Introduction

This book is a history of international legal efforts to confront the phenomenon of state-organized violence in the twentieth century. This history can be told in several ways, and I shall begin by broadly summarizing three possible approaches or metanarratives. The first—and until now, the predominant version—describes a series of rises and declines in which new forms of warfare and other state violence repeatedly emerged, in each case prompting attempts to contain violence by means of international law. This macrohistorical spiral of action and reaction is thought to have driven the development of humanitarian international criminal law, as well as attempts to establish institutions in the fields of conflict management and war prevention.

The first version tends to be contextualized within the larger history of European nation-states and to adopt the top-down perspectives of classical political and diplomatic histories. The developments it describes are usually considered native to a European or transatlantic "modernity" or "high modernity," a period that runs roughly from the mid-nineteenth to the late twentieth century.[1] An earlier and overlapping "long nineteenth century," meaning a historical period that ends in 1914 rather than 1900, is usually portrayed in this narrative as an era of economic prosperity, bourgeois civility, and a relative absence of interstate violence in Europe.[2] All the same, new military technologies arose in the mid-to-late nineteenth century. Nationalist tensions intensified. A "culture of war" that transcended class differences emerged and unfolded its power to mobilize populations.[3] These factors transformed national military strategies and eventually led to a far-reaching dissolution of

limits on state violence. This transformation had already become evident in the Franco-Prussian War of 1870–1871, again during the Balkan Wars and Ottoman breakup conflicts starting in 1912, and, most dramatically, in the Great War that broke out in 1914.[4] The response in the aftermath of World War I, according to the first narrative, was unprecedented in the history of European peace settlements. An international alliance formed that included great powers and smaller states in the effort to prevent war by using legal means—and in the attempt to enforce prosecutions against members of the defeated aggressor (the German Empire) under international criminal law. This undertaking failed, however, and the Allied politics of international criminal law fell apart.[5] And so the pattern of action and reaction, of states committing violence without limits and an international community of states responding with legal containment after the fact, was reenacted in the mid-twentieth century.[6] After the defeat of National Socialist Germany, the victorious Allied powers again engaged in an effort to institutionalize a humanitarian, international criminal law. This, too, was not established for a longer term. Only after the end of the Cold War, finally, did the vision of a world order based on human rights take a step closer to reality, as evidenced by the establishment of a permanent International Criminal Court (ICC).

A second way of telling the story focuses instead on the middle level of nongovernmental and quasi-state institutions that began to spring up across Europe and the United States during the mid-to-late nineteenth century. In recent years, this version has found more and more followers among historians of social movements, who have come to regard past legal and historical debates about forms of state-organized violence and mass violence as new and fertile research resources that may allow better understanding of how various social groups came to participate as actors in defining agendas and pursuing solutions for transnational problems.[7] This "transnational" perspective seeks to link the history of international relations to the social history of transnationally active groups and networks.[8] The specific subject of study is the formation of a political circle that was still oriented around the nation-state and its institutions, but that depended on the existence of a transnational space for its own effectiveness and legitimation.

The prehistory of these civil society groups is located mostly in early humanitarianism and antislavery movements. They put the problem of unlimited state violence on the political agenda for the first time in the 1860s, making it into the target of (trans)national public debates and campaigns.[9] Together with international law experts, they became essential carriers of liberal internationalism, which aimed to advance an evolution of international political and legal norms.[10] Above all, the increasing role of mass media in politics made it possible for civil society organizations to reach new kinds of audiences, to go beyond states and nationally delineated

publics. Hoping to transcend the logics and the limits on expression imposed by national domestic situations, they intentionally adopted the prepolitical language of natural law and human rights. Although they continued to define themselves as members of specific nations, they asserted that warlike violence and its resolution should no longer be treated as the rightful business of current or former belligerents. They instead assumed that a kind of "international public" had arisen and that it could act as an authority in settling questions of legal and moral norms.[11] This orientation around an imagined "international society" or "humanity" (albeit one that did not include all humans) became an indispensable condition for transnational human rights activism and "moral politics."[12]

