

# Double standards. The political character of international human rights

Jan Willem Sap\*

## I. Introduction

International human rights law is a complex field. At first glance, it would seem that human rights are more concerned about the relationship of the state with the individual than with inter-state relations. To get really deep into a human right it seems that knowledge of the constitutional law of a specific legal system is the best way to understand what that human right truly means. But in this approach the responsibility for protecting a human right is often limited to the territorial state. The risk is then that violations of human rights are primarily seen as a list of terrible things carried out in distant lands by and against 'others'. Now a different approach is more dominant. Human rights are seen as universal, based on the notion of shared humanity and shared responsibility. Striving for human rights is a quest for human dignity. The big impetus for the human rights revolution was the Holocaust, the killing of six million Jews during the Second World War. When the Nazi regime made war on a particular group of people, citizenship gave no protection.<sup>1</sup>

Human rights were acknowledged in international law with the creation of the United Nations in 1945, although the concept of human rights at that time was not new. If we see human rights as a concern with 'others', human rights have deep roots in religion and philosophy.<sup>2</sup> The Book of Genesis speaks of the value and sacredness of God's children and the responsibility that human beings have towards each other, illustrated in the cry of Cain: 'Am I my brother's keeper?' Christ spoke of the need to take care of the poor, the sick and the hungry and have compassion with strangers.<sup>3</sup> Human rights were developed in connection with natural law theory and were formulated as claims of the citizens against the 'divine right' of kings in the absolutist state in the seventeenth and eighteenth century (humanists, reformists, John Locke, the French Declaration of the Rights of Man and of the Citizen in 1789). The Declaration of Independence (1776) of the United States of America states: 'We hold these truths

---

\* DOI 10.7590/ntkr\_2020\_012

Prof. dr. J.W. Sap is professor of European Union Law at the Open University in the Netherlands and associate professor of European Union Law at the Vrije Universiteit Amsterdam. An earlier version of this article was presented as an address at the conference 'The Relevance of the Freedom of Thought, Conscience and Religion', Vrije Universiteit Amsterdam, 10 December 2018.

<sup>1</sup> S.C. Varey, M. Gibney & S.C. Poe, *The Politics of Human Rights. The Quest for Dignity*, Cambridge: Cambridge University Press 2016, p. 8.

<sup>2</sup> P.G. Lauren, *The Evolution of International Human Rights: Visions Seen*, Philadelphia: University of Pennsylvania 1998.

<sup>3</sup> Varey, Gibney & Poe, *op.cit.*, p. 17.

to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.<sup>4</sup> The underlying idea of international human rights is that individuals need to be protected against their own governments. Therefore, it is of the utmost relevance to organize decent levels of protection and opportunities for individuals, in pluralistic societies, so that they are allowed to live freely and determine their own future without fear.<sup>5</sup>

For the development of human rights also important was the rise of socialism. It brought the insight that if humans were to enjoy the freedoms, they needed some social-economic conditions also formulated as rights against the state (education, social security). According to Peter Kooijmans, because of the atrocious manner in which the Nazi regime treated citizens of Jewish origin, one of the purposes of the United Nations is 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion' (Article 1(3) UN Charter).<sup>6</sup>

So what is the problem? It is that states can claim that human rights are very important on one day and then disregard them for political reasons the next day. International human rights are used for political reasons to criticize other countries, for instance China, but human rights are disregarded if a state or big company wants a business contract with a certain regime. This not only shows that international human rights are of a political and economic nature – international human rights seem to be more political than legal – it also reveals a double standard. While one country gets support, the other country is punished, even if they have more or less the same attitude towards human rights.

First this article considers the problem that there is hypocrisy around human rights. Politicians use double standards. Human rights are often discussed without taking into account the broader historical and political context, for instance the fact that Western intervention brought harm to non-Western people. Sometimes human rights are sacrificed for political reasons to stay in touch with illiberal states slowly making progress. Secondly the political character of international human rights is shown by discussing some general tensions. Thirdly the language of obligation is addressed, including the difference between negative and positive obligations. While civil and political rights are universal and demand immediate results, economic, social and cultural rights depend on the available resources. Attention is paid to a fascinating case in the Netherlands. Fourthly this article evaluates the relation between the European Union and human rights. How do we treat the rest of the world? The article concludes

---

<sup>4</sup> [archives.gov/founding-docs/declaration-transcript](https://www.archives.gov/founding-docs/declaration-transcript)

<sup>5</sup> J. Klabbers, *International Law*, Cambridge: Cambridge University Press 2017, p. 135.

<sup>6</sup> P.H. Kooijmans, *Internationaal publiekrecht in vogelvlucht*, Deventer: Kluwer 2002, p. 358.

that Western states and organisations should not force the Western way of life on other societies, but that they do demand the organisation of the right of individuals to choose and have a way 'out'.

