

Lecture 2: The international enforcement of human rights as binding universal values

I. Introduction

1) Human rights as universal values (→ see lecture 1)

- the Universal Declaration of Human Rights of 1948 as a global expression of the commitment of all UN member states (and, thus, of mankind) to human rights
 - note, however, that the UDHR is only a political, not a legally binding document!
- the protection of absolute minimum standards of essential human rights by mandatory customary public international law
 - the prohibition of genocide, slavery, forced labour, ethnical cleansing, other crimes against humanity and war crimes; see for examples art. 6 - 8 of the Rome Statute of the International Criminal Court of 1998
 - note that there is a broad global consensus that *these* standards are absolutely binding (ius cogens)!

2) The wide spectrum of measures of the international community and individual states to make states comply with human rights

- an often unprecise terminology in human rights law and politics
- "enforcement" of h.r. in the strict sense (includes coercive measures up to the use of armed force)
- "enforcement" of h.r. in the wide sense (by the legally binding but not physically enforceable decisions of international courts)
- "encouragement" to comply with h.r. (by political and economic pressure)
- "promotion" of h.r. (by legal, educational, institution-building, scientific and cultural cooperation, often development cooperation)

II. The enforcement of the prohibition of large-scale gross violations of elementary human rights

- by these means only enforcement of the mandatory absolute minimum standards (→ I.1)
- only in case of systematic violations of the rights of larger groups, not in individual cases
 - the example of the unsanctioned state-ordered murder of the Saudi-Arabian journalist Jamal Khashoggi

1) Measures of the UN Security Council under Chapter VI UN Charter

- measures for the pacific settlement of disputes, mainly recommendations and investigations (fact-finding missions)
- background: *large-scale gross human rights violations* are considered a *threat to peace*, even if limited to the territory and citizens of the own state
 - an important paradigm shift in the practice of the Security Council in the 1990s

2) Measures of the UN Security Council under Chapter VII UN Charter

- action with respect to threats to peace, breaches of peace, and acts of aggression
 - a) **Determination of the existence of a threat to peace** (art. 39)
 - b) **Provisional measures to prevent the aggravation of a situation** (art. 40)
 - e.g. creation of conditions for humanitarian assistance
 - c) **Measures not involving the use of armed force** (art. 41)
 - *sanctions* against states, groups or individuals (arms embargos, economic sanctions, travel bans, creation of international tribunals etc.)

d) Military measures (art. 42)

- use of force to maintain or restore the international peace and security which are affected by the large-scale gross h.r. violations
- e.g. peacekeeping operations or authorisation of multinational forces
- most severe measure: authorisation of a humanitarian intervention:

3) The humanitarian intervention

- deployment of armed forces on the territory of a foreign state to protect its population against h.r. violations by domestic institutions or forces
- a serious deviation from the prohibition of the use of force (art. 2.no.4 UN Charter) and the principle of non-intervention into the internal affairs of a sovereign state

a) Humanitarian intervention with authorisation by the Security Council
(under art. 42 UN Charter)

b) DISPUTED: Humanitarian intervention in exceptional cases without authorisation by the Security Council?

- example: the intervention of NATO forces in Kosovo 1999

aa) The problem

- a permissible *ultima ratio in urgent cases* if the Security Council does not or cannot take the necessary measures?
 - discussed only as collective action for cases where all other means are exhausted or unpromising
- geopolitical interests and general disregard for human rights often cause one or two veto powers to block the decision-making in the Security Council, but by-passing the institution, which has been created for such crises, could weaken the law- and institution-based international order and undermine one of its fundamental principles

bb) The arguments PRO

- can be imperative to ensure effectively minimum standards of elementary h.r. and, thus, for an effective realisation of the human rights idea at all
- mankind cannot allow large-scale atrocities without losing its humanity
- in the world order of the 21st century, the elementary human rights are of greater weight than the sovereignty of the state

cc) The arguments CONTRA

- a high risk of abuse (especially selective use)
- the risk of a circumvention of the UN mechanisms
- the suspicion of imperialistic imposition of Western values
- sovereignty and non-intervention are vital elements of the international order and therefore more important than human rights

dd) OWN OPINION:

