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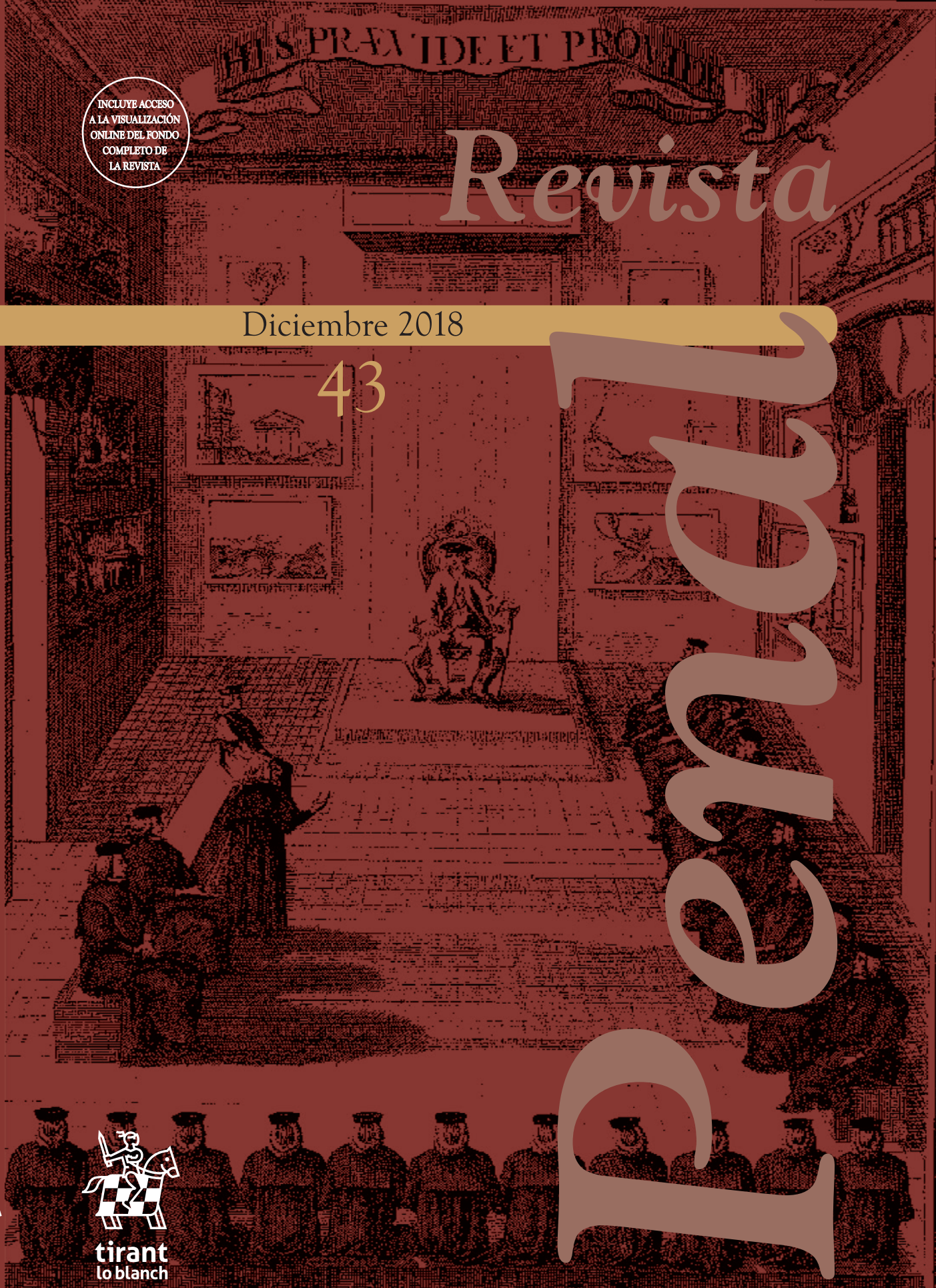

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Sumario

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The Law in the Process of Economic Globalization: Imperialism and Colonization of Legal Systems

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Título: El Derecho en el proceso de globalización económica: imperialismo y colonización de los sistemas legales.

Sumario: I. Introducción. II. La malograda globalización del Derecho penal. III. Derechos humanos. IV. La vía correcta para establecer el Derecho penal internacional. V. Conclusión.
Summary: I. Introduction. II. The unsuccessful globalization of criminal law. III. Human rights. IV. The right way to establish the international criminal law. V. Conclusion.