Finally, a third way to tell the story is conceivable and will be pursued herein. The discipline and practice of humanitarian law—while they can be traced back to particular conjunctures of international politics, academic discourses, and human rights activism—will be treated herein mainly as the means by which actors defined themselves and others in ways that altered reality and created new realities.[13] Adopting terms and methods that have been devised in recent years within the two research fields of transitional justice (TJ)[14] and the politics of the past (*Vergangenheitspolitik*)[15]—meaning the politics of history, memory, and juridical dispute over the past—this study will examine the twentieth-century transnational debates about German state violence with the intent of exploring what kinds of discursive strategies and social practices were employed, and in what contexts, by actors seeking to prove the illegality or legality of given acts of violence to an audience of international and national publics.

This approach is based on the supposition that the process of criminalizing state injustice was not limited to a simple codification of norms. Instead, agreement around particular norms was reached within a contested terrain of political, societal, and cultural negotiation. The rather unstable disciplinary status of international criminal law, as well as its specific modus operandi of using the historical contextualization of incriminating actions to buttress demands for sanctions and punishment, contributed to an often narrow intertwining of legal with historical legitimation strategies in jurisprudential writings. This was even truer in the nonjudicial realms of governments, ministries, civil society, and scholarship, which will be the main subjects of this study. Efforts at setting norms were never just that; they were always also about which historical interpretations would prevail and who could claim hegemony over historical interpretation.

The debates over German state violence, which ran through the entire twentieth century and transpired under a series of very different circumstances, allow us to see how humanitarian law emerged in tandem with an international realm of communications and conflict—within which actors

attempted to justify their positions using a combination of legal, historical, and moral-political arguments. These discussions would contribute, on the one hand, to a fundamental change in the character of international criminal law over the course of the twentieth century; on the other, they also influenced public perceptions and appraisals of cases of state violence. One particularly sustained effect can be seen in the fact that state violence today is defined and judged more than ever in the binary categories of human rights.

Approach

The following study begins with the assumption that the transnational debate about German state violence in World War I would have been impossible without the earlier rise of liberal internationalism in the late nineteenth century. Liberal internationalism is understood here as a border-crossing politics and a set of academic disciplines capable of autonomous development. For our purposes, this phenomenon is important above all as a carrier of modern international law (including the law of war), for its functionally dependent interpretations of history (especially public history) and tendency to give these a juridical form, and for a moral approach to politics (and human rights).

Second, this study will argue that debates about German state violence involved competing concepts of internationalism and combined law, history and (moral) politics in sometimes incompatible ways, creating unpredicted frictions and dynamics that took on lives of their own. Actors strove to differentiate themselves from their antagonists but also engaged in mutual borrowing and opportunistic repurposing of concepts, rhetoric, and tropes. The basic thesis of this book is that a comprehensive view of all these factors is needed if we are to understand why debates about illegitimate manifestations of violence arose at different times and in differing historical contexts—and why these discussions followed particular paths and patterns in each case.[17]

With this approach, the following study also addresses several current research controversies concerning the historical origins of "the human rights turn" in international law (especially the law of war), the rise of a globally anchored "processing and memory imperative" regarding traumatic historical events, and the resulting tensions between the disciplines of law and history.[18] But the aim herein will be to go beyond the limits of these controversies. In the following, therefore, the main concern will not be to sound out and define the disciplinary and professional differences or commonalities of justice and history in their confrontations with modern state criminality.[19] The intent is also not to revisit the controversy that already overshadowed Hannah Arendt's book on Adolf Eichmann, when Arendt famously doubted the opinion of the

Israeli chief prosecutor at the Jerusalem trial that judicial strategies of evidence and narrative were fitting tools for the representation of genuine historical events.[20] Instead, this study approaches the problematic from a new perspective: international law and, in particular, humanitarian international law are understood as comprising an incipient space of transnational communication and dispute, within which various actors positioned themselves regarding the phenomenon of organized state violence, argued over the historical causes underlying this phenomenon, and debated the resulting consequences for politics and policy. The longitudinal framework allows us to explore what long-term consequences and dynamics arose out of these intensified interactions among the subsystems of law, scholarship, and politics.

