behind are still doing the same work."<sup>8</sup>

The chaos and poverty of war and its aftermath also allows other forms of enslavement to flourish which are not part of systematic military policy. These forms of enslavement are fostered by the destruction of liveli-

<sup>7</sup> Recorded in Delhi, 2007. Centre for Education and Communication (CEC), 36.

<sup>8</sup> Darfur Consortium, *Darfur Abductions: Sexual Slavery and Forced Labour* (London, 2008).

hoods, impoverishment, social disruption, and lawlessness which result from widespread violence. Under these conditions, ordinary people become vulnerable to exploitation for profit. The Balkan conflict of the 1990s facilitated widespread exploitation and trafficking, particularly of women and girls who were forced into sexual exploitation. These atrocities are not unique. The Angolan conflict also fostered this form of trafficking and exploitation, as does the conflict in Uganda today.

## Descent-Based Slavery

Most people associate the word “slavery” with traditional forms of chattel or ownership slavery. This form of slavery also exists today, most notably in West Africa, where children are born into slavery by inheriting their status from their mother. In this way, slavery is passed down through the generations. Anti-Slavery International describes this form of slavery as *descent-based slavery*. People enslaved in this way are attached to a master’s family; they are their master’s property and wholly under their master’s control, forced to perform unpaid domestic and agricultural work.

One example of this form of decent-based slavery is the case of Hadijatou Mani. Mani was born into an established slave class. Like all slaves in Niger, her slave status was inherited. She was forced to work without pay, and was also used as a sexual slave by her master. In October 2008, the Community Court of Justice of the Economic Community of West African States (ECOWAS) found the Republic of Niger guilty of failing to protect twenty-four-year-old Mani, a citizen of Niger, from this form of slavery. After the verdict, Hadijatou Mani said, “We are all equal and deserve to be treated the same. I hope that everybody in slavery today can find their freedom. No woman should suffer the way I did.”<sup>9</sup> Yet six years after Niger formally criminalized slavery, at least 43,000 people remained enslaved across the country. Although largely ignored by the rest of the world, decent-based slavery continues to affect thousands of people across West Africa today.

## The Evolution of Slavery in History

The ILO has established six indicators to identify forced labor. According to the ILO criteria, forced labor may exist under conditions of threat or actual *physical harm* to the worker; *restriction of movement* and confinement to the workplace or to a limited area; *debt bondage*, including when the employer provides food and lodging at such inflated prices that the worker cannot escape the debt; *withholding of wages* or excessive wage reductions that violate prior agreements; *retention of passports* and identity documents to prevent escape, or to prevent the worker from confirming his or her identity or status; and *threat of denunciation* to the authorities when the worker has an irregular immigration status.

At Anti-Slavery International, we argue that any one of these indicators is suggestive of forced labor. When two or more indicators exist, we consider the worker a forced laborer. The ability to identify working conditions as forced labor is crucial, particularly because the history of slavery shows that sustained abolition campaigns often cause slavery to mutate in form. As new slavery practices emerge, we need to be able to assess them against a consistent standard.

The mutability and durability of slavery as an institution is amply demonstrated by the history of its development across the centuries. In the late 18<sup>th</sup> century, British abolitionists believed that ending the Atlantic slave trade would spell the end of slavery as an institution. This proved a mistaken hope, although the abolition campaigns may have improved the lives of people in slavery because slave holders found it more difficult to replace slaves they had tortured and worked to death. However, the campaign to end the Atlantic slave trade

<sup>9</sup> The verdict is reprinted in [http://www.unhcr.org/refworld/publisher,ECOWAS\\_CJ,,,496b41fa2,0.html](http://www.unhcr.org/refworld/publisher,ECOWAS_CJ,,,496b41fa2,0.html), accessed Nov. 3, 2009.

brought the horrors of slavery to public attention, and so paved the way for abolitionist laws. In August 1834, slavery was formally abolished in the British Empire. Although people could be no longer bought, sold or owned in the British colonies, slaves on plantations could be converted to “apprentices” and forced to continue to work. This practice was finally abolished in 1840.

To fill the need for cheap labor in the West Indies, “coolie” laborers were then imported from India on five-year contracts. When the British and Foreign Anti-Slavery Society (the former name of Anti-Slavery International) investigated the situation in Guyana, they discovered that laborers were often beaten and forced to work against their will under extremely harsh conditions, which led to high mortality rates. The situation in Guyana was repeated across the Caribbean. The British also recruited Chinese laborers to work in the gold mines of South Africa; these laborers also suffered long hours and virtual imprisonment.

