In: IFSH (ed.), OSCE Yearbook 2001, Baden-Baden 2002, pp. 219-235.

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Human Rights and Political Interests - Is there a Double Standard?

In the spring of 1999, NATO led a costly high-tech war against the Federal Republic of Yugoslavia in order to prevent further human rights violations in Kosovo. Since 1999, there has been ongoing controversy among politicians and scientists on the intensity of the preceding attacks, which had lasted for years, by Serbian rulers against the ethnic Albanian population and the number of victims of these attacks, which gave cause for this war.[1] The OSCE, which before the NATO war, had tried to verify the real situation in Kosovo on the ground, found itself forced, after the "Račak massacre", to leave the country without having achieved its goals.[2] In contrast, there was no question that in the spring of 1994 over half a million Tutsi had become the victims of genocide in Rwanda. Nevertheless, this did not cause the international community to intervene immediately. On the contrary: The UN blue helmets stationed there were actually evacuated while genocide was taking place. Until 24 June 1994, the people of the world remained merely as onlookers.[3] This modus operandi has frequently been criticized. How can one explain these different reactions? The answer lies in the structure of international law and in particular in that of the protection of human rights.

Human Rights and Co-operation between States

States are sovereign.[4] As a result, international law is based on agreement. This means that unlike domestic law, international law cannot be legislated in Parliament, but is created through consensus - i.e. a mutual concurrence of wills. It follows that states are only bound by norms that they have agreed upon. This presupposes the expectation that law created in this fashion will also be voluntarily implemented.

After the Second World War, following the shock of the genocide policy implemented by national-socialist Germany, and under the pressure of public

1 Again recently, Dieter S. Lutz, Völkermord, Moral und die Unabwendbarkeit von Kriegen am Beispiel Kosovo [Genocide, Morals and the Inevitability of War in the Example of Kosovo], in: Hartwig Hummel, Völkermord - friedenswissenschaftliche Annäherungen [Genocide - Approaches from Peace Research], Baden-Baden 2001, pp. 26ff.

2 Cf. Heinz Loquai, Der Kosovo-Konflikt - Wege in einen vermeidbaren Krieg [The Kosovo Conflict - Paths Leading to a Preventable War], Baden-Baden 2000, pp. 45f.

3 Cf. Gunnar Heinersohn, Lexikon der Völkermorde [The Dictionary of Genocide], Reinbek 1999, p. 333.

4 However, it is undisputed that the nature of state sovereignty has changed since the Westphalian Peace of 1648. Cf. Nico Schrijver, The Changing Nature of State Sovereignty, in: The British Yearbook of International Law 70 (1999), Oxford 2000, pp. 65ff.

opinion, states were prepared to accept obligations under international law on the protection of fundamental human rights. This was achieved through the 1945 Charter of the United Nations. However because this treaty only established a general obligation, a long process was required for the codification of human rights. In principle, this process has now been completed and human rights have henceforth represented an extensive body of law in international law, including detailed regulations on almost all areas of daily life.[5] The instruments created by the United Nations and its specialized agencies have been supplemented significantly by regional agreements including those generated by the OSCE.

Human rights treaties are based on the idea of international co-operation between states to promote and develop human rights.[6] Thus they should be preventive and hinder human rights violations. This is achieved in that states comply with these rights on their territory. This goal is, for example, stated in Article 2 of the International Covenant on Civil and Political Rights (ICCPR). This Covenant declares that each State Party "to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant (…)". It is therefore necessary that the particular state in question adopts legislative and other measures "to give effect to the rights recognized in the present Covenant". If the rights in the ICCPR are violated, any person within the states must be given the opportunity to claim effective remedy. Thus, especially national judicial legal protection has to be developed.

Human Rights Treaties Place Limits on the Political Freedom to Make Decisions

In principle, human rights norms apply to the domestic affairs of a state. However a state party to a treaty has made a commitment to other treaty parties that it will implement the regulations. Thus a legal relationship between all state parties exists. Without a doubt this places limits on political freedom. At the end of the day, a state party to the treaty is accountable to the other state parties that it is implementing the treaty and the provision in the ICCPR granting an inter-state complaints procedure is a mechanism to ensure this accountability is being realized. Ultimately, by becoming a party to a human rights treaty, a state takes on obligations which place limits on its sovereignty. This brings up the question why states adopt such treaties in the first place. The reason for this is the interest of states in international stability, which is also based on the stability of each single member in the international

5 Cf. Mary O'Rawe, The United Nations: Structure Versus Substance, in: Angela Hegarty (Ed.), Human Rights, An Agenda for the 21st Century, London 1999, pp. 15ff.

6 Cf. Zdzislaw Kedzia/Scott Jerbi, The United Nations High Commissioner on Human Rights, in: Gerhard Baum et al. (Ed.), Menschenrechtsschutz in der Praxis der Vereinten Nationen [The Protection of Human Rights in the Practice of the United Nations], Baden-Baden 1998, pp. 85ff.

community. True inner strength in a state however can only be achieved when the peoples' right to self-determination is realized and human rights are complied with extensively. Otherwise, only an apparent stability will emerge, which at the slightest easing of suppression will lead to the collapse of the state or even - as the rapid end of the socialist states showed - to the end of an entire political system.

International and national stability are linked. If there are mass and gross violations of human rights on the territory of a state, this will inevitably have international consequences. These are manifested primarily through large-scale cross-border refugee flows and violence. The idea is that through international co-operation this type of problem will be prevented.