During the past two decades, researchers have taken a greater interest in the relationship between moral politics and the disciplines of law and history, but this has been mainly because of developments outside the academic realm. Even as victims of state violence brought cases before national and international courts in the 1990s, hoping that they would gain official recognition of the injustices perpetrated against them and that the perpetrators would be punished, a parallel and intensive academic controversy arose over the causes and consequences of this "juridification of history."[21] As voices within the field of transitional justice especially have argued, humanitarian international criminal law by the late twentieth century had become a central medium for establishing the public memory of past experiences of violence and for allowing individuals to attain their own moral self-understandings.[22] This view attributes the human rights turn after World War II partly to the spontaneous formation of a global community of outrage, which was inspired by an informed recognition of National Socialism's criminal foundations. In this telling, the punishment of NS elites under international criminal law also helped to initiate processes of self-transformation among the German people, above all by affirming and strengthening legal norms. Credit is also given to the specific approach of the Nuremberg prosecutors, who presented indictments fortified with wide-ranging historical interpretations of the NS regime and its politics. All this created a historical model available for adoption by other states and societies undergoing the transition from dictatorship to democracy, so this interpretation goes, and the model was adopted in many cases starting in the 1970s at the latest.[23]

Much of the TJ literature represents the view that the successive breakthroughs of the human rights idea—and of a related, critical view of state power—came thanks to the emancipation of civil societies, which, after 1945, gradually overcame inhibitions and acquired the strength to prevail against overwhelming challenges. Other voices are more skeptical about this linear success story,[24] and a variety of objections have been raised: any decision to respond to past state violence with court trials or truth commissions

necessarily involves multiple political actors and relationships enacted within particular constellations of power. In transitional societies, the indictment of state functionaries under international law has often served as an alternative to more far-reaching social and economic reforms. When justice ventures into the traditional territory of historical studies, the results are, at best, a shortened, functional form of history, one that may not actually be historically relevant. The juridifying trend has prompted defenses of the historical discipline against cooptation. The fashioning of criminal courts into authorities on historical justice raises the risk of overloading the state, of exuberant judicial interventionism, and of a creeping loss of scholarly autonomy.[25] Finally, the skeptics are also critical of viewing the twentieth century in the style of an optimistic, "Whiggish" history, one that construes a narrow causality between state human rights violations and their subsequent sanctioning under international law.

If we historicize these issues, it is striking how quickly the early efforts of humanitarian and military international law inspired controversial public debates about violence. Much like today, commentators in the early twentieth century warned that the law had been overstretched by morality and demanded a stricter separation of law and history. Heated debates unfolded about which among all the violent occurrences of the recent past demanded a legal intervention and which should be regarded simply as a subject for the historians. These debates, in other words, can partly be understood as expressions of complex reorientation processes, as means by which actors come to terms with collective experiences of extreme violence or with far-reaching political and historical ruptures—as a rule, both.

The reasons for the law's increasing importance as a means for dealing with crises and ruptures of varying intensity throughout the twentieth century merit a closer analysis. At first glance, it should be clear that this development was not linear and that it did not rest on a unified, quasi-timeless definition of "the law." Instead, we may suppose that the many vagaries and ambiguities of legal talk are precisely what make it so attractive as a vehicle for normative attributions and ideological suffusions. The indeterminate language of the law could be mined as a resource in political controversies and in the struggle for public opinion. Underlying the undeniable increased resort to legal language were processes of power politics at both the negotiated and explosive extremes. More than this, however, it was a means for addressing upheavals in the political and moral order following historical ruptures that felt irreversible. Yet the legal talk could simultaneously fulfill the opposite function: to invoke the law is to suggest continuity, to give a sense of an identity and a tradition worthy of protection.