## 2. Double standards

In general, a policy of double standards, the application of different sets of principles for similar situations, has a negative connotation. It is an unfair application of the principle that all parties should stand equal before the law. From the perspective of the judge a double standard violates the principle of justice known as impartiality. For instance the Dutch nation likes to present itself as founded on the basis of the struggle for the freedom of conscience and the freedom of religion against the Catholic King Philip II of Spain. In the Netherlands Piet Hein (1577-1629) is an important admiral, a freedom fighter, a hero. But in Spain he is seen as a pirate. In 1628, Piet Hein captured a Spanish treasure fleet in the Caribbean loaded with silver. This money allowed the Dutch army to seize the city of 's-Hertogenbosch. So the city was liberated from Spanish influences, but once the Calvinists had gained control they began to discriminate Catholics.

There is often hypocrisy around human rights. In some parts of the world universal human rights are seen as a cover for the domination of Western interest and values. But the fact that Western states had the primacy in the drafting of treaties, declarations and constitutions doesn't mean that these countries proclaim Western superiority. The Universal Declaration of Human Rights (1948) was in fact a warning by Europeans that the world should not follow their mistakes around nationalism and ethnic cleaning. It was not Western superiority but the acknowledgement of the total failure of the European civilization because of the Holocaust.<sup>7</sup> Placed in the broader context of the ending of the Second World War it remains inspiring that the drafters of the Universal Declaration of Human Rights wanted to create a better world, introducing this new civilisation after the Second World War. The problem is about the obligation to realise these ideals. If we look at the world today, it is frustrating that the levels of starvation, extrajudicial killing, illiteracy, maternal deaths, oppression and torture are still so high, that the drafters of the Universal Declaration of Human Rights would probably be outraged that their efforts have had so little effect.<sup>8</sup>

When Moses came down from the mountain with the ten commandments, he was outraged. His people appeared not interested in the new rules; they

---

<sup>7</sup> M. Ignatieff, *Human Rights as Politics and Idolatry*, Princeton: Princeton University Press 2001, p. 65.

<sup>8</sup> Varey, Gibney & Poe, *op.cit.*, p. 24.

were dancing around the golden calf. So he threw the stone tables on the ground. Let's take gossiping as an example. There is a double standard when someone claims to hate gossip, but secretly does it all the time. Not speaking the truth conflicts with the ninth commandment: 'Thou shalt not bear false witness against thy neighbours.' To accuse another person falsely, to perjure oneself, to slander, or to gossip, these are all violations of the ninth commandment. According to the sixteenth-century protestant reformer John Calvin (1509-1564) the meaning of the ninth commandment is that since God, is truth and abhors falsehood, we must cultivate unfeigned truth toward each other. It doesn't matter if its formal of private; we should not tell lies. Calvin states:<sup>9</sup>

'By malignant or vicious detraction, we sin against our neighbours good name: by lying, sometimes even by casting a slur upon him, we injure him in his estate. It makes no difference whether you suppose that formal and judicial testimony is here intended, or the ordinary testimony which is given in private conversation.'

However, we know that in politics, good relationships, friendship and favouritism are important. Words are used to manipulate others. Politicians have calculated intentions and sometimes use propaganda to impose ideological beliefs or to show that they are competent and diplomatic. In liberal democracies decisions are seen as legitimate if they are made on behalf of the people. Beliefs about legitimacy are strongly influenced by government policies. To prevent ideological confrontations all the time, one can defend that a double standard is one of the cornerstones of the (international) political community. This is because of human shortcomings, societal demands and the process of civilisation. How do we deal with opponents, immigrants, strangers and new situations? When people from the West visit other continents such as Africa or Asia, they like to give their opinion right away. We like to judge. But do we really always have to say everything out loud on arrival?

When we deal with Europe in a broader sense, for instance the European Union and Turkey's candidacy, it may be wise to postpone our judgements for the time being. Start with a double standard, establish contact and then later, when people trust each other, carefully and tenaciously, bring in the European values: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (with the freedom of religion) and including the rights of persons belonging to minorities (Article 2 TEU). Following this, the best approach would probably be to try to help build a strong civil society in Turkey. Introducing a functional double standard, not by telling lies but

---

<sup>9</sup> J. Calvin, *Institutes of the Christian Religion* (translated by H. Beveridge), Peabody, Massachusetts: Hendrickson Publishers 2017, Book II, Chapter 8, Section 47, p. 260.

rather listening carefully and being respectful towards each other, could be helpful to contribute to a functional society for a while.

Sometimes there is hardly any difference between fighting injustice and judging somebody else. Although we abhor sin, we should also try to love (or help) the sinner.<sup>10</sup> Perhaps it is difficult to 'love' Victor Orbán, Hungarian Prime Minister and advocate of the 'illiberal state'. Nevertheless, injustice should not be an excuse to show superiority. In other words: we should help Hungary, Poland and Turkey with their rule of law instead of trying to exclude them. We are prone to wishful thinking, moral appeals and pointing fingers, but we sometimes forget to offer a helping hand. The limit is where human dignity is completely ignored.