Because the international community is thus interested in securing human rights within states, international law control procedures have been adopted that are meant to monitor compliance with human rights - to the extent possible, this is to be conducted non-politically - as well as developing them further in the states parties to international agreements.[7] The aim of this was to create enforcement procedures, which are as remote from state structures as possible. For this purpose, expert committees were established who are bound to the respective treaties and whose central task is to monitor the progress of the implementation of the treaty in question in the member states.

Almost all UN human rights treaties now contain specific state reporting procedures. These stipulate that the States Parties are to report to the committee responsible at regular intervals on the situation in their countries. In these reports they are to give an account of legal, administrative and other measures relevant to human rights. In addition, they are to give details on any obstacles preventing the realization of these rights.[8]

Without a doubt there is the danger that states will "whitewash" these reports. Nonetheless, this possibility has been reduced by very stringent regulations on form so that "unpleasant questions" cannot be excluded. Moreover, the committee discussions are held in the presence of representatives of the reporting state, who may be asked questions on specific aspects of its report.

The goal of the whole mechanism is not to pass sentence on a state in the form of a court procedure with a prosecution and a defence. On the contrary, common ways are to be found to allow the best possible implementation of the treaties in the member states. Of course it is inevitable - as is always the case when states take action - that they will consider their political interests. This is why it is so important that all these enforcement procedures be carried out publicly. Anyone can read the state reports and the committee statements on these. In this manner, a certain amount of public pressure is placed on

7 Cf. Wolf von der Wense, Der UN-Menschenrechtsausschuß und sein Beitrag zum universellen Schutz der Menschenrechte [The UN Committee for Human Rights and its Contribution to the Universal Protection of Human Rights], Berlin 1999, pp. 27ff.

8 Cf. Manfred Nowak, U.N. Covenant on Civil and Political Rights - CCPR Commentary, Kehl 1993, pp. 546ff.

states.[9] Because of the increasing influence of NGOs, this pressure has become institutionalized. In general, there is no "double standard" used here because discussion and co-operation - and less "evaluation" - are in the foreground.
It is obvious that reporting procedures can only work preventively. These are to serve the work on emerging conflict fields and they presuppose the willingness of states to co-operate. They are doomed to failure when states commit mass and gross human rights violations and refuse to co-operate or are no longer capable of fulfilling their commitments ("failed state").

The Special Features of the OSCE

In comparison to the UN codification of human rights, it is evident that the OSCE is not striving to create legal norms although human rights have become the "centre of all OSCE activities".[10] In contrast, in its documents, the OSCE lists standards for the conduct of its participating States on human rights that have a high degree of moral authority.[11] This is the result of the fact that these instruments were established according to the consensus principle, i.e. they were negotiated until none of the OSCE States had any express objections against them. Thus these documents are backed by a broad-based willingness by the states, which frequently finds expression in an explicitly articulated "politically binding character".[12]
The advantage of the OSCE approach is that the instruments are thus passed far more quickly than international law treaties. The latter are characterized by a lengthy codification process that is further lengthened by a ratification process until a treaty finally enters into force. For example, the codification of the ICCPR lasted from 1949 to 1966 and it took another ten years to become law because of the requirement that a minimum of, after all, 35 states ratify it. Passing decisions on OSCE instruments, in contrast, can occur within a short time frame. The Charter of Paris, which was a visionary document, had already been passed in 1990 - about a year after the fall of the Berlin Wall.
To be sure, it is evident that states often only agreed to OSCE documents because they were not legally binding. This conduct has been recognizable in

9 Cf. in general Wolfram Karl, Stille Diplomatie oder Publizität? - Überlegungen zum effektiven Schutz der Menschenrechte [Silent Diplomacy or Publicity? - Considerations on the Effective Protection of Human Rights], in: Eckard Klein (Ed.), Stille Diplomatie oder Publizität? [Silent Diplomacy or Publicity?], Berlin 1996, pp. 13ff.

10 Wilhelm Höynck, Die menschenrechtliche Dimension der OSZE [The Human Rights Dimension of the OSCE], in: Baum et al. (Ed.), cited above (Note 6), p. 242 (author's translation).

11 Cf. Maria A. Martin Estebanez, The OSCE and Human Rights, in: Raijka Hanski/Markku Suksi (Eds.), An Introduction to the International Protection of Human Rights, 2nd ed., Åbo 1999, pp. 329ff.

12 Incidentally, this does not exclude the increasing legalization of OSCE norms. Cf. Hans-Joachim Heintze, The International Law Dimension of the German Minorities Policy, in: Nordic Journal of International Law 68 (1999) 2, pp. 117ff.

UN votes in which states, in so-called "explanations of vote", made reference to the fact they did not want to disturb the consensus; if there had been a formal vote, however, they would not have voted in favour. Here, it is evident that states feel that the (legally) less binding nature of OSCE documents allows more leeway in maintaining their political interests. At best, one speaks of OSCE norms in this context as "soft law", a code of conduct, which has a very general legal foundation and perhaps the perspective of, at some point, acquiring the nature of customary law.[13]

The reserve that the international community shows in its assessment of the significance of OSCE documents in terms of international law is in peculiar contradiction to the explosive power of these agreements, which ultimately were essential in contributing to the collapse of "real socialism" (not least because of the human rights deficit there). Without a doubt, these agreements increased the limitations on the political leeway of the socialist states more than the fact that they were party to UN human rights treaties, which played a rather subordinate role in public perception.

