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Introduction to the International Human Rights Regime

By

Manfred Nowak

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The Western Allies, the United States in particular, entered the war not only to stop *Hitler's* wars of aggression, but also to intervene on humanitarian grounds. As early as 1941, *Franklin D. Roosevelt* and *Winston Churchill*, in the **Atlantic Charter,** had made the destruction of Nazi tyranny their declared war objective, partly on the basis of Roosevelt's 'freedom from fear and want'. The **United Nations** was founded immediately after the end of the Second World War to save succeeding generations from the scourge of further wars, but also to reaffirm people's faith in human rights and the dignity of the human person. Sadly though, the powerlessness of the United Nations (4.) as well as repeated genocides (e.g. in Tibet, Cambodia, Bosnia and Herzegovina or Rwanda) and human rights violations of the highest degree, have shown that it is still very difficult to break the dogma of national sovereignty with regard to human rights. Ultimately, this is what would be necessary to establish a functioning system of collective security and, thus, to guarantee all victims freedom from fear in the broadest sense. However, since the end of the Cold War, a wind of change is blowing through the system as interventions in Iraq, Somalia, Haiti, Bosnia and Herzegovina, Kosovo and East Timor have shown (16.).

2.6. Three Generations (Dimensions) of Human Rights as Ideological Concepts during the Cold War

The development of human rights, their philosophical foundations as well as their legal and factual realization, has been a dialectic and mostly revolutionary process (2.1.). Back in the 1970s, *Karel Vasak,* the Czech human rights expert, created the expression **'human rights generations'** to describe this intermittent process. Provided this term is not taken to imply that each succeeding generation is replaced by the one preceding it, it is frequently used to illustrate the debate on the ideology of human rights during the Cold War. Others have preferred using the term **human rights dimensions.**

TEXTBOX 15

THREE GENERATIONS/DIMENSIONS OF HUMAN RIGHTS

- Civil and political rights
- Economic, social and cultural rights
- Collective rights

Of course, it would be rather simplistic to try and classify all human rights into three generations or dimensions, yet it is a clear reflection of the graphic human rights discussion carried on between the West, the East and the South. The states in the West liked to emphasize, and some are convinced to this day, that the **civil and political rights** of the first generation, i.e., the liberal rights of non-interference and the democratic participation rights inherent in the classical human rights concept, are

the only real human rights in the sense of individual rights enforceable by law against the state. This restricted point of view is reflected in several Western constitutions, as well as in the liberal-constitutional theory of fundamental rights and the jurisprudence of many courts in Europe, the United States and other countries. It restricts human rights to the vertical relations between the state and the individual and to claims of the individual against state interference. In principle, it does not accept positive state obligations to protect and to fulfil human rights, nor the horizontal validity of human rights between individuals (so-called third party effect). The model relies on the classical human rights concept developed during the Age of Enlightenment, yet in doing so it overlooks the fact that the rationalist doctrine of natural law in particular considered the natural rights of human beings as effective against all types of interference, by state and non-state actors alike. In fact, this restriction of human rights to mere claims of non-interference only came about in the latter days of liberalism and legal positivism in the late 19th century and today is no longer sustainable. After all, all human rights are justiciable, obliging the state to respect (by non-interference), fulfil (by positive action) and to protect them against third parties (3.2.1.).

The socialist concept of the second generation is equally narrow-minded for it claims that civil and political rights would only aid and abet the capitalist interests of separating state and society. Accordingly, the only real human rights were those based on harmonization of individual and collective interests in socialist societies, in other words the **economic, social and cultural rights** as originally understood. Thus, the task of the state was to ensure the rights to work, social security, food, housing, health, education, etc. by granting positive benefits. Individual and legally enforceable claims against the state would therefore not only be superfluous, but actually run counter to the system. Furthermore, exercising such rights was not at the discretion of the individual, but in fact considered every citizen's duty (principle of the unity of rights and obligations). Thus, the right to work implied in a socialist economy also the duty to work, and even political freedoms, such as freedom of assembly, were to be exercised in conformity with collective interests of socialist society.

The third generation of the **collective rights of peoples** (of the South) tries to add a third dimension to human rights, which draws on the concept of universalism. Bearing in mind the fragility of human rights in the South, and in Africa in particular, which is due to a large extent to centuries of colonialism and imperialism, postulating individual rights at the national level only would hardly resolve the matter. International human rights protection, instead of being limited to international monitoring of states' observance of human rights, would have to ensure that the peoples of the South are granted collective solidarity rights vis-à-vis the peoples of the North. Article 28 of the 1948 Universal Declaration of Human Rights provides the basis for this third generation concept, stating that 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. The main rights of the third generation are the right to self-determination, which is primarily interpreted as colonial peoples' right

to political independence from the European colonial powers and to free disposition of natural resources, as well as the right to self-determined development which is closely linked to the former.

The concept of the three generations finds its normative expression in the two UN International Covenants of 1966 (the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, including the right of self determination as laid down in article 1 of both Covenants), as well as in the 1981 African Charter on Human and Peoples' Rights. It provided the philosophical and historical foundation for discussions on human rights ideology during the Cold War, yet it lives on in the minds of many people and politicians. It has formally been replaced by the principles of indivisibility, equality, interdependence and universality of all human rights (2.7.), and still it will be a long time before the shortcuts and one-sided assumptions of this generations' debate will be overcome.

2.7. All Human Rights for All: Universality, Indivisibility, Equality and Interdependence of Human Rights

During the Cold War, the question of human rights was essentially a political one. The **western industrialized states**, in establishing the European Convention on Human Rights, had installed a highly efficient regional protection and monitoring system for civil and political rights and took it upon themselves to criticize the socialist states and the South for their gross and systematic human rights violations. Starting in the 1970s, the Conference for Security and Cooperation in Europe (CSCE), (8.), along with the United Nations (4.), began to serve as a platform for the human rights clash between East and West. On a bilateral level, the United States, as well as several European donor states and the European Union (9.4.), as of the late 1970s, were using their development policies to extract human rights concessions (3.1.6.).