One of the main problems of the concept of human rights is the lack of Western self-criticism. Makau Mutua argued that many discussions of human rights miss the broader historical and political context. Those who promote human rights ignore the ugly history of Western interventions. Mutua speaks of the savages-victims-saviour model (SVS). The savage consists of non-Western states and cultures that refuse to follow the European/US model. The victims are the nameless and helpless innocents who suffer under the misrule of the savage states. The third component is the saviour, which is made up of Western institutions including the United Nations, Western countries and non-governmental organisations based in the West. The West has brought great harm to non-Western people, which has been carried out in the name of providing help to unfortunate peoples in savage societies. Mutua states:

'If one culture is allowed the prerogative of imperialism, the right to define and impose on others what it deems good for humanity, the very meaning of freedom itself will have been abrogated. That is why a human rights movement that pivots on the SVS metaphore violates the very idea of the sanctity of humanity that purportedly inspires it.'<sup>11</sup>

There is a strong tendency to see human rights as universal and uncontested, to see double standards as bad. For instance, there have hardly been any mass murderers in the Netherlands. So if someone in the Netherlands were to say 'Genocide is really objectionable' they would not be accused of a double standard. Of course, saying this about genocide can really be considered as an 'open door'.<sup>12</sup> Clearly, somebody is stating the obvious, although the Dutch army did kill people in the Dutch-Indonesian conflict, in fact a colonial war (1945-1949). Western countries and institutions should be more willing to recognize the

<sup>10</sup> 'But I say unto you, Love your enemies...' (Matthew 5:44).

<sup>11</sup> M. Mutua, 'Savages, Victims, and Saviours: The Metaphore of Human Rights', *Harvard International Law Journal* 2001, issue 1, p. 201-245, especially p. 219.

<sup>12</sup> A. Grunberg, 'Dubbel', *VPRO-gids* 1 december 2018, p. 17.

wrongs that they themselves committed and commit. A more self-critical approach combined with a double morality could be more fruitful to secretly open a closed door in countries with a critical situation concerning human rights, for instance Hungary, Poland, Russia, Turkey, China and Saudi Arabia. As long as our statements are not false, it can be in the interest of peace to guard the good name of our neighbours, including the neighbours of the Union (Article 8 TEU) like Turkey and Russia. The zeal to save others is steeped in Western and European history. But the European Union should really avoid new dividing lines within Europe. If the European Union does not promise further inclusion and expansion, its influence will suffer. For instance good relationships between the European Union and the Turkish government, especially regarding the Turkish Coast Guard, is of vital importance to prevent violations of human rights of Syrian refugees. So the European Union has to remain friendly with Turkey. The Dutch have a saying for this form of tolerance: ‘turning a blind eye for a while’.

Because the concept of human rights is filled with hypocrisy, human rights have to be placed within a broader historical context. Of course this can be no excuse to do nothing at all. Preventing wrongs in non-Western countries is the responsibility of Western states and non-governmental organisations (Amnesty International), because the policies of Western states already have deep effect on human rights in developing countries. But we have to beware that Western involvement to eliminate human right violations in non-Western countries can be seen as an aggressive form of Western imperialism. In terms of Michael Ignatieff’s approach, what universal human rights require is not the change of whole societies in Asia or Africa, but the right of an individual to choose and to leave when the human right is denied, to provide an ‘out’ for someone who faces oppression.<sup>13</sup>

### 3. General tensions

That international human rights have a political character can be shown by addressing some general tensions.<sup>14</sup>

#### 3.1. Tension 1: human rights and international peace

Many international lawyers believe that the adherence of human rights is an essential condition for world peace. This idea is present in the

---

<sup>13</sup> Ignatieff, *op.cit.*, 2001, p. 70.

<sup>14</sup> O. Schachter, *International Law in Theory and Practice*, Dordrecht: Martinus Nijhoff Publishers 1991, p. 331-334.

preamble and the purposes of the United Nations Charter. In this preamble, the assumption was that the primary cause of the Second World War was the barbarous violation of human rights by the Nazi regime. This means that the conduct of governments towards their own peoples can lead to war.

If we look at history, this is probably true. With the Peace of Augsburg, in Germany (1555) was established 'whose realm, his religion' to stop the killing. The Union of Utrecht (1579) was a new and more pluralistic step. Article XIII stated 'that each person shall remain free in his religion and that no one shall be investigated or persecuted because of his religion'. Public international law originated in 1648 with the Treaty of Westphalia which ended the secular power of the pope and included human-rights provisions in the form of rights for religious minorities. It was necessary to confirm these rights therefore; it was a necessary condition for peace between states. Many peace treaties between states include protection for minorities of the states concerned. If minorities are protected, reasons for war are reduced. If a government systematically disregards the human rights of citizens belonging to minority groups, it can lead to tensions which could even result in war. An example of this is South Africa under the apartheid regime, with all the gross and systematic violations of human rights before 1994. The United Nations treated apartheid as a danger to international peace and security.