Political Barriers of Prevention: the Example of the HCNM

The political character of OSCE instruments and the straightforward ease of their application have made it possible for the OSCE to give priority to taking preventive action with regard to human rights. Prevention presupposes a huge willingness to co-operate free from accusations that rights have been violated.[14] It is significant that in 1990 only an organization like the OSCE was capable of dealing with the protection of minorities, which had been a "hot potato" particularly for Europe and which the Council of Europe had evaded for decades as if it were a "disreputable business".[15] The OSCE was only being consistent when - after the ice had been broken - it created the office of the High Commissioner on National Minorities (HCNM), which was a revolutionary innovation.[16]

The HCNM was conceived as an instrument of conflict prevention in connection with minority issues according to the relevant idea that the international community can effectively influence minority problems through peace-

13 Cf. Brigitte Reschke, Minderheitenschutz durch nichtvertragliche Instrumente: Soft Law im Völkerrecht? [Protecting Minorities through Non-Contractual Instruments: Soft Law in International Law?], in: Hans-Joachim Heintze (Ed.), Moderner Minderheitenschutz [Modern Protection of Minorities], Bonn 1998, p. 58.

14 Cf. Steven R. Ratner, Does International Law Matter in Preventing Ethnic Conflict?, in: Journal of International Law and Politics 32 (2000) 3, pp. 647ff.

15 Felix Ermacora expressed this very pointedly in: Der Minderheiten- und Volksgruppenschutz vor dem Europarat [The Protection of Minorities and Ethnic Groups in the Council of Europe], in: Theodor Veiter (Ed.) System eines internationalen Volksgruppenrechts [A System of International Rights for Ethnic Groups], Volume 3, II, Vienna 1972, p. 75 (author's translation).

16 Cf. Max van der Stoel, Peace and Stability through Human and Minority Rights, Baden-Baden 1999, p. 22.

ful means only at their inception. If the exchange of hostilities has begun, one can only intervene through military means and this at great expense. Therefore the appointment of the HCNM, whose task is to uncover minority conflicts at the earliest possible stage and settle them, was a sagacious move and as practice has shown also successful.[17] Although the appointment of the HCNM was a bold move, there are also clear-cut limits to his mandate. These seem to indicate a political orientation in his activities according to the maxim "use a double standard".

This begins with the fact that the HCNM takes action from a position as far removed as possible from an individual person belonging to a national minority. It is not the HCNM's function to act as a kind of ombudsman for the concerns of national minorities by acknowledging and examining their complaints. In other words, he is High Commissioner *on*, and not *for* national minorities. His mandate even expressly rules out dealing with individual complaints. This already shows that it is not a matter of placing all persons belonging to minorities in OSCE space on the same level. In fact, the HCNM merely negotiates with government representatives and officials from a very limited number of OSCE participating States.

Moreover, the mandate contains other excluding factors: *First* it includes only situations, which could endanger security *between* states. Situations within a state are not the object of HCNM activities. Logically, minorities who are not the titular nation in another state, i.e. who do not have a "kin-state", are not embraced in the mandate, because especially in this case, there is no inter-state connection.

Thus the HCNM does not deal with the Roma although they are distributed over several OSCE participating States. This was decided in 1993 after the HCNM conducted a study on the Roma situation in OSCE space recommending increased social integration of the Roma. The responsibility for Roma and Sinti issues was then transferred to the Warsaw Office for Democratic Institutions and Human Rights (ODIHR). This transfer of responsibility reflected the OSCE opinion that there was no necessity for conflict prevention in a political sense even though urgent improvements in the situation of the Roma and Sinti will be required in guaranteeing civil rights fully and in view of social and economic discrimination.[18] Nevertheless, the Warsaw Office is at least one other OSCE institution dealing with these problems. On the other hand, this limit to the HCNM mandate means that the OSCE does not deal in any form whatsoever with the conflicts of ethnic groups within a state - like those of the Corsicans in France or the Kurds in Turkey.

17 Cf. Max van der Stoel, Reflections on the Role of the OSCE High Commissioner on National Minorities as an Instrument of Conflict Prevention, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (Ed.), OSCE Yearbook 1999, Baden-Baden 2000, pp. 381ff.

18 Cf. Romani Rose, OSCE Policy on Roma and Sinti Must Be Changed, in: OSCE Yearbook 1999, cited above (Note 17), pp. 327ff.

Second, the clause in the mandate, which expressly states that the HCNM is not permitted to consider situations involving organized acts of terrorism, is crucial. This explicitly excludes once again situations like those of the Kurds, the Corsicans, the Basques, and also - until terrorist activities have been surmounted completely - the Northern Irish. This exclusion is backed in another section of the mandate: The provisions on potential sources of information prohibit the HCNM from acknowledging communications from any person who practises or publicly condones terrorism. The fundamental significance of this limitation on the HCNM mandate for the OSCE in general is made clear by the fact that a corresponding provision has been included in the mandate of the Representative on Freedom of the Media, which was passed in December 1997 at the OSCE Ministerial in Copenhagen.