Britain was not alone in these practices. In the early 20<sup>th</sup> century, King Leopold II of Belgium allowed a genocidal system of forced labor to flourish in the Congo under the guise of “civilizing colonialism,” a practice that was finally exposed by an initiative headed by the British journalist E. D. Morel and the Irish patriot Roger Casement. In 1911, Casement also exposed a similar form of forced labor in the Amazon. Despite the formal abolition of slavery and widespread public revulsion for the practice, many states continued to recreate the practice under a different name to further their economic interests. Even Britain, which had played an important role in ending the Atlantic slave trade, remained party to these deceptive and hypocritical practices.

Similar hypocrisies continue. As noted above, bonded labor is still tolerated in South Asia despite legislation prohibiting this form of labor across the region. In fact, new forms of bondage are emerging that appear to adhere to the letter of the law while continuing to facilitate forced labor and exploitation. In India, for example, young women and girls are recruited under the Sumangali scheme to work for three years in spinning mills. The parents are told they will be paid money that can be used as a dowry at the end of the three-year term. The young women and girls live and work under deplorable conditions. At the end of their contract period, their employers often find reasons to refuse payment.

Elsewhere in the industrialized world, the practice of linking work visas to specific jobs often facilitates the trafficking of forced labor. For example, a migrant worker may enter a European state to work in a restaurant. Upon entry, she may find herself required to work long hours for less than minimum wage. If the worker protests the exploitive conditions, she is likely to be dismissed from her job without recourse. Because her visa is tied to her work, she will then be deported. In this scenario, there are two indicators for forced labor: excessive deduction of wages and coercion through threat of denunciation and deportation. This form of forced labor is facilitated by contemporary immigration legislation.

## Causes of Slavery

Given the mutability and durability of slavery throughout history, we must understand the underlying causes of slavery in order to eradicate it. In this section, I consider a number of key points raised by the case studies of contemporary slavery presented above.

As I have already alluded, many people today believe that slavery is a thing of the past. In 2006, Anti-Slavery International published research into trafficking for forced labor in the United Kingdom. In the course of our research, we encountered 27 men and women who had not been identified as forced laborers during their interactions with state and professional institutions. More surprisingly, the forced laborers themselves sometimes fail to recognize the nature of their predicament. For example, in 2006 the Migrants’ Rights Centre in Ireland noted that trafficked people often perceive themselves as migrant workers, not forced laborers. This

invisibility of forced labor is in part due to the lack of familiarity with the legal and practical definition of forced labor. However, if the problem cannot be identified, it cannot be eradicated.

My case studies also demonstrate how slavery emerges at the juncture of poverty, prejudice and governmental apathy and inaction. Clearly, slavery is as much a social issue as an economic or political one. Individuals and groups who are the target of social prejudice are especially vulnerable to exploitation and slavery. These groups include migrant workers in Western Europe and North America and people from scheduled castes in South Asia. However, the abolition movement has historically neglected this social dimension, which in part explains why slavery continues to persist despite political and social advances such as the promotion of democracy and the reduction of poverty.

Over the past two centuries, the anti-slavery movement has tended to emphasize law and policy reforms, including the legal prohibition of slavery. While these developments are a necessary first step and have undeniably advanced the abolitionist cause, they are not sufficient to end slavery. As the ILO studies have demonstrated, forced labor remains a widespread problem, even today. In societies where social prejudice is a persistent problem, government authorities are also likely to be affected by these prejudices. As a result, government authorities may delay or hinder the implementation of anti-slavery laws, and fail to initiate measures to systematically tackle abuses. India, for example, still has millions of bonded laborers even though bonded labor was officially banned in 1976.

In Europe, many states have ratified the 2005 Convention on Action against Trafficking on Human Beings, which guarantees minimum standards of protection for people who have been freed from trafficking. However, a 2008 European Commission report found that many states were failing to adequately implement the action plan. In the United Kingdom, there are worrying reports that trafficked people continue to be threatened with deportation. Once returned to their countries of origin, these men and women not only face the same horrors that originally caused them to flee their homelands, but are particularly vulnerable to re-trafficking and to added social prejudice as a result of their status as former forced laborers.

The fundamental social dimension of slavery also has implications for the modern development agenda. Development and slavery have always been closely linked. The economies of Britain and other European slave trading nations were built on the profits of the Atlantic slave trade. By the same token, the countries and communities that have historically supplied trafficked labor have been further harmed by the economic and social effects of this trade. For example, the social and economic divides that erupted in the Angolan civil war can be traced back to the consequences of the Atlantic slave trade.