However, internationalization of human rights can also be seen as a cause for hostility between states. It can lead to military interventions to protect human rights. Humanitarian interventions are coercive actions by one or more states in other states without the consent of its authorities, with the purpose of preventing widespread suffering or death among the inhabitants. An intervention in the name of Responsibility to Protect (R2P) can be very sensitive.<sup>15</sup> The failure to intervene in Bosnia in a timely manner, not in 1992 but in 1995 by the Clinton administration, had strong influence on the decision to intervene immediately in Kosovo a few years later (1999).<sup>16</sup>

Over the years, strong and powerful states have used civilisation and human rights to justify their interventions in other countries. This could lead to an abuse of human rights. If we agree that human rights have become an international obligation, when a government of an immoral state starts the violation of human rights regarding their own citizens, it should lead to serious reactions by other states and the international community (Hitler, Saddam Hoessein, Ghadaffi). Because human rights can deeply affect the foundations of regimes, the government and the citizens, they have dangerous consequences. In fact, implementation of human rights can actually lead to war (William of Orange,

---

<sup>15</sup> J.W. Sap, 'Het beroep van Frankrijk op de plicht tot collectieve bijstand in de oorlog tegen het internationale terrorisme', in: A.H. Lamers & C.M. Zoethout (eds.), *De netwerksamenleving vanuit juridisch perspectief*. Zutphen: Uitgeverij Paris 2017, p. 39-59.

<sup>16</sup> Varey, Gibney & Poe, *op.cit.*, p. 167.

Abraham Lincoln). Sometimes we have to notice that a wicked regime in Syria (Bashar al-Assad) can even win the battle, because of the greater danger of Jihadists. Therefore, it is definitely possible that the enforcement of human rights can conflict with the maintenance of peace.

### 3.2. Tension 2: the right of a State to determine its own political and social affairs free from external interference and the limits imposed by the international principles of human rights

Many lawyers state that when a right is internationally recognized it gives rise to an obligation; it is no longer in the reserved domain of domestic jurisdiction. However, we have to accept that although a right is internationally recognized, it is still possible to defend the notion that a minor infringement of that right is not an international concern. For instance, discrimination of Christians in India is a serious problem, but normally the case falls within the domestic jurisdiction of India, a secular state. States will only see it as an international problem if the violation is 'gross and systematic', meaning that judgement will be very political. There is tension between sovereign or national autonomy and international standards of conduct and responsibility. Not all violations of human rights will be cause for international remedy. Sometimes, in very serious cases, we have to cross this line but, in general, we do accept the line between domestic jurisdiction and international responsibility. If not, it will lead to permanent chaos. European courts exercise judicial self-restraint leaving Member states their margin of appreciation.

### 3.3. Tension 3: individual and collective rights

Within the international human rights there is a strong tendency to accept both individual and collective rights. Collective rights are the right of peoples to self-determination or a satisfactory and decent environment or peace, the right of a nation to development, the right of future generations to resources, to a liveable world. These rights are named the third generation of rights. The first are civil and political rights. The second are economic rights. If collective rights are seen as necessary for the fulfilment of individual rights, there is a danger that a certain high priority collective right (for instance the national development of China) implies the subordination of individual rights. If the collective has claims on the individual, the individual owes obligations to for instance the State, leading to restrictions of individual rights because of collective rights. This is not without danger. Human rights can force a government to a policy that can have negative consequences for other groups.

### 3.4. Tension 4: the difference between rights and goals

What happens if we treat social ends as development or self-determination as rights? Formulating something as a right makes a stronger claim, but it all depends on conditions and circumstances. Social and economic rights, like the right to work, have more or less the same problem. Rights are entitlements which in principle should not be denied. Considering a goal as a right is understandable, because it is a sign that this goal has high priority, a social right in the constitution or a social charter. But we have to be honest: goals may be changed or traded-off to satisfy other goals. Sometimes a democratic state can out of necessity decide that elements of human rights have to be sacrificed for societal security, for instance in the fight against international terrorism.

## 4. The language of obligation

When are states responsible for violating human rights? An internationally wrongful act of a State entails the international responsibility of that state. Most states will try to hide their evil actions from international scrutiny, for instance torturing a political dissident like the Russian opposition figure Alexei Navalny on 20 August 2020. These actions could be traced back to political leaders and states don't like to be held responsible for committing internationally wrongful acts. Responsibility also arises in the context of economic, social and cultural rights. The issue of responsibility can be approached in term of positive and negative obligations. A negative obligation is not to do something, a positive obligation is an obligation to do something. The duty not to harm others is the most important negative obligation. This counts for individuals and states and location does not matter.

While negative obligations are associated with civil and political rights (for instance the obligation not to torture) that ask for immediate results, a positive obligation is different. A state has a positive obligation to feed those without food, but the extent of the obligation differs. While negative obligations are seen as universal, positive obligations are not. This is because of resource limitations. Individuals and states do not have the obligation to provide food for all. But because human rights are universal, the demand is a system that protects everybody. The duties have to be divided and assigned among bearers in a reasonable way. As the world is divided in nation states, states are primarily responsible for protecting the human rights of all those within its borders. A poor

state cannot suddenly be expected to provide the highest standard of health care to the whole population.<sup>17</sup>

#### 4.1 The right to shelter, food and clothing

In January 2013 the CEC (Conference of European Churches), a Europe-wide ecumenical body bringing together Protestant, Anglican, Orthodox and Old Catholic Churches, requested the European Committee of Social Rights to hold that the Dutch government had failed to fulfil its obligations under the European Social Charter to respect the rights of undocumented adults or asylum seekers to food, clothing and shelter. The right to food, water, shelter and clothing is closely connected to the right of life and is crucial for the respect of every person's human dignity. Can human dignity be preserved? According to the Dutch Aliens Act (2000) food, clothing and shelter are not perceived by the Dutch State to be a prerequisite of health or life itself.

