CHAPTER 1

Reflections on the Categorization of International Human Rights*

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I  The Emergence of Human Rights Protection at the Level of International Law

The emergence of international human rights protection has revolutionized international law (Klein 1997, 23). Until the middle of the twentieth century, it was a fundamental principle of international law that for almost all purposes only States, being subjects of international law, were capable of possessing rights and duties in international law. Individuals had no such rights; rather they were deemed to be mere objects of international law unless (derivative) rights were conferred to them by States (Buergenthal 2012, 1021). Therefore, individuals stepped into the “light of international law” (a formula that as far as can be seen was used for the first time by Störk 1887, 589) only in extraordinary circumstances. For example, if an individual of one State was mistreated by another State in a manner which violated international law, the home State of the injured individual could intercede by way of providing diplomatic protection for that person. This rule, however, only protected the individual against actions by foreign States and it was even discretionary. Each State was free to decide whether to initiate a claim against the possible perpetrator State in favor of one of its citizens on the ground of responsibility of States for injuries to aliens, or diplomatic protection. By contrast, it was not possible for another State to protect an individual from arbitrary interference by his home State. The rights of nationals against their home State, if they existed at all, were governed by the national law of the State concerned. The manner in which a State treated its own citizens was completely a matter of its exclusive internal affairs (Buergenthal 2012, 1022).

* This paper was published in German language 2010 under the titel “Überlegungen zur Kategorisierung internationaler Menschenrechte” In: H.-G.Ziebertz (Ed.), Menschenrechte, Christentum, Islam, (27–48) Münster: LIT, and has been updated and slightly modified in March 2014 for the English version. The author expresses her gratitude to Mr. Roger Fabry for the translation of an earlier draft. All remaining errors of this final version are mine.
Against the background of the Holocaust, which revealed unprecedented and previously inconceivable levels of savagery and inhumanity, the international community quickly agreed after the end of the Second World War to change the legal situation outlined above. The area of human rights was removed from the domestic jurisdiction (domaine réservé) of the States so that individuals could no longer be injured by the arbitrary exercise of State power by their home State without having recourse (Klein 1998a, 39 and 41). Clear evidence of the salience of this issue is provided by the Charter of the United Nations (UN Charter). In the preamble of the UN Charter the States Parties reaffirm their “faith in fundamental human rights, in the dignity and worth of the human person”; furthermore Articles 1(3), 55(c) and 62(2) of the UN Charter refer expressly to the international protection of human rights. An important indicator of this commitment was later provided by the adoption of the Universal Declaration of Human Rights (UDHR), which was enacted by the General Assembly on 10 December 1948 (UN General Assembly Resolution 217 A[III], UN Doc. A/811). In spite of its non-binding character as a mere recommendation, it signaled a radical political change. The Declaration is understood not only as the authentic definition and interpretation of the rights which the United Nations and its Member States wished to promote under Articles 55 and 56 of the UN Charter. At the same time it was supposed to serve as a legislative program for the world organization. It was intended that binding legal effect would be given to the human rights referred to in the Universal Declaration as soon as possible through the conclusion of (binding) international agreements (Fassbender 2009, 16; Conte & Burchill 2009, 2). However, the development of a single, uniform and legally binding human rights catalogue subsequently failed because of the Cold War and the associated ideological confrontation in human rights matters between the two blocks. Only in 1966, the two sides succeeded finally in adopting two binding human rights conventions, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Both treaties came into force in 1976, after having been ratified by a sufficient number of States (minimum: 35 each). Since that time, these two treaties have achieved almost worldwide binding effect due to the high number of Contracting Parties. Today, the Universal Declaration of Human Rights, together with the two UN Covenants, effectively forms what has come to be known as the “International Bill of Human Rights” (Henkin, 1987, 1; Steiner, Alston & Goodman 2007, 133).

The tedious and protracted process of drafting and ratification of both UN Covenants (see Pechota 1981, 32 et seq.; Craven 1995, 18 et seq.) led to a series of parallel agreements and complementary measures in order to speed up the implementation of a comprehensive international human rights regime. Thus,