Anti-Slavery International's experience in the struggle against contemporary slavery demonstrates that the majority of slave laborers today come from the most impoverished and disadvantaged sections of society. Slavery often exists in poor communities; sometimes poor people enslave even poorer people, justifying this practice with prejudice and economic necessity. Once caught in a contemporary form of slavery, people are unlikely to be able to break out of the cycle of poverty and forced labor.

Yet efforts to reduce poverty remain largely blind to the problem of slavery. It is entirely possible that even if we achieve the Millennium Development Goals, slaves will not benefit from these advances. Indeed, humanitarian and development efforts that fail to take into account the dynamics of power and prejudice in poor communities can exacerbate the problem of slave labor. For example, during the West African famine of 2005, the Niger anti-slavery and development organization Timidria discovered that some food-for-work programs were employing slaves who had been sent there by their masters. When the enslaved workers returned home, their masters confiscated their ration cards and collected the food for their own use. In other parts of West

Africa, former slaves are excluded from access to community water resources. Children of migrant laborers are often excluded from local schools.

Two further themes are worth noting. First, many of the millions of people in slavery today might have escaped this fate had they been able to meet their basic subsistence needs. People are often trapped in slavery for comparatively small amounts of money. For example, research into bonded agricultural labor in India found that nearly 70 percent of laborers were bonded for an initial loan of Rs. 700 or less – the equivalent of 13 US dollars or less.<sup>10</sup> Second, prejudice and social exclusion play an important role in the poverty that leads to slavery. These facts raise another important issue. Although anti-poverty programs that are blind to the problem of slavery have a limited impact on reducing forced labor, anti-slavery programs can have a major impact on reducing slavery as well as reducing poverty. Enabling poor people to work for themselves and their families instead of enriching a local slaveholder could therefore greatly reduce poverty and have an immense benefit to society as a whole.

At Anti-Slavery International, we argue that anti-poverty programs must explicitly work to reduce the social and economic underpinnings of slavery and prejudice. This approach has parallels to the efforts of the 1980s and 1990s to take into account issues of gender in anti-poverty work, which led to qualitative improvements in poverty reduction programs. Mainstreaming the anti-slavery agenda in poverty reduction work would also benefit these programs as a whole and thus improve the lives of forced laborers and their wider communities.

## From Abolition to Eradication

It is possible to eradicate slavery. However, eradicating slavery will require the combined efforts of government, business and civil society, animated by clear political will and a proper understanding of the complexity of the problem. To end slavery, we will also need to make the issue of slavery central to the larger issue of the political economy. In what follows, I outline the actions that are required by each of the major actors if we are to succeed in abolishing slavery.

As Steve Biko once noted, the first step in the struggle for justice is to “put our own house in order.”<sup>11</sup> This exhortation also applies to the struggle against slavery. All countries in the world are affected by slavery to some degree. We should judge the political leadership in these countries not by the existence of slavery, but by their active efforts to eradicate it. In counties and regions where slavery is deeply ingrained in the political economy, systematic and sustained efforts are necessary to address slavery. One key goal must be achieving universal primary education, which would immediately reduce the worst forms of child labor, reduce the vulnerability of children and other disadvantaged groups to future enslavement, and benefit overall economic and social development.

In South Asia, for example, governments must establish permanent national mechanisms to monitor and coordinate the action of the multiple stakeholders involved in the eradication of bonded labor, which include national and state organizations, trade unions, businesses, civic organizations, bonded-labor organizations, and international donors and agencies, particularly the ILO. Governments must also train law enforcement and labor officials to identify bonded laborers and implement bonded-labor laws and standards. Former slaves also need access to rehabilitation programs that will help them achieve a sustainable livelihood. In South Asia in particular, land reforms will be crucial to the ongoing effort to address bonded labor.

However, slavery is not solely an economic issue. Governments must also ensure that all citizens receive equal

<sup>10</sup> Gandhi Peace Foundation and the National Labour Institute, *National Survey of the Incidence of Bonded Labour* (New Delhi, 1979): 41 and 43.