These theses will be elaborated on throughout this study, based on evidence from the twentieth-century debates about German state violence.

Unlike "transitology" discourse, this study will not present a general discussion of the direction, effectiveness, and acceptance of international law interventions, or the role therein of the German case. While this field of research often takes a normative approach, the aim here is also not to show whether the universalist norms of humanitarian international law contributed to the development of a critical and self-reflexive understanding of history—based on a German recognition of domestic guilt and culpability—during the first fifty years of the Federal Republic.[26] The subjects here shall be neither the conceptual framework of international law nor of soft-power "law in action"[27] but rather the discourses that proceeded from these.[28] In the process, resort will of course be made to concepts and categories devised in the democracy research of the last few decades. In contrast to transitology, which generally enshrines "truth" and "historical justice" as immutable Enlightenment ideals, these are understood herein as discursive and contingent concepts that must be located within concrete historical connections. Proceeding from recent political history treatments of the "language of human rights," this study will ask why actors at given times in various contexts took up the binary language of international law; what notions, expectations, and interests they associated with it; and what consequences followed.[29]

This approach requires that existing material be structured according to particular temporal and thematic divisions, so the argument to follow is developed through a sequence of four chronological blocks covering the entire twentieth century. The periodization is oriented to the established caesuras of political and legal history, but with variations. Although each of these great ruptures provided compelling reasons to make an issue of state violence, many of the resulting debates developed their own, unexpected dynamics. Certain controversies became self-perpetuating over long periods precisely because juridically stamped history narratives and images engaged in moralistic excesses.

Given that this study is also about the cultural deep effects of the law, it follows that chapter 1 starts with an overview of the development of the modern international law of war. The late nineteenth-century lobbyism of academic experts and peace activists, international agreement on the Geneva and Hague norms, and the emergence of a transnational critical public each turned into key prerequisites for the outbreak of a far-ranging debate on German international law violations after the start of World War I. These discussions gave rise to the innovation—one as yet barely researched in the historical literature—of actionable history, or what historian Raphael Gross has described with the rather awkward term *Geschichtsbarkeit* ("historability"),[30] echoing the legal terms of "actionability" or "judiciability." How well a historical case could be functionalized became a determining factor. Various contemporary history institutes arose—some called forth by states, some by

civil society initiatives—to take on the work of documenting the actions, sites, responsibilities, and victims of violence by belligerents. This activity was often connected with explicitly punitive policy goals. One might say that the formation of a punitive history culture and a "preemptive historiography" (Erich J. C. Hahn) during the war partly paved the way for the later developments at Versailles. The peace conference controversies over proposals to put German politicians and military officers on trial are approached from two angles. On the one side, it is shown how the victorious Allied powers, having aggressively made an issue of German norm violations during the war, faced pressure afterward to actually do something about it. They struggled to find an acceptable legal, moral, and political solution. On the other side, a study of the domestic controversy about German "war guilt," along with the emergence of a German historiographic field devoted specifically to "war guilt" studies, raises the question of whether and how the German intellectuals' understanding of Allied international law policy influenced the official German stance during the negotiations.

While German resistance largely derailed punitive international law approaches after World War I, the aftermath of World War II saw a large-scale application of these norms for the first time.[31] But this experiment in punitive policy also had a longer prehistory. As will be shown in chapter 2, the proceedings against representatives of the NS leadership required, first, a reconceptualization of the conventional international law of war but also, second, the development of a coherent historical narrative about the motivations of the Third Reich that could legitimate the planned revolution in international law with both the public and policy makers. Among those most involved in the project of developing this narrative were "Jewish think tanks" and a group of exiled German social scientists whom the Office of Strategic Services (OSS) in Washington invited to participate in planning for the Allied occupation of Germany.[32] In studying the cases of Raphael Lemkin, the Polish-Jewish international law expert, and Jacob Robinson, the New York jurist originally from Lithuania, one question that arises concerns the epistemological pitfalls. What happens when a self-appointed contemporary history research project simultaneously pursues the legal policy goal of making German occupation crimes sanctionable under international law? As for the academics who worked for the OSS, a study of their views on US human rights and international law policies during the war years leads to curious findings, at least in the case of Franz L. Neumann, the well-known author of *Behemoth*. During the war, he was outspoken in his rejection of judicial interventionism à la Robert Jackson, yet in the end he played a key role in preparing the International Military Tribunal (IMT) at Nuremberg. How can such astonishing intellectual transformations be explained?