Resumen: Un Derecho penal internacional ideal debería atender a la necesidad de establecer normas penales globales, a los delitos internacionalmente *mala in se*, que se manifiestan principalmente en los sistemas de cooperación judicial, y a los posibles delitos globales, incluyendo los nuevos delitos que puedan ser aceptados en todas las culturas jurídicas.
Palabras clave: globalización, economía, derecho penal

Abstract: An ideal International Criminal Law should stipulate: the necessity to establish global criminal norms; the international mala in se crimes, which is manifested mainly in judicial assistance systems; possible global criminal offenses, including all new crimes that could be accepted by all legal culture.
Key words: globalization, economy, criminal law

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I. INTRODUCTION

In human history, there is hardly a second word like the concept of "globalization" possessing such a powerful influence, which spread rapidly and won an outstanding reputation. Although these words, such as "world politics", "world economy" and "world hegemony" have already been known and used in the 1970s, however, the idea of globalization, which originated from the economy and then spread to the whole society, came into being after the former Soviet Union collapsed and the Internet sprung up. Then in the following twenty years, a Utopia concept evolves into a real possibility. Even though the period of this development is incredibly short, professional literature focusing on the theme of globalization are countless and immense. In the beginning, these works of literature were focusing on economics, sociology or politics[1], while in recent years, literature that discusses globalization from

1 Refer to Held/Mo Grew (eds.), The Global Transformation Reader (2000); Beck (Hrsg.), Perspektiven der Weltgesellschaft (1998), "Globalisierung der Weltwirtschaft-Herausforderungen und Antworten", BT-Dr14/9200 mit Lit.–Verz. S. 569 ff.

the standpoint of law become flourishing[2]. An accurate definition of "globalization"[3] is neither possible nor unnecessary. It is not like the concepts used in the law which needs a precise definition of unlawful constitutive components and the legal consequences connected with them. To define globalization means to describe a dynamic development process that has not ended yet. In this sense, all that cannot be controlled by a single country belongs to the scope of "globalization". Due to the development of technology and elimination of limitation on the freedom of action, the related incidents have no determined locality or the original locality can be arbitrarily changed.

Even though this article will not focus the globalization from the economy, sociology or philosophy aspects, however, these aspects have guiding meaning for the status and role of criminal law in the process of globalization.

Concerning economy, the globalization firstly means de-nationalization, namely elimination of nation-state boundary[4]. Specifically speaking, the so-called "global players" are firstly those multinational corporations in manufactory industries and financial industry. They play beyond most of the national legal restriction and break away from domestic regulations about tax, social security, financial market as well as environment protection. One of the consequences brought by these behaviors is that transnational companies can freely determine where to pay taxes or even whether it needs to pay taxes. As a result, the corporate income tax of Germany is degraded to an insignificant tax type from a very crucial one[5], whose proportion is nearly the same like the dog-retaining tax. Social insurance law of a single country can be avoided like environmental law, if the product manufacturing is transferred to those countries with no relevant legislation or incomplete regulation or if the consolidated companies impose influences on countries in the third world that depend on its financial support[6]. German Legislator tried to restrict research on altering gene code of human embryo with gene technology[7], but what they do is in vain for this reason. This is a proper example, which shows that a single country is unable to impose restrictions on the economy in globalization. Recently the financial crisis concerns all of us and it shows that employees of financial institutions are in unrestrained gambling with hundreds of billions of assets and thus cause tremendous loss to the global economy. This kind of action is in fact harmful not less than a crime, but they finally get away with guilty or even get rewarded on the contrary. However, taxpayers must pay the bill for all of the losses.

If the national economy in globalization cannot be governed by national laws, this situation can be called anarchism, which is a retrogression of human society. Surely, people cannot confuse this anarchism with chaos because the powerful country will arrange world affairs in the way that they can benefit, which creates a kind of unilateral order in this case. In this status, war will not be taken as in the previous history, because the economic advantages can fulfill the super power's personal interest. Violence is only necessary under a particular circumstance. For example, if people with

2 Kettner in Brugger/Haverkate (Hrsg.), Grenzen als Thema der Rechts-und Sozial Philosophie, ARSP-Beiheft Nr. 84 (2002) S. 179, 201; Schwarze, Globalisierung und Enrstaatlichung des Rechts (2008).

3 Beck, Was ist Globalisierung, (1997); Zum Regieren jenseits des Nationalstaats (1998), S. 8f., 20; Habermas, Die postnationale Konstellation (1998), S. 101; Bonß in Voigt (Hrsg.), Globalisierung des Rechts (1999/2000), S. 44ff; Möllers in Anderheiden/Huster/Kirste (Hrsg), Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Reschts, ARSP-Beiheft Nr. 79 (2001), S. 48f.

4 Brunckhorst in Schweppenhäuser/Gleiter, S. 83ff.; Zumbansen in Anderheiden/Huster/Kirste, S. 22.f, 27, 32, 37; Hilgendorf in Dreier/Forkel/Laubenthal (Hrsg.), Raum und Recht (2002), S. 338.