<sup>11</sup> Steven Biko, *I Write What I Like* (Chicago, 2002).

treatment in the economic, social and political spheres. Any government that tolerates caste systems and other forms of social discrimination is betraying its own citizens. Political leaders in wealthy nations must also ensure that the rights of forced and slave laborers are enforced. In Europe, the Council of Europe Convention on Action against Trafficking in Human Beings outlined minimum standards for the treatment of victims of trafficking. Drawing upon the experiences of the past few years, the signatory states must ascertain how best to identify and protect the victims of slave labor, and bring the traffickers to justice. In other words, European states must ensure that the rights of victims are protected while punishing the perpetrators, and ensure that prejudice does not lead the police and judiciary to confuse the two. A systematic and consistent anti-trafficking program would increase Europe's moral authority and ability to move the problem of trafficking to the foreground in development, trade, and foreign policy.

## Anti-Slavery in International Affairs

The issue of slavery is notably absent from foreign, aid and trade policies across the globe. Yet given its potential impact on poverty reduction and human dignity, the eradication of slavery should be central to our agenda. For “reasons of state,” even governments that profess concern for peace, human rights and democratization tend to ignore the issue of slavery in their dealings with states where slavery is prevalent. Yet all states are harmed by the persistence of slavery across the world. The anti-slavery agenda is not only morally necessary; it is a matter of self-interest for all countries and the international community. According to some economists, states that tolerate slavery have an unfair advantage in the competitive global economy. Moreover, countries that allow slavery to persist from generation to generation exacerbate local poverty, which damages their domestic market, their economic growth, and their ability to engage in international trade.

Enslaved populations are also more likely to have a limited stake in society, and are less likely to have the means or desire to limit ecological harm. The cheap labor of slaves also serves as a disincentive to maximize productivity through ecological conservation. The existence of slavery also promotes social unrest. Martin Luther King, Jr. called violence the cry of the voiceless. In Nepal, research by Anti-Slavery International suggests that the failure to address the problem of bonded labor has promoted the Maoist insurgency. India's current failure to address bonded labor raises the specter of similar violence. If the rest of the world continues to watch idly while further bloodshed unfolds, global peace and economic stability is likely to suffer as a result. Anti-slavery must therefore become a central element within our development programs, foreign policies, and trade agendas. National governments and international donors must recognize that universal education for all children in all nations is crucial to ending the cycle of exploitation and forced labor. Our efforts must also target the poorest and the most exploited populations, and ensure that interventions advance the cause of justice and equality rather than reinforcing existing patterns of social exclusion. The governments of South Asia, where slavery is a massive problem, need assistance to help liberate and rehabilitate bonded slaves and end the practice of slavery.

The international community must take steps to address slavery as a weapon of war. The rule of law can only flourish under a lasting peace, so ending war and violent conflict is key to ending slavery. In some cases this may require intervention by outside actors to act as mediators between warring factions or to supply peacekeepers. The example of Darfur shows that peacekeeping efforts are crucial to reducing human rights abuses and slavery. However, these peacekeeping missions still lack the training, investigative capacity, staffing and mandates needed to combat such abuses. To end human rights abuses and enforce the rule of law, wealthy nations must bear their share of the burden.

## Business

Businesses are the most obvious potential beneficiaries of forced labor because forced labor can reduce their production costs. Even when Western business executives express horror at the thought of slave labor, their aggressive cost reduction measures may serve to promote it. When Western companies drive down the prices paid to their suppliers, the suppliers may be tempted to reduce costs by resorting to forced or child labor. For example, the pressure on cocoa prices has helped lead West African cocoa producers to use child labor. In the Cote d'Ivoire, trafficked child laborers are forced to work on cocoa plantations. The abuse of children's rights and labor rights can therefore be an unintended consequence of economic decisions reached by corporations higher on the supply chain. In addition to the horrific human consequences of this failure to consider the issue of forced labor, the reputations of corporations may suffer as a result. This risk can outweigh any benefits accrued from aggressive cost reduction strategies that are blind to human rights and labor standards.

Similar to our position on state governments, Anti-Slavery International argues that firms should be judged less on the existence of slavery-like practices in their supply chains, and more on their efforts to reduce forced labor. Supply-chain audits can help identify risks, but are not sufficient to end the practice of forced labor. A more promising approach is Cadbury's Cocoa Partnership, whose international board has also given a seat to Anti-Slavery International. In this program, Cadbury will invest roughly 1 percent of its profits over 10 years, channeled through non-governmental organizations such as CARE, with the goal of reducing child labor in cocoa production and improving labor conditions in cocoa-producing regions.