At first sight, the limitations in the mandate seem comprehensible. Without a doubt terrorism must be outlawed. In practice however, this had the consequence that the HCNM implemented his activities exclusively in the new democracies in Eastern and South-eastern Europe.[19] In contrast, situations like those in Northern Ireland, the Basque region, Corsica or the status of the Kurds are excluded, which does not do justice to the seriousness of the minority problems in these regions. Nevertheless, at that time, the states concerned, Great Britain, Spain, France and Turkey, did everything they could in political terms to prevent the establishment of the HCNM at all. When this became inevitable, they structured the mandate in such a way that their states would not fall under its scope. For security reasons, the United Kingdom even reserved the right, if necessary, to "regulate" the access of the HCNM to its territory or to a particular place on its territory.[20] In the EU and NATO member states, it seems the general opinion that they have adequate instruments for conflict settlement at their disposal and do not need international assistance. Thus the impression was strengthened that in the OSCE a double standard was being applied "which was perceived by Eastern democracies as having their minds made up for them".[21]

The first HCNM, Max van der Stoel, tried to counter this impression, for example, by also offering assistance to Western states in post-conflict situations. According to the mandate, he is free to use this option. In general, with the exception of the restrictions mentioned above, the mandate does not place any limitations on the self-initiative of the HCNM. He is to recognize ten-

19 Cf. Hans-Joachim Heintze, Minority Issues in Western Europe and the OSCE High Commissioner on National Minorities, in: International Journal on Minority and Group Rights 7 (2000) 4, p. 386.

20 Cf. Interpretative Statement by the United Kingdom, CSCE Helsinki Document 1992: The Challenges of Change, Helsinki, 10 July 1992, in: Arie Bloed (Ed.), The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993, Dordrecht/Boston/London 1993, pp. 701-777, here: pp. 774-775.

21 Berthold Meyer, Zwischen Souveränitätsvorbehalten, Selektions"zwängen" und Selbstüberschätzung [Between Reservations on Sovereignty Grounds, "Compulsory Selection" and Self-Overestimation], in: Österreichisches Studienzentrum für Frieden und Konfliktlösung (Ed.), Friedensbericht 1999, p. 255 (author's translation).

sions at the "earliest possible stage", which according to his judgement have the potential to escalate into a conflict. He is to contribute to their containment, and in the case of the concrete danger of escalation, to issue a so-called early warning to OSCE political bodies. In contrast to the legal mechanisms for the protection of minorities, it is clear that all these steps - from the first moment tensions have been recognized to formally issuing an early warning - are dependent on the political assessment of the HCNM; i.e. they are not subject to a legally verifiable, fixed procedure.

To be able to make a timely assessment of when and where conflicts of interest and tensions are occurring, it is indispensable that the HCNM continually monitors minority-related developments in the OSCE participating States. This statement immediately raises the question of sources of information. Apart from its long-term missions and its Centres in Central Asia, the OSCE does not maintain any diplomatic missions in its participating States. Thus, in many cases there are no reports the High Commissioner could resort to. On the other hand the regular flow of information is vital for the HCNM: He is dependent on a tight information network ranging from public media, reports from press agencies, contacts with other international and non-governmental organizations, official statements by governments and minority representatives and studies from the academic world to consultations of all kinds. Connecting a network of this kind takes a great deal of time and it is also no easy task to evaluate and utilize the wealth of information springing from it.[22]

The connection between sources of information and the HCNM's personal judgement reveals the central feature of the post of the High Commissioner. This feature is the independence of his political judgement given to him by the mandate, which leaves to his discretion alone which situation he deals with. This again creates a "compulsory selection" which is ultimately decided upon using political criteria. Undeniably, the mandate sets stringent limits on this.

The states concerned cannot impede him from dealing with a situation by resorting to the objection, for example, that it is an "internal affair". On the contrary, the mandate requires they co-operate with him. He is also free at any time to visit any location and speak to any person that he wishes to contact. Of course, he cannot force this issue. Thus he was barred from Kosovo until 1999.[23]

In summary, it must be emphasized that the HCNM ultimately must, within the framework of his mandate, decide upon which minority problem he will deal with. He has made significant contributions to surmounting critical

22 Cf. Jakob Haselhuber, Institutionalisierung ohne Verrechtlichung: Der Hohe Kommissar für Nationale Minderheiten der OSZE [Institutionalization without Legalization: The OSCE High Commissioner on National Minorities], in: Heintze (Ed.), cited above (Note 13), p. 124.

23 The formal pretext preventing a visit there was the unclear status of Yugoslavia in the OSCE. Cf. Valery Perry, The OSCE suspension of the Federal Republic of Yugoslavia, in: Helsinki Monitor 4/1998, pp. 44ff.

situations in Eastern and South-eastern Europe. Nevertheless, the impression remains that the HCNM is merely an instrument directed towards the East and that the "old Western democracies apparently have a double standard in this respect".[24] Towards the end of his period in office van der Stoel clearly worked against this orientation in that he moved away from concentrating on specific countries in his activities and also addressed general cross-sectional problems in protecting minorities. He created three expert groups for this purpose aimed at developing the educational, language and political rights of persons belonging to minorities to participate in public life.[25] He presented these recommendations to all OSCE States and utilized them in his discussions. Undoubtedly, this was a skilful move on the part of the HCNM allowing him to circumvent the all too stringent political restrictions of his mandate and exerting an influence on all states to respect minority rights.[26]

Legalization of Human Rights and "Communities of Values"

In the Charter of Paris, the OSCE declared itself a community of values based on human rights, democracy and the rule of law. Admittedly, this was merely a proclamation because as it has such a loose organizational structure, the OSCE does not really have the capacity to enforce the values stated therein. In contrast, for the Council of Europe these values have more than just declaratory character. A development has taken place there, which has actually "legalized" human rights norms and thus taken them out of the orbit of politics.