5 According to Federal Ministry of Finance's data of commercial revenue, the corporate income tax income in 2000 is 235.748 billion Euro and it is only 71.731 billion Euro in 2009. Even though it is estimated that the value in the next year will increase slightly, but compared to business tax and personal income tax, the proportion of corporate income tax income is minuscule. (www.bundesfinanzministerium.de)

6 Luhmann, Das Recht der Gesellschaft (1993), S. 572; Eucken, Wirtschaftsmacht und Wirtschaftsordnung (Hrsg. V. Oswalt, 2001), S. 107, 149.ff; Cohen, Fehldiagnose Globalisierung (1998); Stiglitz, Die Schatten der Globalisierung (2002); Brunkhorst in Schweppenhäuser/Gleiter, S. 88; Kreide, in Anderheiden/Huster/Kirste, S. 121f.; Berthold, Der Sozialstaat im Zeitalter der Globalisierung (1997); Forrester, Der Terror der Ökonomie (1997).

7 Without international agreement, the heated discussion about genetic technology and embryo research is hard to have effects, which is shown in Anderheiden, ZG 2002, S. 152.ff; Böckenförde, JZ 2003, S. 809ff.; Frommel, KJ 2002, S. 411ff.; Dies. KJ 2000, S. 341ff.; Heun, JZ 2002, S. 517ff.; Hörnle, GA 2002, S. 659; Ipsen, NJW 2004, S. 268ff.; Merkel, DriZ 2002, S. 184; Schroth, JZ2002, S. 170ff.; Starck, JZ2002, S. 1065ff.; Schwarz KritV 2001, S. 182; Zuck, NJW 2002, S. 869; Besides, refer to National Ethics Committee's statement of import embryonic stem cell on December 20, 2001, which is shown in www.ethikrat.org; final report of "Law and Ethic of Modern Medicine" Research Committee is shown in BT-Dr. 14/9020, S. 1.ff and its second phased report is shown in BT-Dr. 14/7546, S.1ff. The restrictive scope of *Embryo Protection Law* (Embryonenschutzgesetzes (ESchG)) (BGB.1 I2747) on December 13, 1990 is shown in Beckmann, ZfL 2009, S. 125ff.; Hartleb, JR 2006, S. 98.ff; Kreß, ZRP 2006, S. 216ff.; Neidert, ZRP 2002, S. 467. The *Law of Stem Cell* (Stammzellengesetz, BGB.1 I2277) on June 28, 2002 is shown in Gehrlein, NJW 2002, S. 3680, Raasch, KJ 2002, S. 286ff.; Besides, refer to Kreß, ZRP 2008, S. 53f.; Valerius, NStZ 2008, S. 121ff. for other contents.

objections revolt against the order, they will be eliminated from the society.

The degeneracy of law or justice caused by economic globalization in the first level is the retrogression of the most significant achievement of human civilization and morality since 2500 years. It drags human society with outstanding achievements in technology back to the moral level of the Stone Age. However, this situation theoretically should not be the inevitable destiny of human being and can be reversed by legal globalization in the second level. The elimination of nationalization and boundary of legal institutions should catch up the progress of extensive boundary of the national economy in the first level. According to opinions of scholars in jurisprudence and economic law who consistently made their voices heard in recent years, this development trend, in fact, has started[8]. Therefore, people have found a new concept referring the phenomenon. Even though people admit the appearance of "global government" remains to be seen, the concept of "global governance" indicates the developing direction[9]. There are numerous examples in this aspect, but they are still not carrying much weight. Firstly, the so-called soft law as an example will be mentioned, as it is the gentlemen's agreement between international players[10]. But the compliment on soft law has ignored the following aspects: it is an agreement or a treaty, which can be arbitrarily altered when all parties reach an agreement; it does not set rights and obligations for the third party. Therefore, it is the confirmation of the rights instead of restriction of the power. The difference between a treaty and the real international law is exactly like the difference between citizens' contract in private law and the national law. These agreements cannot interfere directly with the third party in the law, but they can actually impose influences on the third party's economy. As a result, they can still eliminate the third party out of the market or restrict its access to the market, which is the manifestation of Darwinism's law of the jungle and a reflection of unfairness.

The real international law is WTO agreement, which is the source of international law and has a particular institutional basis that is formed to carry out these laws. Nevertheless, its implementation is still a big problem for the reason that international law is "law in paper" and it is different from "law in action". It will exist in the name like those old national legislation we know if it cannot be implemented.

Even worse is, besides "punishment probability" standard, which is well-known in the traditional theory of law[11], the application of global law also depends on two additional factors. The first is called "social distance between sanction institutions and norm violator" (this factor takes the difference of the social status between the norm regulator and violator into consideration. When it's enormous, then the violation of the norm cannot be found or understood.) The second is the opportunity of the probability to give up punishment. These two factors are often manifested in global regulations, e.g. strict sanction measures are only applicable when WTO regulations are seriously violated and severe consequences are caused in global range[12].

Even if the global law exists, the application of its penalty clauses is very limited. Therefore, people can almost deny its nature as law for it cannot be applied.