The East did try to counter by pointing to violations of economic, social and cultural rights (especially the right to work) in capitalist states, yet in the human rights debate it was on the defensive from the very start. For one thing, the human rights situation was much worse objectively, and for another, representatives of the **socialist human rights concept** resisted any progress in international human rights protection (including, economic, social and cultural rights) by rejecting any meaningful international monitoring mechanism and delivering a persistent-running fight for state sovereignty.

No doubt, the South had gained a major victory for human rights in its **battle against colonialism** and **for self-determination**, yet its active human rights commitment for the longest time did not stretch beyond that very area. Up until the 1980s, the South only seemed interested in three issues in the human rights context: the battle against apartheid, in the southern part of Africa, the right of self determination for the Palestinian people and the right to development (previously, the right to a new international economic order). Colonialism was conveniently used as a scapegoat for most other human rights issues, especially in Africa. Because of this restrictive point of view, many 'home made' problems were suppressed and the

South too found itself in the defensive as far as the human rights debate was concerned. Furthermore, the two regional human rights protection systems for Latin America and Africa were a far cry from what was expected and in many respects did not meet any of the European standards. It was not until the 1980s and 1990s, as the military dictatorships in Latin America and apartheid in southern Africa were overcome, that the South too began setting incentives out of its own accord.

At about the same time, the socialist regimes in Central and Eastern Europe began to collapse, and these '**velvet revolutions**' were also considered a victory for human rights. As the Cold War ended and President *Gorbachev's* vision of a 'common European house' was taking root together with a 'new world order' based on the principle of human rights and democracy, the time seemed ripe for a new, dramatic development in global human rights politics. The 1993 **Vienna World Conference on Human Rights** was to set out the parameters for these new politics (4.6.1.)

TEXTBOX 16

1993 Vienna Declaration and Programme of Action

4. 'The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community...'

5. 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms.'

However, the preliminary stage leading up to the conference soon showed that the sense of awakening borne in 1990 had evaporated into thin air. In Central and Eastern Europe the ideological void created by the collapse of socialism had been filled by a policy of aggressive nationalism, which caused the disintegration of Czechoslovakia, Yugoslavia and the Soviet Union, and even led to the genocide of Bosnian Muslims in the Balkans. At the same time, opponents of the idea of **universalism** serried ranks in the South, especially in Cuba, the Asian and the Islamic states. They unleashed a new North-South debate, accusing the industrialized states of abusing human rights to pursue their neo-liberalist and neo-colonial policies of dependence. If it had not been for the more than 1,500 non-governmental organizations (NGOs) both in the North and the South, which parallel to the conference were trying to push through the idea of '**all human rights for all**', the world conference would have foundered because of the issue of universalism.

On the very last day, following tough negotiations, the 171 states were able to agree on the wording of the Vienna Declaration, which states that all human rights are **universal, indivisible, interdependent and interrelated**. Notwithstanding national and regional idiosyncrasies and differences in historical, cultural and religious backgrounds, all states are obligated to protect human rights and fundamental freedoms.

This very clear statement seems to have settled the debate on human rights ideology and generations, if only on paper (2.6.), as there is still a call for action both in the North and the South. At the same time, the Vienna Declaration also aimed to put an end to the tiresome dispute on state sovereignty (3.1) by identifying protection of human rights not only as a **legitimate concern of the international community**, but a **priority objective of the United Nations**. That was to once and for all knock the bottom out of the argument (brought forth by China amongst others) that human rights protection was an exclusively national matter under article 2(7) of the UN Charter. This definition is deliberately overlooked by many politicians yet provides the direct link to the last part of this chapter.

2.8. From Promotion to Protection and Prevention

There can be no doubt that the real aim of national and international human rights protection must be to prevent human rights violations as far as possible. *Mary Robinson*, former UN High Commissioner for Human Rights, quite rightly defined the **21st century as the century of prevention**. Looking at the numerous gross and systematic human rights violations committed at the beginning of this century in all parts of the world, however, this seems to be no more than wishful thinking.

Nevertheless, we must not forget that the international human rights regime, ever since the Second World War, has set a number of serious steps towards implementing that very ideal. The UN Charter, for one, does not mention protection of human rights, but rather their **promotion**. Promotion over protection was chosen carefully at the time because international measures for the protection of human rights would have been considered an inadmissible interference with national sovereignty. All that international law permitted were promotion measures upon the request of states or measures agreed upon by the states concerned, such as holding seminars, deploying experts or carrying out similar activities considered as advisory services.

International measures for the **protection** of human beings against actions taken by their governments in those days required further specifications under international treaty law. Thus, the international community, in the decades that followed, was bent on preparing internationally binding human rights standards. Based on the 1948 Universal Declaration of Human Rights, a considerable number of general and specific, universal and regional human rights conventions have been drafted, adopted, signed and ratified, and thus accepted as internationally binding during the second half of the 20th century. All countries of the world, by ratifying at least one if not several of these treaties, have obligated themselves internationally to respect, fulfil and protect the human rights contained therein (3.2.1.).

However, the term international human rights protection or **implementation** is only applicable in those cases where international bodies (political bodies of international organizations, experts bodies, or international courts) are granted the right to **monitor** compliance with these international obligations. It was the European Commission and the European Court of Human Rights who took on the pioneering role in international human rights protection. They had been established by the 1950 European Convention on Human Rights (ECHR) to decide in cases brought under inter-state and individual complaints (5.2.).

Textbox 17

The Three P's

- **Promotion**
  - Standard setting
  - Advisory services
  - Human rights education
- **Protection (including Enforcement)**
  - Individual complaints
  - Inter-state complaints
  - State reporting
  - Inquiry and investigation
  - Fact-finding
  - Human rights field monitoring
  - Condemnation
  - Sanctions
  - Humanitarian intervention
- **Prevention**
  - Early warning and early action
  - Conflict resolution
  - Preventive visits to places of detention
  - Preventive deployment of civilian and/or military field personnel
  - International criminal law

Such procedures and others like them, e.g. state reporting and inquiry procedures, were also developed by the UN and other regional international organizations on the basis of human rights treaties. However, some of them are directly based on the charter of the respective organization, as in the case of the UN or the Organization of American States (OAS), others again were developed as part of politically binding standards (CSCE/OSCE).

These international monitoring procedures can only be considered effective once a monitoring body's decision or recommendation can be **enforced** against the state concerned. This in fact continues to be the international human rights protection regime's main challenge, but also its biggest weakness.