In this case of the CEC against the Netherlands (Complaint No. 90/2013) the Committee of Ministers of the Council of Europe adopted a resolution on 15 April 2015.<sup>18</sup> The Committee of Ministers took note of the report of the European Committee of Social Rights, which said that migrants found themselves at risk of irreparable harm to their life and human dignity when excluded from access to shelter, food and clothing. While the European Committee of Social Rights had concluded in late 2014 that there had been a violation of Article 13 par. 4 and par. 2 of the European Social Charter by the Dutch government, the Committee of Ministers of the Council of Europe recalled the limitation of the scope of the European Social Charter. The Committee of Ministers confirmed the view of the Dutch government that all aliens who are not lawfully residing on the territory do not fall under the scope of the European Social Charter. The Committee of Ministers looked forward to the Netherlands reporting on any possible developments in the future. The CEC welcomed the resolution of 15 April 2015 as it upholds the validity of the ESCR decision. Dutch courts and public authorities use this legal basis to act in favour of homeless migrants in irregular situations in the Netherlands. At the same time, the CEC regretted that the resolution failed to positively support the decisions of the ESCR and tried to balance a number of considerations, weakening the position of human rights as a result.

What can be concluded concerning this vulnerable category of people unlawfully present in the Netherlands? Although expensive medical treatment is available in the Netherlands, even a very rich welfare state such as the Nether-

---

<sup>17</sup> Varey, Gibney & Poe, *op.cit.*, p. 41-43 and 49-50.

<sup>18</sup> Resolution CM/RESCHS(2015)5, Conference of European Churches (CEC) v. Netherlands, Complaint No. 90/2013 (Adopted by the Committee of Ministers on 15 April 2015 at the 1225th meeting of the Ministers' Deputies).

lands can officially refuse to meet international standards, not complying with the minimum core obligations.<sup>19</sup> We must not forget that the European Court of Human Rights had stated earlier that the abysmal standard of accommodation provided to those seeking refuge in Greece, living on the street, was held to violate Article 3 of the ECHR.<sup>20</sup> Also, it is common knowledge that the climate of the Netherlands is much colder than that of Greece. However, it appears that undocumented persons in the Netherlands in general have no official right to food, clothing or shelter. Therefore, the work of churches and local authorities for ‘bread, bed and bath’ for those who need it most urgently will remain necessary.<sup>21</sup> It is clear that help can be provided contrary to the government’s official denial of this.<sup>22</sup> That this practice remains possible can be seen as an example of a double standard.

#### 4.2. Binding on all states

Article 55 (c) of the Charter of the United Nations (1945) is important. It states that the United Nations shall promote: ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.’ Also important is Article 56 of the UN Charter: ‘All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.’

Article 55(c) distinguishes between ‘universal respect for human rights’ and ‘observance of human rights’, observance is stronger.<sup>23</sup> The two articles in the UN-Charter speak the language of obligation in the field of human rights, including religion, which all members must fulfil in good faith, although the content is not very specific, except for the non-discrimination requirement.

It was on 10 December 1948 that the General Assembly adopted the Universal Declaration of Human Rights. Eleanor Roosevelt saw it as a declaration of principles of human rights and freedoms to serve as a common standard of achievement, not as a legally binding document.<sup>24</sup> She was UN Human Rights Commission leader and in Harry Truman’s words, First Lady of the World. The Declaration was given teeth with two international covenants that followed al-

<sup>19</sup> Second Chamber [Lower House] of Dutch Parliament, 2014-2015, 19637, nr. 1994, p. 1.

<sup>20</sup> ECtHR 21 January 2011, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, par. 263 and 360.

<sup>21</sup> E. Green, ‘CEC reacts to Council of Europe decision on bread, bed and bath in Netherlands’, Press Release No. 15/17, [www.ceceurope.org](http://www.ceceurope.org) (21 April 2015).

<sup>22</sup> Conference of European Churches, General Secretariat, *Collective Complaint CEC v. Netherlands*, Genève, 17 January 2013, p. 5.

<sup>23</sup> B. Simma (ed.), *The Charter of the United Nations. A Commentary*. Second edition, Volume II, Oxford: Oxford University Press 2002, p. 922.

<sup>24</sup> Simma, *op.cit.*, p. 926.

most twenty years later. That these two documents were necessary was due to the growing tensions between Western states and the communist bloc. The West stressed the primacy of civil and political rights, the communist bloc stressed the primacy of social, economic and cultural rights. But the distinction between civil rights and social rights can be quite abstract.