So far, there are almost no measures in international law to make up the ineffectiveness of domestic law. Opinions that are frequently quoted in the latest literature of jurisprudence are, a hundred percent national legal system only exists in people's imagination, and it was in the religious war of Europe that people had started to image the national legal institutions[13]. But this cannot weaken the persuasiveness of the findings above. Because this opinion ignores that human's economic activities in pre-modern era constitute only an insignificant part of human activities of today and the former does not possess the potential to cause a disaster as economic activities does today. The latter can ruin the living foundation of humankind in the form of ecocide, and it can at least cause large-scale land infertility

8 Zumbansen/Möllersu/Calliess in Anderheiden/Huster/Kirste, S. 13, 41, 61; Teubner in Teubner (Hrsg.), Global Law without a State (1997), S. 3.

9 Hirst/Thomson, Globalisation in Question (1996), P. 199; Fues/Hamm (Hrsg.), Die Weltkonferenzen der 90er Jahre: Baustellen für Global Governance (2001); König u.a., Governance als entwicklungs- und transformationspolitisches Konzept (2002); Schuppert (Hrsg.), Governance-Forschung (2006); Schuppert/Züm (Hrsg.), Governance in einer sich wandelnden Welt (2008); Seckelmann, Verw Arch 2007, S. 30ff.

10 Refer to Stein, Lex Mercatoria (1995) for lexmercatoria; Röhl, ZR Soz 1996, 33.ff; Voigt in Voigt, Globalisierung des Rechts 1999, S. 22.f; Teubner u. Mertens in Teubner, Global Law without a State (1997), P. 8, 31; Möllers in Anderheiden/Huster/Kirste (Hrsg.), Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts, ARSP-Beiheft, Nr.79 2001, S. 51 f.

11 Röhl, Allgemeine Rechtslehre, 3. Aufl., 2008, S. 335 ff; Alexy, Begriff und Geltung des Rechts, 1992, S. 201.

12 Hilf/Oeter, WTO-Recht: Rechtsordnung des Welthandels (2 Aufl. 2010); Kopke Rechtsbeachtung und – durchsetzung in GATT und WTO (1997); Ortino/Petersmann (Hrsg.), The WTO Dispute Settlement System 1995-2003: Vol 18 (Studies in Transnational Economic Law) (2003); Petersmann The GATT/WTO Dispute Settlement (1997).

13 Möllers, in Anderheiden/Huster/Kirste (Hrsg.), Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts, ARSP-Beiheft Nr. 79 (2001), S. 48.

and desertification through climatic degeneration[14]. An emergence of not well developed international law, like WTO rule cannot meet massive requirements of economic development for legal norms nowadays. Therefore, it is extremely improper to compare the need of legal rules in pre-industrial age with the huge need of the present world economy for legal norms and use this as an excuse to weaken the latter.

II. THE UNSUCCESSFUL GLOBALIZATION OF CRIMINAL LAW

The status of criminal law in globalization will be discussed in this section. First of all, there is a paradox in the progress of globalization of criminal law. As we all know criminal law protects the legal interest, i.e. protection of rights as well as personal and social interests that could not be given up[15]. Since criminal norms play a significant and indispensable role in the legal system, it should also act as the pioneer in the creation of global law so as to avoid evasion or invasion of legal interests protected by domestic law in the process of globalization. On the other hand, the traditional criminal law is the core element of national sovereignty. This explains why in the formation of confederacy or federation, people were rather cautious and hesitated to give criminal law-making power to central authority. For example, so far, states of the USA still retain large criminal law legislative power, while the EU has no real legislation in criminal law and only till recent years it begins trying to establish criminal clauses protecting the financial safety in EU[16]. In fact, the risk in the process of globalization is always faster than the criminal law that tries to control it. Therefore, against the risks that have been brought by globalization, it dooms to fail in protecting legal interests with the criminal law, and this could not be filled up with the domestic criminal law. The futile efforts made by the Supreme Court of Germany have given us profound lessons. In the case, the defendant denied on the Internet the massacre of Jews. In Germany, it is criminal behavior that denying slaughtering Jews is a kind of genocide (Term 3, Article 130 of Penal Code of Germany) and should be punished. The premise according to Article 9 of the Penal Law is that the act is conducted in Germany or the consequences caused by such act happen within German. The decision of German Supreme Court was that (Judgment File 46212) through the Australian living in Australia published an article of denying slaughtering Jews on the Internet; Germans could browse or download the article; therefore, such behavior should be punished in Germany[17]. However, the judgment is questionable. On the one hand, it shows German judicial authority is self-important and irrational. But on the contrary, it reveals its weakness and inefficiency. German judicial authority tries to impose its national law on people of other countries, tries to stipulate how they should treat Nazi history. Though the crime committed in that history is still a psychological burden of the whole German nation, it should not be a burden to people from other countries. Meanwhile, such symbolic judgment is unnecessary und impossible for German authority to prosecute such act. Only when the actor himself come to Germany then the prosecution is possible, however, if he will voluntarily come is extremely doubtful. Of course, such occasional cases would not affect people in using the Internet. The Internet is a manifestation of globalization, and it is rather absurd to ask Internet user to respect the laws in every country. This thought is not only unreasonable but also not applicable. For in some religious countries, blasphemy or other similar behavior may be deemed as crimes, but in other nations, such behavior may be usual. Therefore, the problem like this could only be solved correctly by formulating international agreements, i.e. to stipulate in a global law about what could be broadcasted and spread on the Internet and what could not. And an individual country could only exert its punitive power within its territory.