The use of historical contextualizations in indictments predictably inspired counterreactions. Chapter 2 accordingly concludes with a study of the German side. What was the role of the German defense attorneys at the Nuremberg trials? The case of the Cologne law scholar Hermann Jahrreiß allows an evaluation of how lived experience affected how he conceived his role as a defense counsel at the IMT. How and in what ways did he and his associates attempt to rebut the historicizing approach of the Allied prosecution? Chapter 2 concludes with a study of the political maneuvers behind the scenes before West Germany's surprising early ratification of the Genocide Convention in 1953. The decision involved the paradox of resisting humanitarian law while appropriating it for political purposes.

Chapter 3 turns to a matter that has received little research attention until now, asking in what ways did the Allied punitive programs in the early Federal Republic of Germany actually set off complicated processes of appropriation and reevaluation. It begins with the observation that a rejection of Nuremberg law took hold early in the West German political realm, with the public, with academics, and in judicial sentencing praxis. The example of the "euthanasia" trials is examined in exploring whether this also brought about a change in the historical contextualization of the crimes being prosecuted. In addition, the question of how contemporary historians in West Germany positioned themselves regarding the proliferating historical interpretations of the Nuremberg trials is pursued. The "historians' controversy" around the "Führer order" will be examined in modeling how a mutual reinforcement of historiographic and juridical interpretations developed within an academic environment characterized by a more or less obviously articulated hostility to "Nuremberg historiography" (which was denigrated either as simplistic or as a sophisticated revival of "collective guilt" reproaches) and by a broad neglect of the NS murder of the Jews. Chapter 3 then turns to the rather different constellation that arose during Eichmann's trial in Jerusalem. This was a world-spanning event, one with far-ranging implications, also for the young field of Holocaust studies, because of the prosecution's unapologetic identity politics and human rights agenda. How did the West German jurists and contemporary historians react to this challenge?

Finally, Chapter 4 makes the big leap to the era after the Cold War. In one way, this complicates the study's perspective, since the concepts of transitional justice serve no longer as heuristics but as objects of scrutiny.[33] Samuel P. Huntington's programmatic text, *The Third Wave*, is presented as a case study in discussing how an emergent transitology conceptualized itself and its academic and research strategies. Among the constitutive ideas of the field was the aspiration to support postdictatorial states in their "transition" to democracy by providing social science expertise. The central postulate (that successor governments had a "duty to process" the past in cases of serious

state violations of human rights) rested on a liberal and individualist understanding of human rights. Since transitology achieved the status of a global dispositive for a time in the 1990s, this section also considers the conception of "historical truth" on which the imperative to "process" and remember rests, and asks what effects it had, both on perceptions and on judicial treatments of systematic state violence.

Given that the discourses of transitology often treat reunified Germany as an exemplary case, the final sections treat the post-1989 German debates about injustices committed in the dissolved German Democratic Republic (GDR) by the ruling Socialist Unity Party of Germany (SED). The focus is on identifying the ruptures and continuities of the "transition." To what extent did the investigative "enquete" commissions called to life by the German Bundestag in 1992 and 1995 represent a new form of "processing," one with a stronger humanitarian sensibility and less readiness to accept state violence? What role was played by the ways in which East German actors viewed the German-German postwar history and the end of the GDR? How important was it that an official culture of "overcoming the past" (*Vergangenheitsbewältigung*) had been established in West Germany during the preceding decades—one that downplayed human rights and international law issues, and was otherwise defined by a strong effort to differentiate the FRG from Communist East Germany?