United Nations resolutions and declarations speak of the duty of all states to observe faithfully the Universal Declaration of Human Rights. Human rights violations are seen as violations of international law. In the Barcelona Traction case in 1970 the International Court of Justice stated that obligations *erga omnes* in international law include those derived from the principles and rules concerning the basic rights of the human person.<sup>25</sup> Although respect for religious freedom is an obligation for all the members of the international community, we have to pay attention to actual practice, to the infringements in several countries in the world. Is the freedom of religion confirmed in actual behaviour, or is the Universal Declaration just window-dressing? Even if we accept that the Universal Declaration is now part of the customary law of nations and therefore binding on *all* states, there still remains this problem: is a verbal affirmation enough as evidence to see the Universal Declaration as part of customary law, even if gross and systematic infringements are tolerated by the international community?

For the view that the Universal Declaration as a document for guidance and inspiration also has become law, there are three legal arguments: 1) it is part of the customary law of nations and therefore binding upon all states; 2) we find the principles in many constitutions and treaties, these can be seen as 'the general principles of law recognized by civilized nations'; this is a source of general international law under Article 38 of the Statute of the International Court of Justice; 3) the Declaration has legal force because of Article 56 of the UN Charter: it pledges all members to take action to achieve certain ends of the UN Charter, including human rights for all without distinction as to race, sex, language, or religion.<sup>26</sup>

Nevertheless, we have to admit that conventions, international covenants and constitutions were necessary to give legal effect to most human rights. It shows that the obligatory force of the Declaration was weak in the beginning. Nowadays some human rights are recognized as obligatory for all countries, irrespective of a treaty. The most obvious are prohibitions against slavery, genocide, torture, and other cruel, inhuman and degrading treatment, including the murder or causing the disappearance of individuals, prolonged arbitrary deten-

---

<sup>25</sup> ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgement I.C.J. Reports 1970, par. 34.

<sup>26</sup> Schachter, *op. cit.*, p. 336-337.

tions and systematic racial discrimination. The growth of the universal human rights culture since 1948 points to the existence of a global civilising process.<sup>27</sup>

Why is this all so political? The problem is that when we raise the question of human rights, we touch the foundation of a regime, its sources and exercise of power. It is a fact that governments use human rights for political ends. In the first place, politics concerns decisions by the government on the formulation and adoption of principles, rules, procedures. Governments are primarily motivated by their judgements of national interest, attitudes of influential elites, underlying political philosophies and cultural beliefs. These are *political* considerations. This is something different than legal concerns.<sup>28</sup>

Secondly, the political aspects of human rights are very relevant when a government reacts to violation of recognized human rights by other states. Foreign politics is complicated in this globalising world that is also falling apart because of nationalism and populism. When and how do governments speak out against violations of human rights? Do we care about the discrimination of Christians in Saudi Arabia, or do we swallow our judgements to stay in good contact, remain polite, keep good relations, so we can open a doorway to bring in the values of humanism in the future?

#### 4.3. Pressure from the West

If we look back on the end of the Cold War, Communism collapsed partly because of the pressures issued from the West. Concerning the nature of American foreign policy, the debate shifted from arms control to an issue congenial to traditional American idealism: human rights. According to Henry Kissinger, human rights were ranked among the principal goals of American foreign policy. The debate started out as an appeal for wielding American influence to improve the treatment of Soviet citizens, but it evolved into a 'strategy' for forcing a Soviet domestic upheaval. The objective was not in dispute: respect for human rights. The discussion was about the degree to which 'ideological confrontation' should be the top priority of foreign policy.<sup>29</sup>

Europe is not a dominant military power like the United States of America, but Europe can do more to serve its values. An important task of Europe is to promote cultural diversity as well as peace and democracy in the world (Article 3(5) TEU). There is no reason to apologize for promoting human rights. Will the freedom of religion be part of a civilisation process or part of more ideological confrontation? Since the War on Terror things have changed. Currently,

---

<sup>27</sup> A. Linklater, 'A European Civilising Process?', in: Christopher Hill & Michael Smith (eds.), *International Relations and the European Union*, Oxford: Oxford University Press 2005, p. 367-387.

<sup>28</sup> Schachter, *op.cit.*, p. 345.

<sup>29</sup> H. Kissinger, *Diplomacy*, New York: Simon & Schuster 1994, p. 752.

not the European Union but rather the United States of America seem to have the strongest capacity to influence other countries to respect the freedom of religion. But will it lead to more peace and democracy? At the World Summit in Defence of Persecuted Christians in Washington in May 2017, Vice President Mike Pence stated that the United States of America would not ignore persecuted Christians. For him protecting international religious freedom is a top priority. Pence states: ‘The reality is across the wider world that the Christian faith is under siege. Throughout the world, no people of faith today face greater hostility or hatred than followers of Christ.’<sup>30</sup> Hundreds of millions live in countries where they can’t fully live out their beliefs. In Nigeria, Boko Haram continues to slaughter more Christians than any other group in the world. International human rights ask for solutions to empower the powerless, giving voice to the voiceless.<sup>31</sup> And all this to provide the choice of opting ‘out’ for these people, if they find it necessary to do so.<sup>32</sup>