The incompetence of single county in dealing with globalization is much more apparent in the field of environmental protection. Therefore it is urgently necessary to formulate a global-wide criminal law in this area. However, no international convention on environmental protection is backed by punitive power. On the contrary, though Kyoto Protocol that intended to protect world environment was adopted cautiously, the USA, the largest consumer of global resources, wrote off the endeavor by making a refusal statement, which makes Kyoto Protocol lose its practical significance at the level of the implement, let alone at the level of criminal law. The Copenhagen Conference that had been held several years ago was a disaster. The reason for the failure of this conference is that the industrial countries were unwilling to offer developing countries equal rights of environmental protection. However, the western media remained silent about this reason. The recently achieved Paris Agreement is not surprisingly

14 Borß in Voigt (Hrsg.), Globalisierung des Rechts (1999/2000), S. 53 ff.

15 Refer to Hefendehl/v. Hirsch/Wohlers (Hrsg.), Rechtsgutstheorie-Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel? (2003), S. 118 ff.

16 Referr to Satzger, Internationales und Europäisches Strafrecht, 4. Aufl. 2010.§9 Rn. S. 31.ff

17 Refer to BGHSt 46, 212 and Hörnle NStZ 2001, S. 309 f. or Koch GA 2002, S. 703, 707.

also a non-binding Commitment, which is a lack of enforcement mechanisms.

The formulating global environmental criminal law should have prevented the malfunction of global environmental policy. Such malfunction is not an accident, i.e. it is not the disorder caused by unfortunate accidental factors, but completely in conformity with the development trend of globalization. As we all know, the essence of globalization is the Americanization of the world[18]. Here, Americanization refers only to the United States. It becomes more and more obvious: the nature of globalization is to liberate the economy from the constraints of the national state, culture and law; for long America has been the pioneer in the process, therefore, it is also the central engine of globalization. To some degree, globalization becomes just a means of Americanization, and its ultimate aim is to gain economic profits. Regarding such ultimate goal, ecology movement is an obstacle[19]. Therefore, in the process of globalization, the environmental protection law is real internationalizing, and international law on environmental protection could only obtain its legality in this way.

III. HUMAN RIGHTS

If a country tries to deny the necessity of a development process initiated by itself and tries to stop the process, it can be called self-defensive imperialism. Besides environmental protection, we could also find another example in the field of human rights. i.e. US refuses to sign Rome Statute on establishing permanent International Criminal Court[20]. No doubt, the US plays a significant role in universal human right protection; however, the establishment of human right protection fall short of success for America's disagreement on "judging serious international crimes"[21] by a permanent International Criminal Court. This was astonishing at the first beginning. This also astonished the 51 authors of Commentary on Roman Statute of the International Criminal Court, which was edited by Triffterer. However, in this 1295-page long commentary only vaguely mentioned about US's standpoint of refusing establishment of an international criminal court; on the contrary, Kiribati' (an island country in the middle of Pacific) and Tonga's rights in signing Rome Statute are stressed and confirmed[22].

America's attitudes toward this issue were quite consistent. The reason for this was rather simple: as the only country who has used military force in all continents and won in all battles except Vietnam War in the past 50 years, America also entrusted itself the right of using first nuclear weapons at the conditions set by itself[23]. According to judicial precedents of the international criminal court, it could not be determined whether the civilian victims of the violence mentioned above belongs to "collateral damages". If so, America would be the primary Accused under Rome Statute; therefore, to this super power in the world who implements supremacy strategy[24], it is a natural choice to make its wilful conduct which could be carried out in the future free from the judicial jurisdiction of the international criminal court. It could be seen that the international criminal norm stipulated by Rome Statute is not the

18 Wiegand in Immenhauser/Wichtemermann (Hrsg.), Vernetze Welt-globales Recht, Jahrbuch junger Zivilrechtswissenschaftler (1998), S. 9 ff.

19 The enormous saved cost (environmentally) as well as the worrisome economical problems could lead to inevitable negligence of the necessity of environmental protection. Though such simple truth is not completely neglected in America (There was the basic statement on this in A.Gore Wege zum Gleichgewicht [d.t 1992]), compared with Europe, it still does not gain enough attention in political affairs and in the field of science it even is concealed and whitewashed (C.C.v. Weizsacker, Logik der Globalisierung [1999]).

20 America's changes from just refusing to approve the Rome Statute to stipulating exemption agreement with enormous political pressure and to full authorization to America president in the form of American Service Members Protection Act please refer to Hamm, NJW 2002. S. 3150.