New Trends in Legal Historiography

In the 1970s, human rights became a central aspect of international political communications and were elevated into a "central ordering principle of Modernity."[34] The collapse of the bipolar world order starting in the late 1980s, the incipient crisis of modern statehood, and the advance of globalization all contributed to reinforcing this trend throughout the 1990s. With this backdrop, liberal humanitarianism—at least in the estimation of numerous historians, social scientists, and moral philosophers—at times achieved the status of a secular religion and a "surrogate for politics."[35] Parallel to the growing influence of nonstate actors in framing and raising awareness about human rights violations around the world, the nongovernmental organizations in the field began to network, scientize, and institutionalize. The most tangible expression of convergence between human rights activism and the discourses and self-concepts of academics was the meteoric rise of TJ itself.

Transitional justice is a typical "catch-all expression" (Frédéric Mégret), one that slips easily into many different cultural and linguistic realms. It describes a wealth of different phenomena. In its more narrow sense, the term covers the juridical and administrative processes undertaken after a

completed change of political systems with the intent of punishing justiciable acts, providing reparations to victims, and restituting robbed properties. A broader definition includes political education, public commemoration, and academic treatments of historical injustice. In their cumulative effect, these are supposed to drive cultural change and more thorough democratization.[36] In the disciplinary terminology, "transition" normally refers to the shift from dictatorship to democracy, while "justice" conveys a kind of liberal-individualist understanding of the idea, as has become characteristic of recent international human rights activism on the whole.[37]

Originating in the context of political upheavals in Central and South America, the concept soon became a global medium of democratization in so-called transition societies.[38] Since the 1980s, the academic discussion on transitional justice has gone through several phases, giving rise to several distinctions and subfields. Although juridical and nonjuridical strategies to "process the past" are occasionally treated as mutually incompatible alternatives, transitology in essence was and remains a product of the human rights breakthrough of the 1970s and 1980s, and the rights talk that has proceeded ever since.[39] TJ scholarship often camouflages a teleological model of history in the definition of "system change" as a linear, legally supported break with the past, and strains to construct causal connections between the punishment of serious human rights violations and democratization. Both tendencies harken back to the discipline's moral-political developmental phase.[40]

Since the 1990s at the latest, transitology has worked with a self-reflexive concept of "processing" legitimated via legal strategies, above all in two ways. First, successful democratization is tied to the structural implementation of a state under rule of law; this goes together with treating the objective of punishing systematic acts of state violence as an imperative. Second, the penal procedures against former state functionaries are conceived as part of a societal confrontation with the past and with the "right to truth" about past state injustices.[41] In this function, criminal law partly enters into a productive if tense relationship with history writing and partly displaces the latter altogether.

As with the scholarship on human rights, the historicization of transitional justice is still in its early stages.[42] While legal scholarship and political science have long plowed this field, historians overcame their reluctance only a few years ago. One reason for the delay was that, for a long time, consciousness of the fact that norms and rights are subject to constant historical change was underdeveloped. The dominant understanding instead was essentialist, viewing "the law" as a kind of container for timeless values and principles. The historical approach prevailing in legal philosophy and jurisprudence, in which the present-day validity of given norms depends mainly on the context of their origination, further reinforced this idea. Only more recently has

the literature begun to give more attention to the historicity of legal terms and discourses. Proceeding from the methods of the culturally turned "new political history," the assumption increasingly is that rights and juridical practices must be conceived as part of a "cultural history of the political" in the twentieth century, one that not only codetermines political actions and language but also structures them.[43]

In recent years, attempts have been made to write a history of human rights and liberal humanitarian international law as a "genealogy."[44] The intent, first, is to stress the contingencies and dynamics that underlie rights discourses. Second is a desire to draw the line against the teleological triumphalism of conventional "Western" human rights discourse.[45] Common points for discussion include the observation that the increased importance of rights talk in political communication is global and arose in several different historical contexts. Contrary to claims of universal validity and universalist rhetoric, rights talk is often deployed to unite diverse interests and generally (although not always) very particular motives. These discourses are subject to changing conjunctures. Changes tend not to emerge from the inherent logic of the law to quite the same degree that the legal scholarship commonly imagines. Instead, the controversies around the validity, construction, and reinterpretation of law far more often arise in the wake of decisive political events.