At Anti-Slavery International, we believe that all businesses have a moral obligation to ensure that the Universal Declaration of Human Rights is respected across their entire business operation, including their supply chains. However, we cannot rely simply on the good intentions of individual executives and ethical companies. Many corporations, particularly international corporations and corporations that benefit from home government support, are also national institutions that express the expectations of their consumers and other stakeholders. This fact should be taken into account in trade policies, and governments should provide support only to companies that meet minimum ethical standards. Furthermore, national and European legislation should be enacted to ensure that business executives and companies can be held legally accountable for extra-territorial breaches of international law, particularly relating to forced and child labor. National and international businesses that operate in South Asia must pay particular attention to issues of human rights, labor standards, and anti-slavery laws. They should also adopt the Ambedkar Principles, a set of guidelines to address the problem of caste discrimination in the private sector.

## Trade Unions

Trade unions are uniquely positioned to reduce the risk of slave labor today, as workers who can act collectively and who have access to advice on their rights and recourses in the workplace are less vulnerable to exploitation. To optimize this potential, trade unions must adopt organizing methods that are adapted to our globalizing political economy. As already noted, the most vulnerable populations tend to be workers in the informal economy and migrant workers, who have been bypassed by traditional union organizing efforts and practices. In some parts of the world, the flexibility of the union movement is hampered by rigid approaches to industrial organization. In some states, including in South Asia, social prejudice further hinders the ability of unions to support vulnerable migrant workers and workers in the informal economy. However much we may yearn for the halcyon dates of the immediate postwar era, it is likely that the age of mass unionization is a thing of the past. The most vital struggles in the coming decades will be efforts to protect the rights of ordi-

nary people from ancient forms of abuse, including slavery, which are being facilitated by developments in our globalizing political economy. As the lesson of history has shown, slavery tends to mutate in form to stay ahead of the letter of the law. This mutability helps slavery elude the institutions that wish to eradicate it. For this reason, trade unions must be willing to be flexible in organizing workers and defending workers' rights.

## Civil Society

Civil society has a crucial role to play in the struggle to end slavery. This is particularly true for organizations working on behalf of poverty reduction. Civic organizations must pressure states to prioritize the eradication of slavery. These organizations can also play an important role in providing professional expertise to programs that address the root causes and the consequences of slavery. Although it is often overlooked, community development is a crucial skill for addressing the social causes of slavery.

Over the years, development organizations have pioneered innovative and effective approaches towards poverty reduction. Directing these efforts towards populations at risk for slavery practices could have an immense and positive effect. Donors and program developers could encourage potential aid recipients to address the issues of discrimination and slavery in the local communities. While no project or program can do everything, foregrounding the issue of slavery will encourage programs to include anti-slavery measures in their planning and implementation.

## Conclusion

Legal efforts will not suffice to eradicate slavery. Many countries have enacted anti-slavery legislation, but failed to adequately implement these laws. Because slavery exists at the juncture between poverty, discrimination and governmental apathy, it is a highly vested social issue. It is estimated that between five and six million slaveholders across the world are currently exploiting the forced labor of between 12 and 27 million slaves. When governments fail to enforce their anti-slavery laws, they make a mockery of the concept of the rule of law, and concretely help the slaveholders to continue to profit from this trade.

However, slavery will not be eliminated solely by effective poverty reduction. Slaveholders can be found among both the poor and the wealthy. In Brazil, wealthy ranchers exploit forced labor. In the Cote d'Ivoire, poor cocoa farmers use trafficked child labor. Thus, slavery is an issue that bridges the economic divide. Any comprehensive effort to eradicate slavery must therefore address the many political, economic and social dimensions of the slave labor system. This effort will require immense political will, which can only come about as a result of public demands for leadership. Our complacency on the issue of slavery is therefore an indictment of us all.

Günter Saathoff

## COMPENSATION FOR NAZI SLAVE LABOR: THE CONTEXT OF HUMAN RIGHTS

The initial legal mandate of the Foundation “Remembrance, Responsibility and Future” was administering compensation programs, particularly for former forced and slave laborers under the National Socialist regime. The program, which ran from 2001 to 2007, compensated the people deported mainly to Germany for the “war economy” between 1939 and 1945, who had been subjected to forced labor for public authorities as well as for private companies, at times under prison-like conditions. However, this essay does not examine the compensation process or its complex prehistory in detail, although I will briefly touch on this process in my conclusion.<sup>1</sup> Rather, the aim of this essay is to trace the political and legal context of the last century in order to elucidate the *significance* to the human rights debate of the payments made to individuals as compensation for state-organized injustice. In other words, my analysis is a case study of the significance of compensation to addressing injustices carried out by the state against private individuals, particularly citizens of other countries. In addition, I analyze the political and legal framework established for this process.