21 See Preface of Rome Statute.

22 Clark in Triffterer [ed.], Commentary on the Rome Statute of the International Criminal Court, 2 Aufl. 2008, 1773.

23 Raven-Hansen 83A.J.I.L.786.787nn. 5-6 (1989); Bundy, Halperin, Kaufmann, Kennan, Mc-Namara, O'Donnell, Sigal, Smith, Ul-Iman□Warnke 258 The Atlantic Monthly 35, 36 (1986) ("In fact the possibility of first use permeates all aspects of American defense policy…U.S. Foreign commitments as well as calculations about the forces needed to meet those commitments are based on the assumption that the United States would in some circumstances be the first to use nuclear weapons. Successive administrations have rejected arms-control proposals that might limit the nations capabilities with respect to first use").

24 Brzezinski, Die einzige Weltmacht-Amerikas Strategie der Vorherrschaft (Germany title of the original American work of 1997), which mentioned twice Iraq who has now descended to the victim of aggressive war and warned people that Iraq was becoming a terrible devil.

international criminal law in its real sense, but a limited humanistic warning sign erected for local conflicts. Since people still have to face great calamities during the war while the winner has actual immunity, this warning sign is of very limited significance.

IV. THE RIGHT WAY TO ESTABLISH THE INTERNATIONAL CRIMINAL LAW

Examples of Internet crimes, environmental crimes and the international criminal court have been analyzed above, from which we have seen that endeavors to create an international criminal law on these aspects all failed. However, there are some successful examples to set global criminal rules, e.g. international agreement on fighting against drug crime and anti-corruption as well as to strike the so-call counterfeit and shoddy products. In these fields, it seems that a global criminal law has been established.

Criminal punishment for producing, selling and buying drugs mainly bases on the **Single Convention on Narcotic Drugs** of 1961. This agreement took effects in Germany in 1974[25]. The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances has strengthened striking on drugs. According to paragraph 2 Article 3, the member states have the obligations to punish the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption. It was the twice "declaration war" against drug use by Regan and Bush that promoted most the progress[26]. Though the term "war" did not appear in Germany, the similar action took place soon in Germany. Based on the experiences accumulated so far, we could get the following three definite conclusions: drug supply does not decrease, and drug-related crimes are not reduced, so the war on drugs does not succeed; criminal justice and prison system concentrate on fighting against drugs while neglecting the punishment of other crimes; no matter in terms of direct injury of marijuana and other narcotics on human health or the indirect injury on human body by hastening alcoholic dependence, its danger would not be more serious than alcohol[27].

To make the purchase and hold hemp products for individual consumption a crime is unreasonable because this conduct does not damage legal interest. Therefore, it is incompatible with the principle of liberal democracies. Compared with the legal treatment of alcohols, it violates the principle of equality seriously. It has been proved that this criminal regulation has not any effects in practice. On the other hand, to deal with drug addiction related crime occupies plenty of judicial resources which has prevented it solving other tasks efficiently[28]. Therefore, here it is unnecessary to explore what kind of motivation that promotes a nation to stipulate such a crime in the criminal code, which goes against all rational principles of criminal legislation. Also, According to economic laws, the war on drugs just accelerate the expansion of organized crime. According to certain pieces of evidence people know in the world, it could be said that criminal law is no longer the tool of protecting legal interests. It has become a tool to carry out specific social ideology. Thus, globalization of war on drugs also brings colonization of the rest states. In these countries, perhaps drug is not a serious problem or drug could be enjoyed positively like alcohol; or people would rather choose medical treatment than criminal punishment to restrain drugs.

International anti-corruption is also a significant field for the discussion of criminal law. The anti-corruption agreement concluded in recent years has resulted from Lockheed-Scandal. As the consequence of the scandal, in 1977, American issued Foreign Corrupt Practices Act. According to the Act, American Enterprise, which gives bribes to obtain public projects in foreign countries, should also be punished. Worrying that American companies would be at a disadvantage in competition because of this act, America began to manipulate the establishment of international agreements, trying to promote relevant criminal laws to other countries. First, on March 29 of 1993, Anti-Corruption International Agreement was established within American countries. Then on December 17 of 1997, Convention on Combating Bribery of Foreign Public Officials in

25 Gesetz v. 2. 1. 1974, BGB l Ⅱ1211.

26 See Beke Bramkamp, Die Drogenpolitik der USA 1969-1990 (1992) 88 ff.

27 P.-A. Albrecht, Kriminologie, 4. Aufl. 2010, 350 ff., 358 ff.

28 According to statistics from the Federal Bureau of Crime, drug-related crimes increased from less than 80,000 in 1987 to more than 240,000 (www.bka.de/pks/pks2001/index2.html), till 2009, though declined slightly, it still reached as high as 236,000 (http://www.bka.de/pks/pks2009/startseite.html). Drug trafficking crime (Kreuzer u. A. Beschaffungskriminalität Drogenabhängiger [1991] 340.ff), besides containing judicial resources, could also lead to permanent corrosion of criminal procedure of constitutional state (Nestler [Fn.36] Rn. 378. ff), and hasten organized crime (Gebhardt [footnote 36] Rn.86; Eisenberg [footnote 36] §57 Rn.73). All these consequences shall be undertaken by judicial system and the society, including expensive but unfruitful anti-money laundering movement. All these are enough to show that the current drug-related criminal policy is the root of all dilemmas and that it is pure junk policy.