There are still very few ways of enforcing measures against the will of individual governments and those measures that are used are applied with great caution. They include, amongst others, exerting diplomatic and political pressure, expelling countries from international organizations, reducing or suspending development cooperation, as well as imposing economic and other sanctions and conducting humanitarian interventions (16.3.).

Textbox 18

From Declarations to Enforcement of Human Rights

- **Declaration**

non-binding document/resolution of political bodies (UNGA, Parliamentary Assembly, etc.), e.g.
- Universal Declaration 1948
- American Declaration 1948

- **Convention/Covenant**

binding international treaty, e.g.
- UN Covenants 1966/76
- European Convention 1950/53
- American Convention 1969/78
- African (Banjul) Charter 1981/86

- **Implementation**

human rights treaty monitoring, e.g.
- complaints procedure
- reporting procedure
- inquiry procedure

- **Enforcement**

sanctions and enforced measures, e.g.
- expulsion from international organizations
- economic sanctions
- humanitarian interventions
- international criminal tribunals
- reduction or suspension of development cooperation, financial aid, etc.

Efficient prevention of human rights violations still has a long way to go (14.). Governments generally are not too enthusiastic on being accused of human rights violations, which is why objective fact-finding, publicity, and 'mobilization of shame' (Amnesty International) are still the most effective **prevention strategies.** The better human rights protection mechanisms and their enforcement are functioning in practice, the more they also yield a preventive (deterrent) effect. This holds true for traditional mechanisms, such as complaints procedures, and for more recent measures, such as imposing economic sanctions and the establishment of an International Criminal Court. Other methods include early warning systems

(provided they are employed in combination with early action), preventive visits to places of detention (the European Committee for the Prevention of Torture), human rights educational activities or deployment of preventive field staff. In practice, however, it is difficult to mobilize the necessary financial and other resources, as long as 'nothing has happened', even though preventing a fire is always cheaper than having to extinguish one. Furthermore, there is still widespread belief that prevention measures, especially field operations, constitute a violation of national sovereignty.

Litbox 2

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3. International Human Rights Protection – Context and Conceptions

3.1. Human Rights in Context

3.1.1 Human Rights versus National Sovereignty

The development of human rights to date very impressively illustrates the tensions between national sovereignty and international human rights protection. Before the Second World War it was practically unthinkable for international law to interfere with the relations between states and their citizens (2.3). In fact, it was not until the Nazi holocaust that a gradual turnaround in people's thinking set in (2.5). The UN Charter does emphasize the promotion of human rights as one of its goals, yet at the same time, in article 2(7), it stresses the **principle of non-intervention in domestic affairs** (4.1). This meant that while during the Cold War so-called 'advisory services' were admissible with the consent of the state concerned, the same was not true for measures of international human rights protection, which were not to be imposed against the will of the government concerned. Indeed, such measures had to be based on international treaty law, as a result of which innumerable human rights conventions were elaborated on at the universal and the regional level, the main conventions being equipped with international monitoring mechanisms established for that purpose. Thus, when the European Court of Human Rights, in a judgment based on an individual petition, determined that the Austrian state broadcasting monopoly conflicted with the right to freedom of information, as laid down in article 10 of the ECHR, then Austria was obliged to abolish that monopoly and could no longer argue that this was an unlawful or illegitimate interference with its national sovereignty, as the government had voluntarily accepted the jurisdiction of the European Court as final and binding. Apart from these treaty obligations, the **dogma of state sovereignty** has gradually lost ground since the late 1960s in other spheres too. Milestones in this direction, amongst others, have been the special procedures of the UN Commission on Human Rights, the Helsinki Final Act of 1975, the Vienna CSCE Final Document of 1989, as well as the Vienna Declaration and Programme of Action 1993.

Resolutions 1235 (XLVI) and 1503 (XLVIII) were issued by the **Economic and Social Council** of the United Nations (ECOSOC) to authorize the UN Commission on Human Rights to accept complaints from individuals and NGOs in the event of gross and systematic human rights violations, and further, to examine these situations in public and confidential proceedings and take the necessary decisions, regardless of whether the states involved have ratified any human rights conventions (4.4.1.). Since the early 1980s, a growing number of country specific and thematic working groups and special rapporteurs have been established to carry out fact-finding and reporting tasks.

With the **1975 Helsinki Final Act**, human rights were made an essential element of the CSCE's political negotiation process between the West and East,

which ultimately was instrumental in bringing down the socialist regimes of Central and Eastern Europe (8). For all intents and purposes, the CSCE negotiations proved a catalyst in the gradual dismantling of the state sovereignty dogma in human rights matters, as upheld by the socialist states. The most visible sign of this development is the **conference on the 'human dimension'** agreed upon at the 1989 Vienna follow-up meeting (8.3).

Following the end of the Cold War, the United Nations, at the **Second World Conference on Human Rights**, endorsed international protection of human rights as its legitimate concern (2.7). Since then, it is no longer legitimate to apply article 2(7) of the UN Charter to human rights matters. In those cases where human rights violations are considered particularly serious, i.e. where they pose a threat to international peace and security, the **Security Council** itself may intervene and decide on binding measures in accordance with Chapter VII of the UN Charter. Examples of interventions like these are South Africa, Iraq, Haiti, Somalia, former Yugoslavia, and East Timor (16.).

Textbox 19

HUMAN RIGHTS VERSUS NATIONAL SOVEREIGNTY

Human rights as goal of the United Nations (article 1 UN Charter)

Sovereign equality of states as basic principle of international law (article 2(1) UN Charter)

Protection of human rights
- UN Commission on Human Rights, since 1967/1970: fact-finding, reporting and complaints procedures
- 1975 Helsinki Final Act
- 1993 World Conference on Human Rights ('legitimate concern')
- Binding measures set by the UN Security Council

Non-intervention in domestic affairs, (article 2(7) UN Charter)

Despite these clear legal findings, most governments criticized by international organizations, other states or NGOs for violating human rights, still argue that such interventions are inadmissible interference in their domestic affairs. This is true not only for typical opponents of international human rights protection, such as China, Iran or Cuba, but ironically also for the United States or the European Union (EU) countries which, otherwise, like to interfere with other states human rights issues. No doubt it will take many serious efforts to develop a new political awareness for the fact that human rights protection is a legitimate concern of the international community.