- a necessary option until a UN reform has created a reliable, law-based and unpoliticised mechanism which effectively ensures a minimum protection of essential human rights
- permissible only as last resort in extreme and extremely urgent cases, strictly limited to necessary and proportionate measures and under full reliability of the intervening states for any excess

ee) YOUR OPINION:

- _____

4) **The often overestimated concept of "responsibility to protect" ("R2P")**

- developed by an expert commission, brought in by UN General Secretary KOFI ANNAN (see his report A/59/2005, no. 135), embraced and formulated by a World Summit in 2005 (cf. GA Resolution 60/1, no. 138 f.) and occasionally mentioned in Security Council resolutions - UN has even established an Office on Genocide Prevention and Responsibility to Protect

a) **The idea of "responsibility to protect"**

- each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity; this entails the prevention of such crimes, including their incitement, through appropriate and necessary means
- the international community should encourage and help states to exercise this responsibility
- the international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to help to protect populations; it may also take measures under Chapter VII UN Charter, should peaceful means be inadequate and national authorities failing to protect their populations

b) **The political nature of the concept**

- the concept as such has not been enshrined in the UN Charter or intern. treaties; it is *only based on a political resolution* of the General Assembly, which is not legally binding
- however, it roots in, reflects and operationalises the already existing legal obligations under intern. treaties and ius cogens; moreover, it confirms today's practice not to consider severe h.r. violations anymore as internal affairs which are tabu for outside intervention

c) **The failure of the concept in the face of current challenges**

- example 1: the refusal of the international community to exercise its responsibility in the civil war in Syria
- example 2: the refusal of the international community (in particular ASEAN) to intervene against the large-scale grave h.r. violations in Myanmar
- conclusion: a serious concept of international human rights law or empty words?

5) **The complementation of these measures by the criminal prosecution of serious human rights violators by the international criminal justice**

- flanking post hoc measures to deter serious h.r. violations in the future
- 1993/94 - 2014 criminal prosecution of most serious human rights violations by the ad hoc International Criminal Tribunals for Rwanda and the former Yugoslavia
- since 2002 subsidiary criminal prosecution of genocide, crimes against humanity, war crimes and crimes of aggression by the International Criminal Court (ICC) in Den Haag
 - legal basis: Rome Statute of the ICC of 1998 (ratified by 123 states but not USA, China, Russia, Iran)
 - own Office of the Prosecutor which can initiate proceedings
 - can only prosecute crimes committed within its territorial jurisdiction or by a national of a state that is within its territorial jurisdiction
 - CRITICISED by African states of disproportionately targeting African leaders

III. The legal protection of human rights by international human rights courts

1) The existing geo-regional human rights courts

- European Court of Human Rights (ECtHR) in Strasbourg
- Inter-American Court of Human Rights (ACtHR) in San José
- African Court of Human and Peoples' Rights (ACHPR) in Arusha
- projected: Arab Court of Human Rights in Manama City (Bahrain)
- still missing: an Asian or ASEAN human rights court

2) The concept behind

- a) Consistent, unbiased protection based on law by independent, impartial legal professionals**
 - no risk of sabotage in politicised institutions, as in the UN Human Rights Council and the Security Council
 - reliable and predictable protection through the continuous development of a consistent, sophisticated legal human rights doctrine
- b) Effective protection by legally binding decisions in individual cases**
 - the essential difference to the little effective protection by the UN h.r. treaty bodies
 - comprehensive jurisdiction on individual cases
 - courts can even adopt provisional measures and order remedial action or compensation
 - decisions *directly binding to all domestic courts and institutions*
 - no need to wait for implementing steps of the government or parliament which might not come
 - execution of ECtHR judgements even supervised by Council of Europe's Committee of Ministers, which can, after consultation of the Court, take sanctions (art. 46 ECHR)
 - however, no use of armed force to physically enforce the court decisions in the states

3) On the way to a global human rights court?