International Business Transactions was signed among OECD member countries. It is stipulated in Article 1 of OECD Agreement that each Party shall take measures to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantages to a foreign public official in order to obtain or retain business or other improper advantages in the conduct of international business.

In the beginning, the punishment of such behavior was limited only to territorial jurisdiction, and that means Foreign Corrupt Practices Act applied only to conduct occurred in the USA; therefore, only several conducts were punished mildly[29]. The 1998 amendments expanded jurisdiction concerning payments made wholly outside the United States only with respect to U.S. nationals or U.S. entities.

If OECD is investigated from the aspects of basic principles of criminal law and practical consequences of the legislation, it could be found that it is in some way similar to that in the war on drugs. As we all know, one could not obtain contracts of public projects in many countries if one does not bribe. Since what bribery crime protects is the nature of the rule of law, it is naturally that a nation's stipulation of corruption crime would protect its rule of law principle; otherwise, it would not only be absurd but also go against the principle of international law to protect the rule of law of other nations. According to the general principle of international law, such fundamental principle could only be changed through agreements between countries, for example, by establishing EU Convention or OAS Agreement, the member states promised to one anther to punish bribing public officials in other member countries. However, the stipulation of OECD Agreement is entirely different, which also includes bribery to civil servants of countries that are not members of the agreement. This reminds people of the notorious Munich Agreement which was concluded in 1938 between Germany, U.K., France and Italy, that determined the fate of Czechoslovakian who did not attend the negotiation. This is a typical agreement that has established an imperial global criminal law.

It is unnecessary to give more details about the apparent flaws of OECD Agreement in practice and the legal defects of some nations in international bribery[30]. Just like the war on drugs, the whole philosophy in anti-international bribery is doomed to fail, because close cooperation with relevant third nation is the precondition of detecting foreign bribery case; however, OECD Agreement cares less about this point. Moreover, the territorial principle that America implemented strictly in the early stage also makes the law on the punishment of international bribery not applicable. This has not be changed even personal jurisdiction has been introduced. What is important in foreign bribery is not the nationality of the manager who bribes but the transnational company's action, but the existing OECD Agreement lacks the connection point to punish the big concern. Suppose Daimler Company in Saudi Arab bribed, it could only be prosecuted when a Germany manager conducted the behavior; so, if a Lebanese conducted the act on behalf of Daimler Company, it would be impossible to apply the law. Apparently, some industrial countries know how to take advantage of this loophole, that's why public corruption cases are not many, though it is no doubt that bribery is a common means to obtain the international contract. Therefore, there are also some impractical imperial legal regulations in the international agreement on anti-international corruption. This is also a negative example of the formulation of global criminal law.

It seems that German anti-corruption practice is an exception. Germany judicial authority struck severely the international corruption conducted by Germany enterprise, such as the Siemens bribery scandal in Greece. However, its implement is confusing. First, in order to apply stipulation of infidelity in Germany criminal law, the behavior of opening the so-called black account for preparation of bribery will be explained as a harmful act to the enterprise. However, such explanation is economically not right und untenable. Besides, the profits obtained "illegally" from international contracts flow into Germany Treasury by confiscation. Since the profits are from the national economy of the entrusting country of the contract, German is making profits directly from the loss of other nations and these nations are mostly developing countries. This has provided us with a classic example of imperial criminal law.

The right approach shall be to return the Property confiscated to its prior legitimate owners that suffer damage economically. Article 57 of 2003 United Nations Convention Against Corruption stipulated compensation to injured countries in this direction. Only when this article is implemented practically, we could say that there is international justice in the battle against corruption.

V. CONCLUSION

Finally, we can see that regarding the global criminal law, the criminal thinking of common law leads, while the fundamental principle of Continental Criminal Law must make a sacrifice, though they are regard-

29 Benseler in Eser/überhofen/Huber, Korruptionbekämpfung durch Strafrecht (1997). S. 672.

30 German carries it out at domestic level with Int Best G v. 10.9.1998. BGB1 §2327.

ed as inviolable and even have the constitutional effect domestically. In order not to cause misunderstanding, some clarification on this point must be made. It's necessary to make a compromise between criminal ideas of different countries in formulating a global criminal law. First, it is to find out the commonly punishable field; second, it is to decide to add some criminal stipulations based on the constitutional legislative right of all member states; and the third is to determine the unbridgeable boundary of criminal policies based on the constitutions of the nations. The fourth point is the indispensable part of those criminal law protections, i.e. the part that an individual country could not protect efficiently in a globalized the world.