3.1.2. Human Rights Protection – An Atypical Task of International Law

Classical international law determines relations amongst sovereign states. Its beginnings, like those of private law, are rooted in customary law, while today, relations between states are primarily determined through bilateral state treaties or multilateral agreements concluded in the framework of international organizations. International law essentially draws on the **principle of reciprocity**, i.e. the existence of mutual-joint interests. Thus, if France were to conclude a bilateral agreement with Senegal on the exchange of students and France were not to adhere to said agreement, e.g. by admitting fewer students than agreed, then as a rule, Senegal would respond by also admitting fewer French students or terminating the agreement altogether. Disputes might also be settled through arbitration or referred to the International Court of Justice in the Hague. Multilateral treaties such as the International Coffee Agreement may also provide for exclusion from the organization as a last sanction against violations.

In principle, this system also works for the protection of individual rights in the context of diplomatic immunity and international humanitarian law. In the event that a state restricts the immunity of diplomats on its territory in a way contrary to international law, or even goes so far as to arrest, ill-treat or expel them, it runs the risk of reciprocal treatment of its diplomatic staff. The principle of reciprocity also holds true for armed conflicts. Thus, once a state knows that one of its soldiers has been made prisoner of war of an enemy state, it will adhere to no less than the minimum international humanitarian laws required to protect that person and have them freed.

Human rights law on the other hand primarily deals with citizens of a single state, in which case the principle of reciprocity no longer takes effect. While it is true that states enter multilateral treaties with other contracting states – committing themselves to respect human rights – in reality it matters little to them whether or not the other parties actually adhere to them. Many states ratify human rights treaties for the simple reason of showing that they accept this unique and universally recognized value system, or for unrelated reasons such as receiving development aid if they do so. Yet, every time a situation occurs in a country where other states parties would be called upon to safeguard adherence to human rights standards (e.g. political unrest), such criticism of the country in question usually fails in the face of economic and strategic interests, which are not curtailed by human rights debates, as in the case of China. This is where non-governmental organizations (11.) and independent media come into play as they are capable of mobilizing the public and reporting to generate widespread attention and sometimes massive political pressure. However, most governments are willing to take further action against regimes disrespectful of human rights in extreme cases only, i.e. if such states are waging international wars or offering shelter to terrorists (e.g. Iraq 1990/91 or Afghanistan: 16.11. and 16.15.).

Given the fact that adherence to human rights treaties is not ensured by the principle of reciprocity, **collective monitoring and enforcement mechanisms** have to be introduced. To that end, international organizations consider it their duty to

protect human rights (e.g. the UN, Council of Europe, OSCE, OAS and OAU) and have developed a comparatively complex system of international (intergovernmental) bodies and procedures.

Textbox 20

International Human Rights Law	Classical International Law
Individuals as subjects of international law	Only states as subjects of international law
Network of objective obligations, the enforcement of which is not primarily in the interest of other states	Reciprocity – mutual rights, obligations and state interests
Enforcement rather through international bodies ('collective enforcement')	Enforcement rather through state (re-)action

However, bearing in mind that there will not be a 'world state' in the foreseeable future, with its own police force in place for compulsory enforcement of international law, the international human rights system will primarily have to trust in national legal protection systems, as it did before. In some exceptional cases it will also rely on a gradually emerging international solidarity for collective enforcement of elementary human rights.

3.1.3. Human Rights Protection: International and National Law

Historically seen, early human rights developed as part of national constitutional law (2.2.). Today, most states have a constitutional bill of rights, which includes a more or less refined national legal protection system, as the case may be. Admittedly though, since the Second World War, these domestic bills of rights are increasingly being determined by international law. In fact, nowhere else have international law and national constitutional law interacted as closely. For want of effective intergovernmental enforcement mechanisms, international human rights protection continues to rely on a functioning national human rights protection system. **Transformation** of international human rights standards into domestic law is largely left to national constitutional law.

International human rights treaties are considered national law equal to, or superior to, the constitution by virtue of express constitutional order in those states, which tend to abide by the theory of **monism** with preference to international law (e.g. the Netherlands), provided they have ratified such agreements and such agreements have been sufficiently determined (self-executing). Others, which according to the **dualist theory** strictly distinguish between international and national law (e.g. the United Kingdom), may not incorporate or transform international human rights treaties into national law except by express order from the national legislator.

Thus, for states parties to conform with international human rights treaties, there is no requirement to transform them word for word into national constitutional law but rather that all the obligations contained under international law are **implemented** under domestic law. Many states, especially those with a historically grown bill of rights (e.g. the United States and Germany), seem to be of the opinion that their bills of rights automatically meet the requirements of international human rights law or are superior to the latter.

Textbox 21

International and National Law

- Primary responsibility of national authorities
- Subsidiarity of international protection of human rights
- Effective remedy at national level
- Exhaustion of domestic remedies as condition for international complaints
- Obligation to implement international human rights through legislative and other measures
- Incorporation of human rights treaties in national law desirable, but not obligation

As a result, international human rights treaties are frequently implemented at the level of ordinary laws only. Whenever their conformity with national constitutional law is put in doubt, many states resort to reservations under international law (3.2.4.) instead of reforming their constitutional bills of rights. However, approaches like these tend to bring about different national standards and with them, enormous problems of interpretation.

For example, the European Convention on Human Rights (ECHR: 5.2.) originally was directly applicable in only a few states as most governments were convinced of the superior quality of their own, national civil rights standards. It was the jurisprudence of the European Court of Human Rights that finally made it clear that such assumptions were incorrect in many cases. However, as national (constitutional) courts were forbidden to directly apply the ECHR and repeal opposing national laws or at least, interpret them so as to conform with the Convention, time and again the European Court in Strasburg had to be resorted to for the necessary legislative reforms to become effective. Seeing as this double track of national and European human rights protection was turning out to be counterproductive, most states (most recently the United Kingdom with its *Human Rights Act 2000*) gradually began to incorporate the ECHR into their national laws.