In his overview of the history of human rights before and after 1945, Stefan-Ludwig Hoffmann specified several reasons why the human rights discourse of the nineteenth and twentieth centuries suffered temporary disappearances and an unprecedented rise. First, it received its earliest impulse from the movement to abolish slavery—the success of which paradoxically came just when European colonialism increasingly sought legitimation in racist rather than religious rationales. Second, the rise of the European nation-states elevated forms of law and constitutionalism that foregrounded the rights of "citizens" rather than "people." Third, the "juridification" of wars, beginning with the emergence of humanitarian international law in the second half of the nineteenth century, served further to codify the unequal relations between the European powers and other territories of the world. Although some of the worst belligerent practices were delegitimized, a concurrent tendency reduced the rights of combatants, and this extended in part to civilians. As a fourth influencing factor, Hoffmann identifies the continuing power of the nation-state idea well beyond World War I and the associated politics regarding minorities—above all, Jews in Eastern Europe.

Hoffmann goes on to identify another four sets of conundrums in the post-1945 period. A paradox of the postwar order was that the human rights discourse of the war years, grounded in a common system- and bloc-overlapping front against NS Germany, was reshaped after the war into an

instrument for battling Communism. Second, in the wake of decolonization and anticolonial liberation struggles, a competition arose between liberal-democratic, socialist, and postcolonial conceptions of human rights. The number of nation-states exploded, especially in the 1960s. Third, the 1970s saw the formation, primarily in the Western industrial nations, of a "new" humanitarianism that rejected state violations of human rights, as well as imperial exploitation, and resided mainly in nonstate actors and networks. Fourth, the fall of Communism strengthened the legitimacy of the Western human rights discourse but also brought new tensions and splits, since it was followed by the return of interventionism justified in humanitarian terms.[46]

This longer view sheds new light on several matters. First is the contrast between classical liberal narratives and those that portray human rights as the product of a "global history of violence and conflict." Second, debates about rights have come not only at the end but often also at the beginning of political crises and controversies. A historical overview gives only conditional confirmation of the supposed evolutionary convergence of democratization, liberal legal cultures, and a peaceful world order, although the claim is still happily postulated, down to this day. These connections do exist but tend to work more on the domestic level and have had almost no demonstrable impacts on foreign relations. Over and over, post-World War II developments have forced the conclusion that there is no autonomy of the law, at least not on the international level. Even as legal arguments have become more important to political communication, the corresponding legal institutions, treaties, and agreements have little influence and remain nonbinding.[47]

The last statement highlights a conceptual problem with the above narrative as a whole. If international law is so weak and ineffective, why have actors put so much stock in legal semantics and discourses? What have been the short-term and long-term consequences? And what about the contrary cases, in which the institutions and codifications of international law had undeniable consequences in the political realm, as with the fatal effects of the Versailles punitive provisions on the domestic politics of the Weimar Republic? Regardless of heuristic advantages, a strict transnational history of terminology and discourse evinces certain weaknesses and inherent limits. The characteristic developments of the twentieth century cannot be understood very well without discerning how a great many actors and institutions existed alongside the terms and discourses, and how these actors not only used the law as a vehicle for implementing their various interests but also pursued "international law politics" (Andreas Fischer-Lescano) in a highly active way.