This was achieved through the 1950 European Convention on Human Rights (ECHR). This Convention does not differ fundamentally in substance from the ICCPR. The big difference lies rather in the enforcement procedure. While the UN Covenant contains primarily political implementation procedures, the ECHR has its own Court, namely the European Court of Human Rights (ECourtHR). If someone believes his/her rights have been violated, after having exhausted all domestic legal remedies, he/she can appeal to this Court. This is a judicial procedure, free of political influence, which ends in a judgment. This binding judgment generally contains a state obligation to make reparations or pay compensation to a victim. Up to now states have met this obligation, because if they had not, they would be threatened with the sanction of expulsion from the Council of Europe.[27]

24 Meyer, cited above, (Note 21), p. 255 (author's translation).

25 Cf. Hans-Joachim Heintze, The Lund Recommendations on the Effective Participation of National Minorities in Public Life, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (Ed.), OSCE Yearbook 2000, Baden-Baden 2001, pp. 257ff.

26 Cf. John Packer, The origin and nature of the Lund Recommendations, in: Helsinki Monitor 4/2000, pp. 29ff.

27 Cf. Mark Janis et al., European Human Rights Law, 2nd ed., Oxford 2000, p. 8.

The question whether the ECourtHR has, out of political opportunism, a double standard on human rights, can be answered in the negative. On the contrary, the Court has time and again pronounced judgments, which were politically unwelcome and in particular when politics had failed to find a political solution. Currently, this has yet again been made clear in the case of Turkey.

Turkey has long been accused of serious violations of fundamental human rights. These are primarily accusations against the police for their use of torture,[28] attacks in the "fight against terrorism" in the Kurd areas[29] and the refusal to grant rights to the Greek Cypriots in Northern Cyprus.[30] The violations of human rights are so extensive that political action on a broader level would be necessary. Up to now however, EU states have instead exercised reserve because Turkey lies in an important strategic region and is struggling to achiever inner stability.

In particular, the solution of the Cyprus problem - which must also include resolving the issue of the massive human rights violations there (in the end, "ethnic cleansing" occurred there too) - requires concerted international political efforts. All states with the exception of Turkey have refused to recognize Northern Cyprus, which was created following Turkish military intervention, as a sovereign state and have instead demanded that a political solution to the problem be found. Nevertheless, political forces have not been able to solve the conflict. Because of a lack of political initiatives the victims of human rights violations transferred their hopes to the ECourtHR. This kind of behaviour is well known in domestic public law and is often practised when legislators are unable or unwilling to take action for political reasons. Experience has shown that this course is entirely feasible. For example, the problem of racial segregation in the US during the fifties was not surmounted through legislative measures and political action, but through the verdicts of the US Supreme Court, for example through its famous decision in the case of *Brown v. Board of Education* in 1954.[31]

Nevertheless, in the instance of Northern Cyprus, the route through an international court has not been trouble-free, because once a case of "ethnic cleansing" is brought before the court, thousands of similar cases can also be appealed. This is the major difference to the above-mentioned problem of US racial segregation. In the US case, it was a question of a change in the inter-

28 Cf. Ralf Alleweldt, Auf dem Wege zu wirksamer Folterprävention in der Türkei? [On the Way to Effective Prevention of Torture in Turkey?], in: Europäische Grundrechte-Zeitschrift 27 (2000) 7-8, pp. 193ff.

29 Cf. Amke Dietert-Scheuer/Cem Özdemir, Kurden: Verfolgt in der Türkei - Ungeliebt in Deutschland? [Kurds: Victims of Persecution in Turkey - Unloved in Germany?], in: Franz-Josef Hutter et al. (Ed.), Das gemeinsame Haus Europa [The Common House of Europe], Baden-Baden 1998, p. 225.

30 Cf. Loukis G. Loucaides, Essays on the developing law of human rights, Dordrecht 1995, pp. 108ff.

31 Cf. Heike Steinberger, Rassendiskriminierung und Oberster Gerichtshof in den Vereinigten Staaten von Amerika [Racial Discrimination and the Supreme Court of the United States of America], Cologne 1969, p. 173.