With this **trend towards incorporation**, which is beginning to show effect with some UN human rights treaties too (e.g. the International Covenant on Civil and Political Rights 4.3.1), it is finally possible to establish a well-functioning division of labour between national and international human rights protection. In summary,

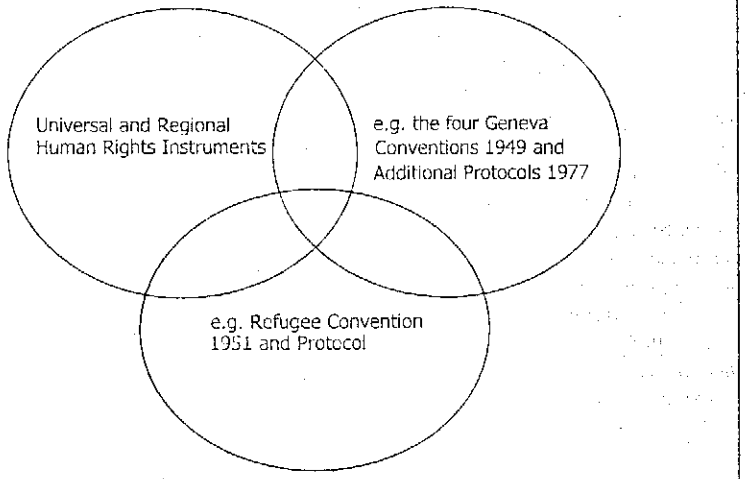
human rights that are codified in international treaties are to be protected first and foremost by the relevant **national legal protection institutions**. International courts of human rights and monitoring bodies are only appealed to as *ultima ratio*, i.e. in the event that the national legal process proves unsuccessful or the treaties are interpreted in conflicting ways.

3.1.4. Human Rights Law, Humanitarian Law, Refugee Law

These three areas of modern international law, while closely linked to each other, need to be distinguished systematically. **Protection of the individual** is a priority for all of them. **Human rights** are standards defined in international treaties and national bills of rights, and as such, in principle are applicable both in times of war and peace (but see the derogation provisions: 3.2.4.). **Humanitarian law** on the other hand, especially the four 1949 Geneva Red Cross Conventions and Additional Protocols of 1977, define minimum standards for international and non-international armed conflicts to protect combatants (especially when wounded or held as prisoners of war), as well as civilians affected by armed conflicts.

Textbox 22

Human Rights, Humanitarian Law, Refugee Law



Yet despite the fact that human rights continue to be formally valid in times of armed conflicts, means of actual protection through national and international human rights bodies are rather limited. The International Committee of the Red Cross, on the other hand, because of its humanitarian role and consequently its

access to prisoners of war camps, has far more efficient means of protecting prisoners of war from arbitrary detention, torture or ill-treatment than national courts of an occupied state, the European or Inter-American Court of Human Rights, or the UN Committee against Torture. This is due to the fact that the principle of reciprocity under international law becomes effective in the event of international armed conflicts (3.1.2.).

Of course, **humanitarian law** only becomes effective in the event of **armed conflicts**. The main difficulty with this is how to distinguish between non-international armed conflicts, in which case the minimum standards of common article 3 of the four Geneva Conventions of 1949 and Protocol II of 1977 are applicable, and internal tensions, riots or actions by security forces to combat terrorism or guerrilla activities. In both cases, human rights tend to be restricted either legally or practically, yet only in the first case is this compensated, albeit partially, with the additional application of humanitarian law. Furthermore, most states, in fighting terrorism, are inclined not to consider relevant military action as armed conflicts in the sense of humanitarian law, as this would necessarily imply recognition of combatants and restrict their national sovereignty. The war rhetoric of the United States after the terrorist attacks of 11 September 2001 ('America at war' and 'war against terrorism') has done nothing to change this fundamental attitude of states.

Those most affected by a state of reduced international protection are civilians who are frequently involved in ethnically, religiously or politically motivated conflicts. In the event that the latter lead to violent displacements and the people concerned (so-called **internally displaced persons**) are unable to flee to another country, which in view of the rising number of violent internal conflicts and the unwillingness of traditional asylum countries to accept refugees is becoming more and more difficult, they have no recourse to protection under refugee law either. While article 14 of the Universal Declaration of Human Rights (4.2.) does mention the right of all persecuted persons to seek and enjoy asylum, this principle, in Europe at least, has not become part of internationally binding treaty law (but see article 18 of the non-binding EU Charter of Fundamental Rights, article 22(7) of ACHR and article II of the 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa).

International refugee law only applies to recognized refugees and, in some cases, to asylum seekers too. Refugees as defined by the 1951 Geneva Refugee Convention are persons who, for well-founded fear of being persecuted on for reasons of race, religion, nationality, membership of a particular social group or political opinion, have fled to another country to seek asylum and who have been recognized by the competent authorities of that country as refugees under this Convention. Yet, with the growing immigration pressure on rich industrialized countries and the increasing xenophobia in these countries in recent decades, their willingness to accept migrants and refugees has diminished drastically. As a result, not only have immigration and alien laws become more stringent, but asylum and refugee laws have also been affected substantially. As immigration was made more

difficult, persons who left their country for other, mainly economic reasons or because of social need (so-called 'economic refugees') also availed themselves of asylum procedures. This, in turn, meant that asylum laws were made even more stringent and persecuted persons have great difficulty being recognized as refugees. Spiralling restrictions play into the hands of organized crime or more specifically organized human trafficking, which is capitalizing enormously on the misery of persecuted persons. As a result, only a small minority of persecuted persons and refugees in this world are really protected by international refugee law.

Recognized refugees in the sense of the Convention, on the other hand, are equal in principle to the citizens of the receiving state with regard to the right to choose their place of residence, and other human rights such as with rights of equal access to education, work, social security and the courts. In particular, the state granting them asylum is responsible for protecting them from persecution, and for not expelling or returning them to the persecuting state (**principle of *non-refoulement***), as well as for granting them social support and integration aid should they need it.

Along with the refugee law under the Geneva Convention, which is based on the principle of individual asylum procedures, in the light of recent humanitarian crises (e.g. Bosnia and Herzegovina and Kosovo) a system of **temporary protection** on humanitarian grounds has developed in Europe particularly. This system provides that, instead of assessing individual asylum applications and granting refugee status to individuals, entire groups of individuals from these states are taken in collectively to be granted protection from persecution until they can safely return. Their status, however, is vested with far fewer minimum rights than the status of refugee as recognized under the Convention, and the fact that it is restricted in time and is followed by their repatriation creates additional uncertainties, and raises difficult political and social issues.