The US government is committed to confront radical Islamic terrorists who target Christians and other minority faiths abroad. To draw a clear line concerning limitations in the interest of public safety and for the protection of public order and the rights of others, it can be helpful to stress even more that a terrorist is not a religious person anymore. We cannot allow that the freedom of worship is being abused for radicalisation and fearmongering by terrorists. Many years ago, in 1921, Gandhi said: ‘As soon as we lose the moral basis, we cease to be religious. There is no such thing as religion over-riding morality. Man, for instance, cannot be untruthful, cruel or incontinent, and claim to have God on his side.’<sup>33</sup> It is inspiring when political leaders pay more attention to the freedom of religion. Katrina Lantos Swett, former chair of the US Commission on International Religious Freedom and president of the Lantos Foundation, said that she is still waiting for President Donald Trump to refocus his foreign policy to address human rights violations. Is a departure from power politics possible, focusing more on responsibilities and rights so they are not seen as far-away problems?

‘Obviously, Vice President Mike Pence is personally a man of great faith, he feels this in his heart, but with an administration there sometimes can seem to be a focus on deals and getting the deals done in a very transactional approach to our foreign policy’, Swett said. ‘But I think it’s reassuring to have the vice

---

<sup>30</sup> [world.wng.org/2017/05/pence\\_us\\_will\\_not\\_ignore\\_persecuted\\_christians](http://world.wng.org/2017/05/pence_us_will_not_ignore_persecuted_christians) (accessed on 15 September 2020).

<sup>31</sup> Valey, Gibney & Poe, *op.cit.*, p. 26.

<sup>32</sup> Ignatieff, *op.cit.*, p. 70.

<sup>33</sup> S. Bhalla (ed.), *Quotes of Gandhi*, Mumbai, New Delhi: International Print-O-Pac 2012, p. 25.

president come and speak clearly from a position of values and faith and conviction and express solidarity.<sup>34</sup>

Because human rights are based on international human rights law they are supposed to be more than just morality. There is the hope and possibility that the ideals will become reality.<sup>35</sup> At the same time there is the risk that the political attention for the freedom of religion fits in with the savages-victims-saviours metaphore all too well, illustrating that non-Western cultures have to follow the European/US model. The European Union also likes to present itself as the saviour in the area of human rights, but is this really true?

## 5. Human rights and the European Union

When the European Economic Community (EEC) was created in 1957, with a functionalist focus on economic integration, there was not much attention for human rights. With the growing of activities of the EEC human rights gained more importance in the 1970s. Germany especially did not accept that this powerful economic organization could operate without explicit constitutional limits. Therefore, the European Court of Justice started to refer to human rights. The European Court of Justice found that fundamental rights constituted an integral part of the general principles of law, the observance of which the Court ensures.<sup>36</sup> The European Court of Justice identified a number of basic rights through a comparative exercise looking at the constitutions of the Member states and drawing inspiration from the European Convention on Human Rights. In 1992, this case law of the Court of Justice was incorporated in the Maastricht Treaty.

In 2000-2004 political leaders in the European Union seemed to agree that a constitution for Europe was necessary. Could Europe protect its values and way of life? It was up to Europe to promote cultural diversity, as well as peace and democracy in the world.<sup>37</sup> The constitution for Europe was rejected in 2005 because of referenda in France and the Netherlands. But the fact that the European Union strengthened the role of human rights in the EU legal order in the Lisbon Treaty had both legal and political consequences. Since 2009, the EU-Charter of Fundamental Rights (2000) has the same legal value as the Treaties (Article 6(1) TEU). The European Union is founded on respect for hu-

---

<sup>34</sup> [world.wng.org/2017/05/pence\\_us\\_will\\_not\\_ignore\\_persecuted\\_christians](http://world.wng.org/2017/05/pence_us_will_not_ignore_persecuted_christians) (accessed on 15 September 2020).

<sup>35</sup> Valey, Gibney & Poe, *op.cit.*, p. 28.

<sup>36</sup> Court of Justice of the EC 14 May 1974, *Nold v. Commission*, 4/73, ECLI:EU:C:1974:51, par. 13.

<sup>37</sup> J.-M. Ruiz, 'Is the European Union on the Way to its Philadelphia?', in: V. Béghain & M. Chénétier, with the collaboration of J.-P. Gabilliet (eds.), *The Cultural Shuttle. The United States off/in Europe*, Amsterdam: VU University Press 2004, p. 15-24.

man dignity and human rights, values, which the European shall uphold and promote also in its relations with the wider world.<sup>38</sup> For Member states the European Union has a sanctions mechanism (Article 7 TEU), now used against Poland and Hungary. EU human rights are binding on the institutions of the Union and on Member states whenever they are implementing Union law (Article 51 EU-Charter of Fundamental Rights).