pretation of the 14th amendment of the US Constitution, which became binding for all similar cases, while the ECourtHR deals exclusively with the individual claim of the applicant. Ultimately, this has led to overtaxing the bodies responsible for the protection of human rights. The *Loizidou* case is a good example of this.[32] It received a great deal of attention because Turkey was made responsible for human rights violations in Northern Cyprus. After the Turkish invasion of 20 July 1974, the Cypriot applicant, Titina Loizidou, was unable to utilize several plots of land in Kyrenia, which is part of Northern Cyprus. In 1989, Mrs. Loizidou filed a complaint, which stated that the continual refusal of access to her property was a violation of the right to respect for her home according to Article 8 of the ECHR and a violation of the right to the peaceful enjoyment of her possessions according to Article 1 of the additional Protocol No. 1 to the ECHR. In 1993 the Commission dismissed this appeal as being unfounded. Thereupon, the case was referred to the Court by the government of the Republic of Cyprus according to Article 48 lit. b of the ECHR (in the version of additional Protocol No. 9). In an initial move, the Court dismissed Turkey's preliminary objection that this was an alleged abuse of process aimed only at a discussion of the status of the Turkish Republic of Northern Cyprus (TRNC).[33] The judgment of the ECourtHR of 18 December 1996[34] stated that Turkey was accountable for the refusal of access to the property of the applicant Loizidou and thus for the loss of control over it. This limitation was a violation of Article 1 of the additional Protocol No. 1 to the ECHR. In contrast, however, it was not in violation of Article 8 of the ECHR. Based on this, on 28 July 1998 the ECourtHR ultimately pronounced judgment obliging Turkey to pay approximately 1.1 Million DM in damages and costs of the proceedings. As was to be expected, numerous similar cases have been brought before the ECourtHR. The Loizidou judgment has been frequently criticized because ultimately the facts in question involve the political problem, which has yet to be solved, that the Cyprus conflict poses. At any rate, Turkey is in a dilemma: If it complies with the judgment, it will have acknowledged the fact that Northern Cyprus is not an independent state, which goes against Turkish doctrine up to now. However, if it does not pay the damages, it is threatened with exclusion from the Council of Europe for failure to comply with a judgment.

Thus, on the whole, the Loizidou judgment leaves us with ambivalent impressions. On the one hand, justice, which is independent and not influenced

32 Cf. Christian Rumpf, Türkei - Zypern - EMRK. "Loizidou" und seine Folgen [Turkey - Cyprus - ECHR. "Loizidou" and Its Consequences], in: Zeitschrift für Türkeistudien 10/1998, pp. 233ff.

33 Cf. ECHR, *Loizidou v. Turkey*, Application No. 15318/89, Report of 8 July 1993, reported subsequently in European Court of Human Rights, *Loizidou v. Turkey* (Preliminary Objections), Judgment of 23 March 1995, Series A, No. 310, pp. 22-23

34 ECHR, *Loizidou v. Turkey* (Merits), Judgment of 18 December 1996, pp. 15-18; cf. also the comments of Christian Rumpf, in: Europäische Grundrechte-Zeitschrift 24 (1997) 20, pp. 555ff.

by politics, carries great weight for human rights questions on the international level. However, it does not seem to be an instrument for dealing with human rights violations on a massive scale. For this, political action is required. Ultimately, political and legal protection of human rights must be combined and also co-operation between the different human rights organizations must occur. This moves us on to the question of which international mechanisms can be utilized in the case of human rights violations on a massive scale.

Reactions to Serious Human Rights Violations

Human rights violations occur in every single state. In general, they are resolved through domestic remedies. In part, international assistance is required, for example in surmounting developmental weaknesses in the realization of social human rights.

Regional organizations make a fundamental contribution to solving human rights problems. They have the basic advantage that they unite states with a common history and similar values. Therefore, there are frequent demands that regional organizations, within their scope, should combat violations of human rights more intensively. In fact the OSCE - which has contributed immensely to dissolving Eastern European regimes that were not based on the people's will - has also been making efforts to combat human rights violations. A mechanism was specifically created for the "human dimension" at the Vienna Follow-up Meeting (1986-1989), which was improved in Moscow in 1991 (the Moscow Mechanism).[35] Ultimately, this means the OSCE can become involved in the human rights situation in a state against its will, which fundamentally breaks through the consensus principle upon which OSCE work is based in other respects. Nevertheless, the measure is aimed at obtaining a publicity effect and can be seen as *primae facie* evidence that serious human rights violations exist.[36] In practice, the effect of this mechanism has remained rather minimal, even though it served to exclude what was left of former Yugoslavia from OSCE work at that time.[37] Thus the question remains whether more drastic measures should be taken and to which institution these could be linked.

In the case of massive and severe human rights violations in a state that refuses to co-operate internationally, states true to the law will strive to place this topic on the agenda of the UN Human Rights Commission. This occurs by introducing a resolution condemning the country in question for the hu-

35 Cf. Katrin Weschke, Internationale Instrumente zur Durchsetzung der Menschenrechte [International Instruments to Enforce Human Rights], Berlin 2001, p. 337.

36 Cf. Arie Bloed, Monitoring the CSCE Human Dimension: In search of its effectiveness, in: Arie Bloed et al. (Ed.), Monitoring Human Rights in Europe, Dordrecht 1993, pp. 58f.

37 Cf. also a critical evaluation by Sandra Mitchell, Human Rights in Kosovo, in: OSCE Yearbook 2000, cited above (Note 25), pp. 241ff.

man rights violations committed and demanding an immediate end to these deplorable circumstances. At the 54th Session of the Commission (1998) for example, 200 different human rights violations were dealt with and resolutions were adopted on the human rights situation in 13 countries. The great importance of the Human Rights Commission is that it takes on a glasshouse function. The debates in this body receive international recognition and are important for the reputation of a state.