The **United Nations High Commissioner for Refugees** was established in Geneva in 1951 to support refugees and asylum seekers. It has since become the world's largest humanitarian organization and today increasingly takes care of displaced persons as well (4.4.8.5.).

3.1.5. Human Rights and Peace

Securing international peace and protecting human rights are major tasks of the international community. They have gradually come close to each other over the past decades and today are considered complementary. There are two reasons for this essentially. Firstly, the way human rights are threatened has changed. While in the early days human rights were threatened primarily by military dictatorships as in Latin America, or by totalitarian regimes as in Eastern Europe, most human rights violations today are witnessed in the context of armed conflicts. The latter are frequently motivated ethnically or religiously, yet in most cases they are far more deeply rooted in policies of discrimination or other systematic human rights violations. Thus, generally speaking armed conflicts are best prevented by adequate measures of human rights protection.

Secondly, the definitions for peace and international security have gradually been expanded. While peace used to be understood in a negative sense as absence of war, ever since the end of the Cold War a positive and **comprehensive concept of peace and security** has been developed that also includes human rights, the rule of law and democracy. In other words, dictatorships, which are suppressing their own civil society in general and their political opposition in particular and are systematically violating human rights, are considered a threat to peace and international security even if they do not pose an immediate danger of war to other states. Ensuring peace and security therefore is no longer primarily the responsibility of the military, but rather constitutes a complex task that is brought about effectively only through the concerted efforts of different parts of society. This is true both for national and international peace and security.

Textbox 23

Human Rights and Peace

- Negative *versus* positive concept of peace
- Human rights as ingredient of peace – peace as condition for human rights
- Human rights violations as threat to international peace and security – 'humanitarian intervention'
- Human rights as essential components of peace-keeping/peace-building operations
- Human rights: an obstacle in peace negotiations?

This shift in the way peace and security are perceived, is best seen with the development of the UN **peacekeeping operations** (16.). Typical examples of classical operations during the Cold War are the operations on the Golan Heights and in Cyprus. From today's point of view there is no peace to keep there (after all, there are no peace treaties), but instead only armistice agreements, i.e. the absence of armed disputes. This task is carried out by lightly armed (blue helmet) soldiers positioned along the demarcation line between the two hostile parties. Their function is to observe whether armistice is obeyed or not. They may act as mediators in the event of minor violations, but for their own safety have to be withdrawn in the event of major violations. Other tasks such as creating the necessary requirements for sustainable peace are not within their competence.

The latter tasks are essentially those of a new generation of **peacekeeping and peace-building operations** such as those witnessed in the last decade of the 20th century in Cambodia, El Salvador, Guatemala, Haiti, Bosnia and Herzegovina, Kosovo, East Timor, Sierra Leone and other countries. These are based either on peace treaties brought about with the help and/or the pressure of the international community, or at least on preliminary treaties which provide for the conclusion of permanent peace treaties during the peace operations. Along with the military element (which is granted either by traditional, lightly armed blue helmets or combat

troops) this also calls for the deployment of police units and civilians. The police units generally recruited through the UN have the task of monitoring, training, supporting and, if necessary, reorganizing the national police force. The **civilian component** is responsible primarily for setting up democratic structures in accordance with the rule of law and human rights. Civilian tasks include carrying out and monitoring democratic elections, strengthening independent media and democratic parties, as well as setting up operational legal and administrative systems with their own bodies for the protection of human rights (administrative and human rights courts, ombuds institutions, national human rights commissions, truth commissions, etc.).

Given the fact that gross and systematic human rights violations today are considered a threat to international security, the UN Security Council, in accordance with Chapter VII of the UN Charter, is also entitled to impose **measures of constraint** against the governments concerned. Thus, it may exert diplomatic and political pressure, impose economic sanctions (arms embargo, boycotting air traffic and other means of transport and communication, and comprehensive economic embargo), and even carry out armed humanitarian interventions. These measures of constraint, too, have only become possible since the end of the Cold War, both from the political and the military point of view. Naturally, they are only applied as *ultima ratio*, i.e., in the event that other measures directed at protecting collective security, which have less of an impact on the sovereignty and territorial integrity of the states concerned, have proved futile. In the last decade of the 20th century, such **peace making and peace-enforcement operations** were carried out against Iraq (in 1991), Somalia, Haiti, Bosnia and Herzegovina (albeit only after the summer of 1995), the Federal Republic of Yugoslavia, East Timor, amongst others. The NATO air raids against Yugoslavia in the spring of 1999 were the cause of much controversy in this context, which from the political and the moral point of view were widely supported inasmuch as they were to prevent further systematic human rights violations and even genocide in Kosovo, but in the absence of a Security Council mandate must be qualified as a violation of international law (16.14). The Kosovo crisis and the United States-led war against the Saddam Hussein regime in Iraq in 2003 vividly show the limitations of the current concept of collective security in the context of gross and systematic human rights violations. If the UN does not want to leave humanitarian interventions to the United States, NATO or other military alliances, they will have to carry out a massive reform of structures in the Security Council and establish permanent UN military structures (in particular, a rapid intervention force) at the same time.

By the same token, during the last decade of the 20th century, the Security Council did set some very innovative steps towards **prevention** of armed conflicts and serious human rights violations. These include, amongst others, installing relevant early warning systems (which all too often were not followed by early action), deploying military units to prevent the spreading of armed conflicts (e.g. UNPREDEP in Macedonia: 14.1.), setting up commissions of experts to examine crimes under international law, as well as establishing international ad hoc tribunals

for criminal prosecution of war crimes, genocide and crimes against humanity in the former Yugoslavia and Rwanda (14., 15.).

3.1.6. Human Rights and Development

As peace securing, **development cooperation** as well, in the course of the past thirty years, has increasingly been merged with the tasks of human rights protection. Up until the 1970s, development essentially stood for industrialization and economic growth. This was based on the slightly naive idea that the so-called 'underdeveloped' states of Africa, Asia and Latin America had to be brought up to the economic standard of the industrialized North (Western Europe and North America). Development cooperation mainly focused on large industrialization and infrastructure projects, such as high-performance roads, industrial complexes, dams and similar projects of prestige. Not surprisingly, this form of development cooperation was primarily to the benefit of the corporations of the North and the political and economic elites of the South, and not so much to that of the general public in the so-called 'developing countries'. On the contrary, the gap between rich and poor widened and the spiral of 'overdevelopment and underdevelopment' accelerated, with stark contrasts between North and South, but also inside the societies of the South.