There has been a recent boom in works of legal history—mostly affirmative pieces upholding the categories of Wilsonian "idealism"—that describe the outstanding contributions of American politicians, jurists, and activists in

developing modern international law. Among the various critiques, one point of objection is that these works uncritically reproduce the universalist, missionary self-image of the "city on the hill."[48] Although these arguments are valid and justified, this should not mean downplaying the central influence of the United States. For one thing, US behavior in the twentieth century shows that an engagement for human rights and liberal international law most certainly can go together with imperialist and colonial policies. From the American perspective, the law often, but not always, serves as an instrument of geopolitical expansion and a legitimation of violence; the history of US colonial wars offers a wealth of illustrative materials.[49]

Moreover, the processes of rupture following 1989–1991 make it obvious that the American contribution to the juridification of international politics cannot be overestimated, even if human rights rhetoric and government action often diverge. The influence of liberal legalism and constitutionalism is not limited to the shaping of norms and institutions. That may not even be the most important place to look. This discourse has been far more effective along the cultural dimension, where the egalitarian and pluralistic elements of American legal thought are mixed with ethical-religious and social-psychological motifs.[50] These mirror the experiences of American constitutionalism and its confrontations with the dictators and totalitarian regimes of the twentieth century, especially those in Europe.

Opinions in the literature nonetheless differ on how far the human rights and international law developments of the twentieth century were shaped by Europe's history of dictatorship and violence. Its importance has been relativized with assertions in recent years that the breakthrough for human rights activism as a "politics of the unpolitical" was achieved only in the 1970s, after leftist protest movements were hit with "political disillusionment" following the struggles over the Vietnam War.[51] Around the same time, the political and regulatory influence of the United States received a new accent. As a victorious Allied power, according to this argument, the United States had played a leading role in the codification and institutionalization of humanitarian international law in the immediate wake of World War II, but the onset of the Cold War forced a retreat to the bare-knuckle rules of realpolitik. It was only when this was discredited by the US involvement in Vietnam that Jimmy Carter's presidential administration rediscovered human rights as the "moral grounds of legitimation for a new US political and economic hegemony in a time of global integration of markets and spaces."[52] Certainly, the two world wars, National Socialism, and Stalinism continue to be seen as important prerequisites that made possible the creation of various human rights institutions after World War II, including the United Nations, the Council of Europe, and the Organization of American States (OAS). However, the skeptics emphasize that because of the bipolar global conflict,

the attraction of these institutions remained relatively limited. Their functions were of a primarily declaratory style. They were instrumentalized in efforts to delegitimize political and ideological adversaries. Meanwhile, the parallel creation of military security structures, primarily designed to avoid a new world war, contributed little toward solidifying the idea of a universal protection of human rights that transcends citizenship, although it had already been articulated at Nuremberg and has been developed further since.

Against this skeptical current, another strand in the literature instead sees the development of transitional justice as coming at the end of a long-term process that originated during World War I and achieved a first culmination with the Nuremberg trials.[53] In this reading, the appearance of new forms of violence and the military defeat of National Socialism played a decisive role in the "politicization" and "modernization" of international law. It was above all the decision to remove the status of the German Reich as a subject under international law that created a state of exception; in the immediate postwar years, this was used for a creative advancement of international law. In this reading, after a long phase of latency, a new global model of *transnational* justice formed in the late 1980s. It harkened back to the Nuremberg pattern, modifying and advancing it. While earlier international law had stood in competition with national law—insofar as the latter was supposed to be abrogated in times of serious human rights violations—international law meanwhile had access to an overarching cultural paradigm that enjoyed allegiance in many transition societies, as well as among a great many private persons and organizations. According to this reading, a process had begun in which the ideal values of humanitarianism could be successively integrated into national legal regimes. Thus, in a thoroughly pragmatic tradeoff, postdictatorial states were thought to have the options of punishment or amnesty, juridical establishment of truth or historical enlightenment, integration or political lustration, while private actors could use the transitional justice model to pursue their restitution demands or to initiate perpetrator-victim dialogues.[54] The common quality of these various historical "processing" strategies, however, lies in their public performance of the law, justice, and justice-like procedures aimed at establishing collective but, even more so, individual responsibilities for state injustice yet at the same time providing the means to achieve distance from such responsibilities.