- the benefits of a human rights court at the global level for the protection of the universal human rights
- the unwillingness of the majority of states to accept international binding decisions on domestic human rights issues

IV. Options of states and international organisations to generally force or encourage respect for human rights in a state

1) Background

- in the world order of sovereign states, every state is free to decide with whom it will or will not trade, cooperate or maintain close relations - but there is no right of the individual state to be accepted by others as partner
- every state is free to stop or restrict trade, cooperation and travel with states disregarding universal h.r. standards; such measures are legal under public intern. law and legitimate
 - if necessary, contrary obligations resulting from intern. treaties or membership in intern. organisations can be canceled by terminating the treaty or withdrawing from the organisation
- international organisations are, in accordance with their founding treaties, also free to accept or not accept an individual state as a member or partner
- this enables the international community to *exert finely graduated pressure* on states with serious h.r. deficits *in many different ways* and, if necessary, even to isolate them and cut them off from the benefits of globalization

2) Examples

- a) **Making a sound commitment to human rights a condition for membership in geo-regional organisations**
 - the example of the Council of Europe ([art. 3 CoE Statute](#)) and the European Union ([art. 49, 2 EU Treaty](#)); the missing example of ASEAN
 - in particular: requiring the ratification of geo-regional human rights treaties with effective control mechanisms for accession
 - in particular: providing for the suspension of membership rights or termination of membership in case of serious h.r. deficits
 - example: Council of Europe (cf. [art. 8 CoE Statute](#))
 - bad example: European Union (the failing sanctioning mechanism under [art. 7 EU Treaty](#))
- b) **Making respect for human rights a condition for mutual assistance in military defence alliances**
 - why should a state risk the life of its own citizens to defend a state that does not respect human rights?
 - the missing example of NATO: military assistance of free and democratic states even for the totalitarian regime of the Turkish president Erdogan?
- c) **Insisting on respect for human rights as a precondition for international economic cooperation** (→ see Lecture 3)
 - most effective, in particular to encourage improvements in newly industrialised countries
- d) **Personal sanctions against human rights violators**
 - e.g. confiscating assets or denying entry, transit and the use of national airlines to persons involved in or responsible for serious h.r. violations
- e) **Human rights mainstreaming in development cooperation**
 - comprehensive consideration of human rights aspects in programs and projects of development cooperation; already common
 - encouraged by and in line with the UN Sustainable Development Goals ([GA Resol. 70/1](#))
 - includes support of human rights education and professional education as a pillar of development cooperation
- f) **Human rights mainstreaming in scientific cooperation**
 - making the common commitment to h.r. a basis for joint projects, inter-university cooperation and scholarship programs
 - promoting research and an open scientific dialogue on h.r. and h.r. deficits

V. Further reading

- [Adams, Simon](#): 'If Not Now, When?': The Responsibility to Protect, the Fate of the Rohingya, and the Future of Human Rights, Global Centre for the Responsibility to Protect Occasional Paper Series No. 8, 2019, <https://dx.doi.org/10.2139/ssrn.3319491>
- [Donnelly, Jack; Whelan, Daniel J.](#): International Human Rights, 6th edition 2020, p. 235 ff.
- [Fassbender, Bardo \(editor\)](#): Securing Human Rights? Achievements and Challenges of the UN Security Council, 2011
- [Fancioni, Francesco; Bakker, Christine](#): Responsibility to Protect, Humanitarian Intervention and Human Rights: Lessons from Libya to Mali, Transworld Working Paper 15 (2013), www.iai.it/sites/default/files/TW_WP_15.pdf
- [Hehir, Aidan](#): Humanitarian Intervention. An Introduction, 2nd edition 2019
- [Jemirade, Dele](#): Humanitarian intervention (HI) and the responsibility to protect (R2P). The United Nations and international security, African Security Review 30 (2021), p. 48 ff., DOI:10.1080/10246029.2020.1847153
- [Kaltenborn, Markus; Krajewski, Markus; Kuhn, Heike \(editors\)](#): Sustainable Development Goals and Human Rights, 2020, DOI 10.1007/978-3-030-30469-0

- *Lepart, Brian D.*: Rethinking Humanitarian Intervention. A Fresh Legal Approach Based on Fundamental Ethical Principles in International Law and World Religions, 2002
- *Security Council Report (editor)*: Human Rights and the Security Council - An Evolving Role, Research Report, 01.2016, www.securitycouncilreport.org/research-reports/human-rights-and-the-security-council-an-evolving-role.php
- *Weiss, Thomas G.*: Humanitarian Intervention, 3rd edition 2016