TEXTBOX 24

Human Rights and Development

- Human right to development *versus* human rights based development cooperation
- Development as a process for the realization of human rights
- Human rights as indivisible, universal rights
- Democracy, popular participation, good governance
- Human rights mainstreaming
- Prevention of poverty as a bridge between human rights and development

Bilateral and multilateral development policies (particularly those of the OECD, the EU and the UNDP) tried to counteract this by continuously establishing and revising development theories and strategies. Thus, they suggested overcoming the dependency of the South as revealed by the dependence theory (e.g. by improving the terms of trade and increasing prices for raw materials), including large numbers of the population in the development process (popular participation), emphasizing self-reliance in development, promoting the idea of sustainable development, and giving priority to poverty reduction as an over-arching principle of development cooperation.

Since the late 1970s, several scholars and politicians of the South tried to establish the stagnating development issue as part of the modern human rights discourse by propagating a **human right to development**. In 1981, the African heads of state and government, under article 22 of the African Charter on Human and Peoples' Rights, espoused the collective right of all peoples (meaning in particular the citizens of African states) to economic, social and cultural development, and consequently the duty of all states (meaning, in particular, those of the North) to secure the use of that right through appropriate bilateral and multilateral measures. Not surprisingly, the states of the North were not willing to accept such a duty derived from a regional human rights treaty. Decidedly more caution was used in phrasing the **UN Declaration on the Right to Development** proclaimed by the UN General Assembly in 1986 (which nevertheless did not prevent the United States as the only state from voting against it). It defines the right to development as an 'inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'. According to the Declaration, the right to development is both an individual and a collective right, even so its article 2 defines the human person as the central subject of development, as an active participant and beneficiary alike. The duties of states (e.g. to devise appropriate national development policies) are primarily addressed to governments of receiving states, however, donor states too are called upon to cooperate and create international conditions for the promotion of the right to development. It is interesting to note that promotion, strengthening, as well as indivisibility and interdependence of all human rights were considered important elements of the right to development, even then. These concepts were also the main focus of the debate on universalism during the Second UN World Conference on Human Rights in 1993 (4.6.1.) and were incorporated into the **Vienna Declaration and Programme of Action** agreed upon with the consent of 171 states (including the United States). Article 5 of the Declaration sets out that all human rights are universal, indivisible, interdependent and interrelated. According to article 8, 'democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing', whereas under article 10, the World Conference reaffirms the right to development as defined in the 1986 Declaration on the Right to Development as an integral part of fundamental human rights. The Vienna Programme of Action as the basis of the UN Human Rights Programme after the Cold War, dedicated a separate chapter (articles 66 to 77) to the correlation between development, democracy and human rights.

Parallel to the demands of the South for a human right to development, as of the early 1980s, the majority of donor countries (especially the Scandinavian countries, the Netherlands and Canada, with the EU following suit) were becoming convinced that development cooperation was not to be granted irrespective of the human rights situation in the receiving countries. This meant, on the one hand, that donor states were entitled to suspend or even freeze development cooperation in the face of

drastic deterioration of the human rights situation in their partner countries (so-called '**negative conditionality**'), while development projects were increasingly aimed at creating the necessary requirements for promoting and securing human rights (so-called '**positive measures**'). This new policy was revolutionary, particularly with regard to civil and political rights (implementation of projects to strengthen structures of democracy and the rule of law, i.e. elections, promotion of independent media, democratic parties, independent judiciary, as well as a civil service and police force respectful of human rights). As expected, it was reproached as interference with national affairs, or rather 'neo-colonialism based on human rights'.

This struggle over policies between the right to development advocated by the South and development cooperation contingent upon human rights stressed by the donor states of the North was, on the whole, diffused by a number of factors. For one thing, the UN Development Programme witnessed a paradigm shift towards **human development** in the early 1990s. UNICEF reoriented its policies on the basis of the Convention on the Rights of Child adopted in 1989, and the 1993 Vienna World Conference managed finally to grind out a compromise. This demonstrates that, on closer inspection, the different concepts are less antagonistic than their proponents in the North and the South pretend. Upon examination of the 1986 UN Declaration on the Right to Development the basic philosophy of development has changed fundamentally. Industrialization and economic growth, which used to be the objective of development, were gradually replaced by extensive realization of human rights, implying civil and political, as well as economic, social and cultural rights. Countries are no longer considered 'highly developed' simply because they have positive macro-economic statistics, but because of the number of people who have access to efficient education and health care, work, food, housing, social security, democratic governance, independent courts and a critical civil society and are able to live in safety and without discrimination; in other words, when **poverty** has been fought successfully and 'all human rights for all' (the NGO motto of the Vienna World Conference) have been implemented to the greatest extent possible. In practice, however, it will take some time for both the development agencies in the North and the political elites in the South to digest this **new development paradigm.**

3.1.7. Human Rights and Democracy, the Rule of Law, Good Governance and Popular Participation

Human rights and **democracy** are closely related to each other. Even though there is no binding definition of 'democracy' under international law, it is generally understood as a type of governance, which unlike autocracy (dictatorship), puts into effect the will of the people to the highest degree possible (sovereignty of the people), so as to meet or at least come close to the ideal of political freedom (the individual's self-determination through political participation) and political equality. As the European Court of Human Rights emphasizes in its jurisprudence, democratic societies also, and especially, call for pluralism and tolerance towards

minorities and outsiders, which means that they must not become 'tyrannies of the majority'. As to the practical application of democracy, there are different forms such as the so-called people's democracy (based on the principle of the bound mandate), the plebiscitary or direct democracy (extensive direct decision-making on the part of the people as in the Swiss municipalities and cantons), as well as the representative or indirect democracy, where the people delegate most of their power of decision to freely elected representatives (members of parliament) by means of a free mandate. Representative democracy in turn distinguishes between parliamentary democracy as in the United Kingdom (sovereignty of the parliament, including the right to dismiss the government by a vote of no confidence), and presidential democracy as in the United States where the president, who has been elected by the people, is independent of parliament (congress) and has extensive competencies. Most modern states since the collapse of the model of socialist people's democracies have chosen the western model of **pluralistic representative democracies** as a form of governance.