Of course a verdict on human rights violations through a resolution by the Human Rights Commission is a highly political instrument. This has been shown repeatedly when human rights violations in powerful states are to be addressed. Thus the EU refrained from introducing a resolution draft condemning China for human rights violations in 1998 although this had been prepared for seven years. This suggests that there were political (and economic) reasons for making this move, although officially it was stated that effective opportunities to influence China had been found. Moreover, this is why the foreign offices involved have denied that there was a case of "double standards".[38] Whatever the fundamental reasons for the lenient treatment of China ultimately were, one cannot deny that the Human Rights Commission is an organ that, under the agenda item "human rights violations in all parts of the world", does not really deal with all existing violations. Very often the question: "Silent diplomacy or publicity?"[39] has been asked. However, even just asking this question has a political character and demands making a selection counter to the legal principle of equal treatment. However, even when a state has been condemned, the Commission does not have any coercive measures at its disposal, with the exception of mobilizing public opinion, for putting a real stop to human rights violations.

Under these circumstances, the only option remaining is for individual states to place unilateral sanctions on the states violating human rights. Of course, ultimately this reaction is guided by national political interests and not the seriousness of the human rights violations actually committed.[40]

Often the only option remaining is making an appeal to the UN Security Council.[41] After the end of the East-West conflict, there were great expectations that the Council would establish effective protection of human rights. These expectations were primarily nourished by Resolution 688 (1991),

38 Cf. Michael Schäfer, Brückenbau - Herausforderung an die Menschenrechtskommission [Building Bridges - A Challenge for the Human Rights Commission], in: Baum et al. (Ed.), cited above (Note 6), p. 65.

39 Wolfgang Gerz, Stille Diplomatie oder Publizität? [Silent Diplomacy or Publicity?], in: Klein (Ed.), cited above (Note 9), pp. 47ff. (author's translation).

40 Cf. Carmen Thiele, Wirtschaftssanktionen und Menschenrechte im Völkerrecht: Das Helms-Burton-Gesetz [Economic Sanctions and Human Rights in International Law: The Helms-Burton Law], in: Humanitäres Völkerrecht - Informationsschriften 11 (1998) 4, pp. 223ff.

41 Cf. Heike Gading, Der Schutz grundlegender Menschenrechte durch militärische Maßnahmen des Sicherheitsrates - das Ende staatlicher Souveränität? [Protection of Fundamental Human Rights through Military Measures of the Security Council - the End of State Sovereignty?], Berlin 1996, pp. 205ff.

which dealt with the Kurds in Iraq, and has repeatedly (but incorrectly) been cited as a breakthrough in this area.[42] In spite of all shortfalls, the Council has developed a certain practice in characterizing specific serious violations of human rights as a threat to or breach of international peace. This interpretation according to Article 39 of the UN Charter is the prerequisite for permitting the Council to deal with a specific problem without intervening unduly in the internal affairs of a state. Since 1991 the Council - first having established a threat to peace - has made the decision to intervene militarily in the former Yugoslavia, Somalia, Haiti and Rwanda to prevent human rights violations.[43] However, the specific circumstances and causes of these violations were varied. It has been impossible to filter out any specific criteria to determine which human rights violations would be considered so serious by the Council that it would impose coercive measures. Scientific research in this area has failed.[44]

This is not surprising because the UN Security Council is a political and not a legal organ. Its task is ensuring international peace and therefore it requires political leeway in making decisions. This can certainly have the effect that the Council makes different assessments of similar situations or ignores them completely. Thus because of pressure from public opinion, the Council (unwillingly) dealt with the fate of the Kurds in Iraq in 1991 and adopted a half-hearted resolution that raised more questions than it answered and in the end induced the US military to impose "no-fly zones" in Iraq (which they insist upon maintaining even today) without a mandate from the Council.[45]

In contrast, a similar situation, i.e. the civil war scenario in Sudan, which has been going on for years, has not interested the Security Council. Morally this may be condemnable, but it is permissible under international law. Therefore the Council has always placed great value on not creating precedents for taking action in case of human rights violations; solving of individual cases has always been emphasized. In particular, China has continually raised objections to the Security Council having authority in the field of human rights.[46]

There is a legal limitation - which however cannot be enforced - on the conduct of the member states in the Security Council when they no longer focus

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42 Cf. Hans-Joachim Heintze, Die Resolution 688 (1991) des Sicherheitsrates der Vereinten Nationen und der internationale Menschenrechtsschutz [Resolution 688 (1991) of the United Nations Security Council and International Protection of Human Rights], in: Humanitäres Völkerrecht - Informationsschriften 4 (1991) 1/2, p. 46.

43 Cf. the evidences in Harald Endemann, Kollektive Zwangsmaßnahmen zur Durchsetzung humanitärer Normen [Collective Coercive Measures for the Enforcement of Humanitarian Norms], Frankfurt/M. 1997, pp. 182ff.

44 See, for example, the study by Andreas Stein, Der Sicherheitsrat der Vereinten Nationen und die Rule of Law [The United Nations Security Council and the Rule of Law], Baden-Baden 1999, p. 390.

45 Cf. Nico Krisch, Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council, in: Max-Planck Yearbook of United Nations Law 3 (1999), Heidelberg 1999, p. 73.

46 Cf. Höynck, cited above (Note 10), p. 252.

interest on ensuring world peace - an activity with which they have been entrusted by the international community - but focus on their national interests. This illegal behaviour has been observed repeatedly. One of the latest drastic examples of this, which also had a devastating effect on safeguarding human rights, was the Chinese veto in February 1999 against continuing the preventive deployment of blue helmets in Macedonia because Macedonia had established diplomatic relations with Taiwan for economic reasons.[47] This UN retreat was the factor that made the military clashes, which materialized in the spring of 2001, between the National Liberation Army (*Ushtria Clirimtare Kombetare,* UCK/NLA) and the Macedonian armed forces possible.