I focus on the fundamental question of forced and slave labor in the Nazi regime from the perspective of criminal and civil law and within the context of the debate on human rights. Here, on the occasion of our conference at the historic site of the Nuremberg Trials of 1945–1946, I would like to examine the significance of the fundamental assumptions that shaped the Nuremberg Trials and especially the Major War Criminals trials. Importantly, the trials of 1945 and 1946 did not take place under ordinary jurisdiction, but instead already applied the principles which were later established by regulations such as Article 4 of the European Human Rights Convention (EHRC) and the Universal Declaration of Human Rights (UDHR), which prohibit forced labor and slavery. These early trials were conducted on an ad hoc basis by the victorious powers, and by a military tribunal that tried criminal acts committed by the defeated state.

The victorious powers defined forced labor under the Nazi regime as a form of “slave labor” and a crime against humanity, and also established penalties for the crime. The codification of the prohibition against slavery in the EHRC in 1950, as well the incorporation of this prohibition under slightly reworded terms in the UDHR, were a direct political consequence of decisions made by the victorious powers in the Nuremberg Trials.

The Nuremberg trials convicted some of the main defendants, who represented the Nazi state and party apparatus, of crimes against humanity for their involvement in the deportation and forced labor of millions of

<sup>1</sup> See Michael Jansen and Günter Saathoff, eds., “A Mutual Responsibility and a Moral Obligation” – *The Final Report on Germany’s Compensation Programs for Forced Labor and other Personal Injuries* (New York, 2009).

persons. Fritz Sauckel, who headed the forced labor program from 1942 to the end of the war, was sentenced to death. Albert Speer, who was Hitler's minister of armaments and administered the use of forced labor in the concentration camps for war production, was sentenced to 20 years.

Significantly, the Nuremberg military tribunal charged no industrialists as major war criminals, even though large German firms had used many thousands of forced laborers, who often lived and worked under extremely poor conditions. However, some industrialists were charged in the subsequent Nuremberg trials, most famously the directors of the Flick, Krupp and I. G. Farben companies, although debate persists about the political motivations of these trials. None of the industrialists convicted in the subsequent Nuremberg Trials served their full sentences, but were released from prison in the 1951 amnesty granted by the US High Commissioner. The property and financial holdings confiscated from Krupp as part of the sentence were also returned.

What is also remarkable is that the Nuremberg Trials did not provide the individual victims of forced labor with legal standing to obtain compensation from the perpetrators of the Nazi state and private firms. The Nuremberg Trials were purely criminal trials, and the victims only appeared as witnesses for the prosecution. As such, the Nuremberg Trials did not enable the victims to lodge a claim for compensation against the perpetrators. This fact gives rise to a number of basic legal and political questions. What are the legal and material consequences of a conviction for slave or forced labor? What is the relationship between international law and national law in such cases? How do these international legal norms interact with other norms, such as state immunity? What courts are responsible for handling these claims? I will only be able to consider a few of these questions in depth.

First, I want to consider another historical example. Nuremberg was not the first time that crimes committed by the state during wartime became a subject of international law. For example, Article 3 of the Hague Convention of 1907 stipulates a claim against the state, which was not standard practice for violations of international law at the time. However, the Hague Convention did not stipulate how to assess the extent of the damages, or who would receive compensation from the state. Moreover, the Hague Convention made no provision for compensation by the state when it was found to have wronged individual persons, and its signatory states assumed that compensation could be paid only by one state to another state (which is called "reparation"). This provision for claims against the state was later incorporated into Article 91 of the First Additional Protocol of the 1949 Geneva Convention, titled "Responsibility," which stipulates that states that violate the provisions of the Convention are liable for all acts they commit.

In fact, as a result of (or in spite of) Nuremberg and later international legal reforms, international law *in principle* still allows prisoners of war to be used for forced labor. Moreover, there is no international statutory law that gives individual persons the right to lodge a claim for compensation against the perpetrator state for their slave or forced labor. These rights, which are often defined under the rubric of reparations law, exist solely between states, with the fictive assumption that each state will defend the rights of its citizens. Whether the state in fact defends the rights of its citizens is another matter entirely.

This legal position corresponds closely to the principle of national jurisdiction and state immunity, which holds that citizens of one state may not seek redress against another in their own state's courts. Both the issues of subjective right and state immunity are immensely important to present-day Germany, since cases concerning Nazi crimes are still before courts in Italy, Greece, and even the European Court of Human Rights.