Because of the interest of the European Union to accede to the European Convention on Human Rights (ECHR) – the international treaty to protect human rights and fundamental freedoms in Europe, drafted by the Council of Europe – accession became a legal obligation in 2009. Article 6(2) TEU states that the ‘Union shall accede’ to the ECHR. What are the advantages? Accession would improve the legal protection of citizens within EU jurisdiction, because of the gap in the external supervision of the ECtHR. It is not possible for individuals to complain in Strasbourg about alleged human rights violations by EU institutions.<sup>39</sup> Accession of the European Union to the ECHR would avoid contradiction between the two legal systems. It would strengthen the process of European political integration. According to Joschka Fischer, former Minister of Foreign Affairs of Germany, only a full-fledged federation could provide the ‘overarching order’ necessary for a permanent peace in Europe as well as a lasting departure from power politics.<sup>40</sup> In the eyes of third countries the credibility of the European Union would be enhanced. It would send a message concerning the coherence between the Union and the countries belonging to the Council of Europe, countries like Turkey and Russia. It would also give a strong signal to countries, such as China, which the Union calls upon to respect human rights. After the accession of the European Union to the ECHR the danger of differing opinions between Strasbourg and Luxembourg would be less relevant; the ECtHR would have the final word.

That was the plan. But things changed in December 2014. According to the Court of Justice of the European Union in Luxembourg the accession raised serious questions concerning the division of responsibilities between the European Union and its Member states, the protection of individuals and the autonomy of EU law.<sup>41</sup> Suddenly the difference of opinions concerning the interpretation of human rights was not seen as such a great danger anymore. Human rights touch foundations of regimes, and governments and parliaments can try to influence independent judges. This is all very political. It seems that

---

<sup>38</sup> A. von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’, *Common Market Law Review* 2000, issue 6, p. 1307-1338.

<sup>39</sup> ECtHR 9 December 2008, *Connolly v. 15 Member States of the European Union* (dec.), no. 737274/01.

<sup>40</sup> Joschka Fischer in his speech at the Humboldt University, ‘From Confederacy to Federalism: Thoughts on the Finality of European Integration’, Berlin, 12 May 2000.

<sup>41</sup> Court of Justice of the EU 18 December 2014, Opinion 2/13, *Opinion on the Accession of the EU to the ECHR*, ECLI:EU:C:2014:2454.

political developments in Russia and Turkey, with leaders like Putin and Erdogan, made it much less desirable for the European Union to accede to the ECHR, because it would mean that Turkish and Russian judges in the ECtHR could decide over the autonomous legal order of the European Union.

A testcase for human rights and the European Union is the way refugees and migrants are treated. The European Union is rich enough to accept one million migrants every year, if it is well organized. In recent months the Greek government used the coronavirus to close borders. Migrants landing on the Greek islands from Turkey have been forced on life rafts, dropped at the boundary between Turkish and Greek waters. This is done by masked Greek officials and these pushbacks are illegal under international and European law, but the Greek government denies any illegality. It is clear the Greeks have grown frustrated and hostile after five years in which other European countries offered only modest help and tens of thousands of asylum seekers live on overburdened Greek islands. Greek authorities have rounded up migrants living legally in Greece and secretly expelled them. Ylva Johansson of the European Commission said she was concerned by the accusations but had no power to investigate them.<sup>42</sup>

## 6. Conclusion

Courts primarily have to work with facts and with the law. In the courts double standards are seen as unjustified because they violate a maxim of legal jurisprudence that all parties should stand equal before the law. Double standards violate impartiality. In other words, no favouritism and double standards in the courts. But parliaments, governments and political leaders are different. States have specific political relations, alliances, ideologies, economic, political and military interests; for instance, the interests of NATO, the Council of Europe, the European Union and the will of the people. There are binding principles and rules of solidarity and good faith in constitutions and the treaties of international and supranational organizations. But people can grow frustrated and hostile. Regarding the protection of human rights there are double standards. Now the government of Greece, a member state of the European Union, is organizing illegal pushbacks, although the Greek authorities deny that they engage in illegal activities. It's a human rights disaster, but the European Union is not taking control. It was clear that the Dutch government had not recognised certain rights enshrined in the European Social Charter. But

---

<sup>42</sup> P. Kingsley & K. Shoumali, 'Taking Hard Line, Greece Turns Back Migrants by Abandoning Them at Sea', *The New York Times* 14 August 2020, [www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html](http://www.nytimes.com/2020/08/14/world/europe/greece-migrants-abandoning-sea.html) (accessed on 15 September 2020).

the Committee of Ministers of the Council of Europe accepted the Dutch position on the sovereign right of states to decide on the entry of foreigners on their territory. Politicians are aware that they constantly have to make deals and trade-offs.

Governments have to promote cultural diversity as well as peace and democracy in a world that is not longing for more ideological confrontation after September 11, 2001. Although the West has shortcomings, the Western concept that individuals should be protected from oppressive forces within a given society has in the long run become a universal value. Western governments should not try to fundamentally change societies in for instance Asia or Islamic regions. But because of the demand of universal human rights Western states and organisations do have the obligation to make it possible for individuals who face oppression to make their own choice and provide the choice to leave if the individuals find it necessary. This should be a real exit, not just a theoretical one. For politicians, *political* considerations will always play a big part in the field of international human rights. Therefore, there will probably always be some preference for the use of double standards in the international political community, even if governments try to not put their hand in with the wicked and try to keep far from false matters. Using a double standard for a short while could give an international organization or government a chance to stay in contact with sinners and victims. Offering them a genuine and cautious hand, but not joining in the mud.