Thus the Security Council once again belied its task of making international peace more secure. This kind of failure - that is, political misuse - has certainly contributed considerably to the fact that the criticism of the most important body of the United Nations and its composition has increased continuously in the past few years. Finally one must say that the Council could definitely be an effective instrument in protecting human rights. The fact that this has not occurred up to now lies in its practice of applying a double standard according to solely political interests - often even determined exclusively by national interests - and thus disregarding obligations under international law.[48]

However most recently the Council has - certainly because of the general helplessness about how to deal with ethnic conflicts - embarked on a course which is certainly a slight detour from the political arbitrariness of dealing with serious human rights violations. What is meant is the creation of the two *ad hoc* tribunals for the former Yugoslavia and Rwanda. Both tribunals are a novelty in international law and differ dogmatically from the International Court of Justice (ICJ), international courts of arbitration and the ECourtHR. The first two courts mentioned are organs of peaceful conflict settlement, the ECourtHR however is ultimately an instrument to enforce the public-law claims of persons whose human rights have been violated. In both instances, the goal of a case is not to penalize a state or a person. In contrast, the point in the tribunals is to punish natural persons who have committed international law crimes. In these cases, personal guilt must be proven before an independent criminal court. It is in the nature of these tribunals that they are not influenced by politics. As a consequence, these tribunals must not apply double standards. In fact, particularly the Yugoslavia Tribunal has to a very large degree placed limits on state sovereignty because states must - if the Tribunal

47 Cf. Manfred Eisele, Die Vereinten Nationen und das internationale Krisenmanagement [The United Nations and International Crisis Management], Frankfurt/M. 2000, p. 137.

48 In the current literature, the question has even been raised whether the Security Council could also pass decisions violating human rights and whether the Council is subject to legal control. Cf. Jana Hasse, Resolutionen des UN-Sicherheitsrates contra Menschenrechte? [Do UN Security Council Resolutions Contradict Human Rights?], in: Vierteljahresschrift für Sicherheit und Frieden (S+F) 2/2000, pp. 158ff., as well as Jochen Herbst, Rechtskontrolle des UN-Sicherheitsrates [Legal Control of the UN Security Council], Frankfurt 1999, pp. 204ff.

calls for this - transfer cases against a defendant to The Hague and hand over the accused person.[49] In addition, investigations by the international prosecution must be given backing.[50]

With the decision by the UN Security Council to create the tribunals, a process has been launched which has led to the further legalization of the protection of human rights in international law - at least with respect to combating the most serious violations of this body of law. This process will be continued through the creation of a permanent International Criminal Court, probably next year. Naturally, this kind of criminal court will only be able to deal with a few very serious international crimes. Its significance however will go far beyond this because a basic preventive effect will emanate from it and many potential perpetrators will be deterred by the simple existence of an international criminal court, as experience has shown. However, even criminal courts can only be truly successful in contributing to the enforcement of human rights through the support of politicians and policy-makers.

Summary

Human rights in international relations fulfil the requirements that have to be placed on every law: Rights and obligations have been stated in a sufficiently precise manner and represent a generally binding and equal standard for all states. This has always been confirmed when these rights have been linked to legally shaped enforcement procedures. Thus the judgments of the ECourtHR are free of political influence; here double standards are not applied.

However most human rights treaties are not linked to these kinds of legal enforcement procedures. Their implementation is usually realized through political means so that ultimately this conforms with political interests. It is inherent in the whole concept that inevitably a double standard is used - dependent on political interests. This means that the political will to enforce human rights must be strengthened because the extent to which human rights are actually implemented depends on the strength of the law.

In practice, it has been shown that public opinion is a fundamental factor in the enforcement of law. This realization is of outstanding importance for human rights and relativizes the importance of politics. Namely, today human rights are no longer only implemented by states to the exclusion of the public, but rather with the co-operation of civil society. Its reinforcement has led to

49 The fact that the former Yugoslav President Milošević has been forced to appear before court is certainly one of the high points in the enforcement of international law in this new millennium. Cf. Süddeutsche Zeitung of 4 July 2001, p. 7.

50 Cf. Hildegard Uertz-Retzlaff, Über die praktische Arbeit des Jugoslawien-Strafgerichtshofes [On the Practical Work of the International Criminal Tribunal for Former Yugoslavia], in: Horst Fischer et al. (Ed.), Völkerrechtliche Verbrechen vor dem Jugoslawien-Tribunal, nationalen Gerichten und dem Internationalen Strafgerichtshof [International Crimes before the Yugoslavia Tribunal, National Courts and the International Criminal Court], Berlin 1999, pp. 87ff.

the fact that people worldwide are demanding their rights guaranteed and insisting on unified standards. In this manner, the act of "using different standards" is being gradually reduced. The creation of international criminal jurisdiction will also contribute to applying unified standards for the most serious human rights violations and thus force back political arbitrariness.

However, even in future enforcing human rights without political implications will not be attainable. Ultimately, this will mean seeing human rights as a part of the rule of law and democratic order, which, in an international "community of values" must go beyond the domestic sphere. If on this basis there once will really be "global governance", then it must be based on a unified standard of human rights. Of course until then, politics has a long way to go before it subordinates itself to law.