The Hague Convention and Nuremberg Tribunal also failed to resolve another problem: under international law, what claims could a victim of slave or forced labor lodge against a civilian perpetrator, such as an industrial firm or farm that clearly did not belong to the state apparatus? This question was defined not at an

international level, but by the highest German courts in complaints that former forced laborers filed against civilian operations for decades after the war. The German courts construed these companies as institutions that had taken their orders from the Nazi state. As such, they were regarded as “agencies of the Reich” acting on behalf of the Nazi state, which had (allegedly) dictated their use of forced labor for the war economy. By this line of argumentation, the companies fell under the protection of what might be called an “extended state immunity,” and the courts defined claims lodged against German companies as part of the “protected sphere of state activity.” They therefore declared the companies “immune” to legal claims lodged abroad under reparations law. With only a few exceptions, the majority of German courts followed this line of reasoning.

However, this line of argumentation was not yet an airtight legal argument for Germany and German firms to counter the compensation claims of former forced laborers. The victorious powers and other third-party states could have lodged a claim on behalf of their citizens from “state to state,” as the Soviet Union did until 1953 in order to enable Soviet citizens to sue the German Democratic Republic for reparations.

A subsequent legal barrier eliminated this possibility. In the 1953 London Agreement on German External Debts, Germany succeeded in establishing that it would assume repayment obligations to the 33 Western states that participated in the war (with the exclusion of the Eastern Bloc states) only for debts incurred before the start of the Second World War. Germany also initially succeeded in defining the concept and scope of these repayment claims. This definition excluded the possibility of compensation for individuals (and thus former forced laborers) under the debt repayment scheme.

The political problem for Germany in the 1950s thus remained essentially the same: the West German government realized that it would be unable to establish normal relations with its neighbors, let alone with Israel, without some material compensation for victims of the Nazi regime, who at the time were mainly understood to be former concentration camp inmates. For this reason, Germany developed a “soft” political and legal concept that recognized certain forms of injustice, the so-called “specific National Socialist injustice.” At the same time, this form of injustice was distinguished from war crimes as defined under the Hague Convention of 1907 and did not fall under the 1953 London Agreement on German External Debts. According to the German interpretation, this “specific” form of National Socialist injustice would and should be compensated without violating the London debt agreement, which would have triggered the assertion of individual compensation claims.

This interpretation resonated in the initial round of negotiations for the “Israel Agreement” and the corresponding agreement reached with the Jewish Claims Conference in 1953. Later, it informed the additional omnibus agreements for the compensation of National Socialist injustice that were reached with 11 Western states.<sup>2</sup> Because of the Cold War, similar agreements were not reached with Central and Eastern European states until the early 1990s. However, the Federal Republic of Germany was always careful to ensure that these agreements did not provide for individual compensation for forced labor, including wages withheld during forced labor, since these claims were supposedly covered under reparations law. In other words, these bilateral agreements were reached between states, and did not apply to individual claims for compensation against the German state (such as former concentration camp inmates or victims of medical experiments). Individual victims were granted the right to lodge these claims only when a German law explicitly provided authorization for compensation, for example under the West German Federal Indemnification Law (*Bundesentschädigungsgesetz*, BEG).

<sup>2</sup> See among others Ernst Feaux de la Croix and Helmut Rumpf, *Der Werdegang des Entschädigungsrechts* (Munich, 1985); and Ludolf Herbst and Constantin Goschler, eds., *Wiedergutmachung in der Bundesrepublik Deutschland* (Munich, 1989).

For several decades, Germany succeeded in legally and politically defending against the claims of former forced and slave laborers. This situation began to change for three reasons. First, after 1989, the German courts had to decide whether the 1990 Treaty on the Final Settlement with Respect to Germany (the “Two-Plus-Four Treaty”), which paved the way for German reunification, was a peace treaty for the Second World War. If it was a peace treaty, then by extension, it would end Germany’s “grace period” for reparation claims. Second, the political parties that formed the German federal government in 1998 (the Democratic Socialists and Alliance ’90/The Greens) were meanwhile open to the possibility of individual compensation to former forced laborers of the Nazi regime (who lived mainly in Eastern and Central Europe). And third, in the 1990s, class-action suits began to be initiated in US courts against German firms that had used forced labor under the Nazi regime. German firms realized that the US courts, which did not regard German firms as protected “agencies of the Reich,” might affirm the subjective right to compensation.