The concept of democracy provides one of the philosophical foundations of human rights (2.1.). The ideal of political (democratic) freedom corresponds to the category of **political participation rights** in the narrower sense, i.e. the general right to take part in the conduct of public affairs either directly or through freely elected representatives (article 25 CCPR), the right of voting and being elected, the right to participate in popular referenda, the right of equal access to public offices, as well as the right of petition. Yet, the **political freedoms** as well (freedom of expression, media, information, association, assembly, trade union rights and in a wider sense also freedom of religion and belief, art and science) are indispensable if democracies are to work. Restrictions and limitations of the exercise of these political freedoms are usually only permitted to the extent of being 'necessary in a democratic society' (e.g. articles 9-11(2) ECHR), i.e. required by a pressing social need and proportionality. The democratic ideal of political equality and tolerance towards minorities is reflected in the right to equality before the law and equal protection of the law including a comprehensive prohibition of discrimination and protection against discrimination (article 26 CCPR), as well as different types of minority protection. Ultimately, the peoples' right of self-determination, by virtue of which all peoples may freely determine their political status (article 1 of the two UN Covenants), may also be considered a comprehensive guarantee of democratic governance. It has convincingly been argued to deduct a general **human right to democracy** from the sum of the above-mentioned rights.

The term **rule of law** (in the formal sense) refers to states whose legal systems, unlike those of police states, are well defined and have appropriate facilities in place to secure and adhere to statutory provisions. Above all, the rights and duties of persons must be defined with sufficient precision and their implementation must be secured through appropriate institutions, especially judicial ones. In other words, the rule of law essentially provides for **legal certainty** (predictability, transparency), as well as legal (judicial) protection and is to guard people against arbitrariness from the police and others. The Anglo-American terms rule of law and due process also

include a substantive aspect of justice and humaneness, which is to protect people from states of injustice in disguise (e.g. National Socialism).

As with human rights and democracy, the essential elements of the rule of law are reflected in today's human rights treaties. The **procedural guarantees** for the administration of civil and criminal justice (right to fair trial: e.g. article 14 CCPR) adopted from Anglo-American law constitute the core content of the rule of law.

Textbox 25

Human Rights and Democracy, the Rule of Law, Good Governance and Popular Participation

- **Democracy**
  - 'Rule by the people' (demos – kratos)
  - Ideal of identity between those who govern and those who are governed (*Rousseau*)
  - Right of peoples to internal self-determination
  - Political participation (in conduct of public affairs, elections, access to public offices/service), political freedoms (freedom of expression, information, media, association, assembly, freedom to form a political party)
  - Tolerance, pluralism, protection of minorities, equality and protection against discrimination are essential elements of modern democracies
- **Rule of law**
  - Legal certainty (legality, predictability, transparency)
  - Effective legal (judicial) remedy, procedural guarantees
- **Good governance**
  - Concept shaped in development context
  - World Bank concept: accountability, transparency, rule of law in public sector, prevention of corruption
  - EU concept: broader, includes democracy, civil society, human rights
- **Popular participation**
  - Concept shaped in development context
  - Grassroots involvement (the people) in decision-making at all levels
  - Human right to take part in conduct of public affairs, freedom of expression, association, assembly, right to vote

The principle of legality is embodied in the limitation clauses whereby restrictions of human rights are admissible only on the grounds of predictable and transparent legal provisions, which are in accordance with minimum standards of the rule of law (3.2.4.). The concept of the rule of law is also expressed in the provisions set out to ensure that people affected by human rights violations are granted the right to an **effective remedy before national and international courts** and similar human rights monitoring bodies, as well as the right to reparation (3.2.7.)

While it is true that certain human rights, in the short term at least, may well be practiced by non-democratic regimes or regimes which are not subject to the rule of law, it is still safe to say that **democracy, the rule of law and human rights are contingent upon each other**. It is an empirical fact that well-functioning democracies governed by the rule of law are usually better able to protect human rights than autocratic police states. By the same token, past experience with processes of democratization has shown that the more human rights are accepted or gained, the more open states necessarily become towards democracy and the rule of law. The fact that human rights, democracy and the rule of law are inseparably linked to each other was first recognized in Western Europe, where in fact these three elements were made inalienable conditions for membership in the Council of Europe (5.1.), and later on, the European Union (9.2.). With the fall of the Iron Curtain, these three values were also established as the foundation of the CSCE/OSCE process, as laid down in the 1990 Paris Charter for a New Europe (8.5.). In addition, the Vienna Declaration adopted at the Second UN World Conference on Human Rights in 1993 (4.6.1) expressly defines democracy, development and human rights as interdependent and mutually strengthening concepts.

As a result of the above, human rights and democracy have increasingly become the target and main objective of modern day development cooperation (3.1.6.). This trend was first made evident with the claim for **popular participation**, i.e. participation of the majority of people in an ever more self-determined development process, and was complemented in the 1990s by the concept of **good governance**. The latter, in the eyes of the World Bank (4.5.6.), primarily refers to the rule of law, transparency and responsibility of the public sector (including the fight against corruption), while the EU pursues a wider concept based on the participation of civil society and the establishment of democratic and human rights structures within the development process (9.4.2.). Regardless of how these concepts are perceived, they both strongly favour the kind of development that will pave the way for democracy and human rights.

3.2. Human Rights Theory

3.2.1. Obligations of States to Respect, Fulfil and Protect Human Rights

In the early days it was assumed, in accordance with *Georg Jellinek's* status theory (status negativus = liberal rights of non-interference, status activus = democratic participation rights, status positivus = social rights requiring positive state action) and the theory of the three generations of human rights (2.6.), that states, with regard to civil rights, were merely obliged not to intervene whereas concerning economic and social rights they were obliged to perform positive services only. Only since it was made apparent that human rights are indivisible and interdependent (2.7.) it has gradually become accepted that in principle states are obliged to respect, fulfil and protect all human rights.