An ideal International Criminal Law should contain the following sections. Section one stipulates the necessity to establish global criminal norms. The condition of this part at the moment is not going very well, just as in the field of environmental protection and the refusal of Roman Agreement by the USA. The second section following is about the international mala in se crime, which is constituted by the conventional criminal stipulations of all nations. The internationalism of this part is manifested mainly in judicial assistance systems[31]. For example, the European Union is trying to bring in the so-called European Arrest Warrant. The system requires to make a comparison in advance if the crimes involved are substantially same, this means, when the crimes only have the same names but not the substantially identical nature, they will not be treated as the same offense. This could lead to the application of the heaviest punishment within Europe[32].

The third section is about possible global criminal offenses. It includes all new crimes that could be accepted by all legal culture. However, considering that constitutions in a few countries have stipulated some insurmountable boundary, the global criminal law introduced in this section could not break through such boundary. In fact, we are far from respect of the boundary. The phenomenon of surpassing the limit reflects the legal imperialism in the globalizing.

An example in term of this situation is liability principle. Because of refusing to admit some important excuses and accepting the reversion of burden of proof in common law, the global criminal law does not pay much attention to the liability principle. This is the infringement of the core principle of the continental legal system. According to European laws, the principle of responsibility has either been implied by constitutions as in Germany[33], or been protected explicitly by constitutions as in Italy[34]. As to Rome Statute, if one takes a closer look at the general provisions, he will find that the important third part lags far behind the dogmatic legislation level of continental law systems. But imposing the results of continental criminal jurisprudence on common law nations would, in turn, become imperialism of the criminal law thinking of Europe. In paragraph 1(d), Article 31 of Rome Statute, it makes concession between the common law and the continental law on the stipulation of exculpatory issues. However, this leads to injuries to liability principle, because this provision retains duress as defense according to Weighing of Interests, i.e. it stipulated that the person under serious stress, who does not intend to cause greater harm than the one sought to be avoided can be excluded from criminal responsibility. This stipulation blurs the difference between justification and excuse, and in practice, it excludes the possibility to exempt the criminal responsibility in case of acting with no liability, which is incompatible with the personal avoidance principle and liability principle. The same shortcoming also exists in paragraph 2, Article 32 of Rome Statute, which stipulates vaguely on the mistake of law, and in article 28 on the commanders and the superiors' criminal responsibility[35]. Paragraph 2 of Article 66 and paragraph 1I of Article 67 which are about the prohibition of the presumption of guilt are praiseworthy; however, they are questioned by the authors of common laws in Commentary that was edited by Triffterer[36].

Another great danger of global criminal law lies in the blending of criminal law and the law of war. For example, the decision of the United States to launch a "global war on terror" after September 11, 2001, and anyone suspected of terrorist activity could be detained

31 See Schombung/Lagodny, Internationale Rechtshilfe in Strafsachen (3.Aufl. 1998), Einleitung Rn. 15.ff; Hackner/Lagodny/Schombung/Wolf, Internationale Rechtshilfe in Strafsachen (2003), Rn. 7 ff, 24 ff; and Schombung/Lagodny/Gleß Hackner, Internationale Rechtshilfe in Strafsachen (4, Aufl. 2006), 36 ff, 245 ff.

32 Relevant criticism see Schünemann: in Joerden/Szware (Hrsg.), Europäisierung des Strafrechts in Polen und Deutschland- rechtsstaatliche Grundlagen, Berlin 2007, S. 265-277.

33 BVerf GE 6,389,439,7,305,20,319,20,323,331.

34 Stipulation of term 1, article 27, personal responsibility for an offense is the condition of criminal punishability ("la responsabilita penale e Personale").

35 Here, the behavior of failing to prevent one's subordinate by negligence is punished as an intentional act. What makes it irony is that adoption of such stipulation was under the suggestion of America (Ambos, Der Allgemeine Teil des Völkerstrafrechts (2002), 698).

36 Schabas in Triffterer, Commentary on the Rome Statute of the International Criminal Court [2 Edition 2008] XXV, Art.66 Rn.22, Art.67 Rn.50.

as "enemy combatants" without not only protections entitled by Geneva Conventions but also due process protection[37]. Those legislations have negative human rights consequences. However, under international criticism, we could see that the United States begins to reflex on its deeds[38]. All these experiences and observations could form an aspect of global criminal law finally. According to the complementary jurisdiction of ICC stipulated in Article 17 of Rome Statute, if the State is unwilling or unable to carry out the investigation or prosecution the international criminal court could then has the jurisdiction. Inspired by this stipulation, in reverse, the globalization of criminal law might be used to limit the expansion of the national power of punishment that goes against the rule of law in the future. However, in reality, we still have a long way to go.

37 See Press Release, White House Office of Press Sec, President Issues Military Order: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), Website: http://www.whitehouse.gov/news/release/2001/11/20011113-27.html; Maddox, Comment, 28 N.C.J Intl L. Com.Reg.421, 449-453(2002).

38 Rasul vs. Bush, 542 U.S. (2004); Boumediene vs. Bush, 549 U.S. (2007).