The rest of this history has been described well elsewhere. Although none of the court cases in the United States resulted in a *final* verdict against a German firm, they set the stage for a political solution to the problem. In 2000, an agreement between Germany and the United States and a number of additional states enacted the Law on the Creation of a Foundation “Remembrance, Responsibility and Future.”<sup>3</sup> Together with its international partner organizations, the new Foundation made financial payments totaling 4.37 billion Euros to 1.66 million former slave and forced laborers from 98 states. In return, the United States established a unilateral waiver of further compensation claims against Germany. German firms were thus granted legal certainty against further claims by former forced laborers in the United States.

The question of compensation to former forced laborers and their claims against the German state and German firms was therefore not addressed by the German federal government with formal and legal reference to human rights norms such as the prohibition on slavery. Unfortunately, at both that time and today, there are no clear international legal norms that make international claims for compensation possible. At the same time, however, this history shows that the administration of justice and legal theory on international law was slowly moving toward a solution, and even arriving at isolated verdicts that boldly interpreted Article 3 of the Hague Convention of 1907 and Article 91 of the First Additional Protocol of the 1949 Geneva Convention.

For this reason, the German “compensations” or “humanitarian benefits,” as the individual payments made under the Law on the Creation of a Foundation “Remembrance, Responsibility and Future” were called, were not the outcome of an international legal norm, but another *sui generis* ruling. It is therefore not surprising that the law does not contain a clear legal definition of the term “slave labor,” a term that is by definition linked to the human rights debate. Instead, it contains only a politically defined concept of forced labor. In fact, the Law on the Creation of a Foundation “Remembrance, Responsibility and Future” makes no mention of the term “slave labor,” but uses the term “forced labor” instead. In my opinion, this omission is not fatal, since the precise definition of the term “slave labor,” as it refers to the use of forced labor under the Nazi regime, is contested by the victims of National Socialism and within legal and political debate. For example, the international human rights expert Benjamin Ferencz titled one of his books “Less than Slaves,” noting that slaves were generally not killed during the exploitation of their labor, while the Nazis pursued a conscious policy of “annihilation through work” against the Jews.<sup>4</sup>

From a broader point of view, international law has recently succeeded in establishing international courts,

3 The Law on the Creation of a Foundation “Remembrance, Responsibility and Future” is known in German as the *Gesetz zur Errichtung einer Stiftung “Erinnerung, Verantwortung und Zukunft” (EVZStiftG)*.

4 Benjamin Ferencz, *Less than Slaves: Jewish Forced Labor and the Quest for Compensation* (Cambridge, MA, 1979).

which have reached legal verdicts against war criminals, who have been stripped of personal legal immunity deriving from the sovereign immunity of states.<sup>5</sup> Even today, there is no international codified legal standard regarding individuals harmed by war crimes, such as the right to individual compensation for forced or slave labor. However, the history of the human rights debate demonstrates that the assertion of a human right, such as the right to be free of slavery or obtain compensation for enslavement, cannot over the long term remain at the discretion of a state that perpetrated this injustice. Human rights are subjective rights, and as such there must be an individual legal recourse for lodging claims against the state that violated these rights. This path remains long and difficult because state governments will understandably continue to insist on the principle of state immunity. With respect to the cases that are currently pending against Germany, we must also take into account the prohibition on *ex post facto* law.

It is likely that over time, we will begin to breach “absolute state immunity” in the most serious human rights violations. This may also entail the establishment of international courts concerning human rights violations. As yet, we do not know if the claims of citizens against the state will initially entail the right to petition, or whether they will contain an individual right to litigation for individual compensation.

In the final analysis, we are heading in the right direction, even if we are proceeding more slowly than we had hoped. By way of reminder, Article 41 of the European Convention of Human Rights envisions, under certain conditions in contemporary legal violations, an individual claim to compensation through claims lodged at the European Court for Human rights. Only a few years ago, Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings established the possibility that citizens could sue civilian perpetrators of slavery even outside of an act of war, meaning under normal civil conditions. We hope that Germany soon ratifies this 2005 Convention. In terms of legal practice, we are still at the beginning.

Within the larger context of the debate on human rights, the establishment of the Foundation “Remembrance, Responsibility and Future” is an example in two senses. First, it established a concept for the previously unsolved issue of an individual claim for compensation, here for state-run and privately run forced labor. We have seen that such examples of the establishment of a limited individual right can serve as the basis for later universal norms. With its ongoing mission to keep alive the memory of injustice and continue its work on behalf of human rights, the Foundation is also an example of how states and society can prevent such crimes committed by the state. In this sense, states and society learn from history and can take preventive action against slavery and forced labor.

<sup>5</sup> Here I am speaking of international courts, not war tribunals organized by combatant states.