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Walking the tightrope: the diplomacy of human rights

Summary

This article explores the historical and normative framework of human rights as an international issue, the tensions and conflicts faced by states in implementing diplomatic policies aimed at the protection and promotion of human rights, the salient debates in the human rights discourse and the instruments and institutional mechanisms available, in both the domestic and the international context, to implement human rights diplomacy. Finally, the limits of human rights diplomacy and its relationship to the use of force to achieve the same objectives is investigated.

Menseregtediplomasie: die kuns van die (on)moontlike

Hierdie artikel ondersoek eerstens die historiese en normatiewe raamwerk van menseregte as 'n internasionale kwessie, tweedens die spanninge en teenstrydighede wat state ervaar in die implementering van diplomatieke beleidsrigtings wat die beskerming en bevordering van menseregte ten doel het, derdens die vernaamste debatte wat gevoer word binne die diskoers oor menseregte en vierdens die instrumente en institusionele meganismes wat beskikbaar is om menseregte binnelands sowel as in die internasionale konteks te verwesenlik. Laastens word die beperkinge van menseregtediplomasie, en die verhouding waarin dit staan met geweldgebruik ter bereiking van bepaalde oogmerke, ondersoek.

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One of the most remarkable developments of the twentieth century was the birth of the human rights movement.[1] While the antecedents of the concept of human rights can be traced back to the inception of the Westphalian state system, the large-scale suffering of the two world wars, especially the systematic efforts of the Nazis in Germany to exterminate peoples on account of their racial, ethnic or social origin, impelled human consciousness towards the creation of a new international system aimed at the protection of the basic rights of human beings. The United Nations, founded at the end of the Second World War, and its constitutive document, the United Nations Charter, formed the foundation for the development of a new branch of international law aimed at securing the protection of the basic rights of people. Mechanisms for the protection of human rights were created within as well as outside the United Nations system.

This new concept of international human rights aimed at the regulation of the relationship between the state and its citizens challenged the existing Westphalian international order, which was based on the principles of the sovereignty and equality of states and non-interference in their domestic affairs.

It is not surprising that one commentator has described the relationship between human rights and international relations as having the appearance of a dialectic contradiction.[2] Realists consequently also tend to deny, or at least denigrate, the influence of human rights concerns in the formulation of a state's foreign policy: Morgenthau,[3] writing in 1973, restricted discussion on the protection of human life in peace and war respectively to moral issues and humanitarian law, without once mentioning human rights as a factor in international politics. Writing in 1984, he then acknowledged the concept of human rights but argued forcefully against its application in foreign policy, believing that it is not possible to reconcile moral concerns

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1   This article was prepared in partial fulfilment of the requirements for a masters degree in diplomatic studies, Dept of Political Sciences, University of Pretoria.

2   R Mullerson, *Human rights diplomacy*. New York: Routledge, 1996: 3.

3   H J Morgenthau, *Politics among nations: the struggle for power and peace*. New York: Alfred A Knopf, 1973.

with national interests.[4] Kissinger, while not denying that moral and human rights concerns have a place in international relations and diplomacy, describes the role thereof as secondary or complementary to that of considerations of power.[5] Idealists, on the other hand, strongly argue that while a state's foreign policy often involves competing interests, it should reflect and promote the state's domestic values in the external environment.[6] Some states, notably the Nordic states, the Netherlands, Canada and Australia, have accorded a central place to human rights in their foreign policies.

Despite the objections of the realists, human rights concerns have acquired a permanence in international relations and can no longer be ignored. This is in part the result of the activities of non-state actors in the field. Human rights, defined as the rights individuals hold against the state, have not only concretised into positive international law but also become an accepted norm for state practice, domestically and internationally.[7] It is consequently increasingly difficult for democratic states to ignore human rights considerations in the formulation of foreign policy despite the fact that human rights directly impact on and undermine the principle of state sovereignty. The discourse on human rights diplomacy has received new impetus as a result of recent events in Kosovo, East Timor and Chechnya.

The aim of this article is to explore the historical development and the normative framework of human rights as an international issue, the tensions and conflicting interests faced by states in implementing a foreign policy aimed at the promotion of human rights, the salient debates informing the present discourse, the various instruments that can be used for implementing human rights diplomacy, the limits of this form of diplomacy and the institutional mechanisms available for its implementation, in both the domestic and the international con-

4   H J Morgenthau, Human rights and foreign policy. K Thompson (ed), *Moral dimensions of American foreign policy*. New York: Transaction Books, 1984: 344.

5   H Kissinger, *Diplomacy*. New York: Simon & Schuster, 1994: 622 & 752.

6   S P Huntington, American ideals versus American institutions. J G Ikenberry (ed), *American foreign policy*. London: Pearson Higher Education, 1989: 239; L Henkin, *The age of rights*. New York: Columbia University Press, 1990: 66.

7   J S Barkin, The evolution of the constitution of sovereignty and the emergence of human rights norms. *Millennium* 1998 27(2): 229.

text. For the purposes of this discussion the definition of human rights diplomacy proposed by Mullerson[8] will be used:

> the use of foreign policy instruments in order to promote human rights, as well the use of human rights issues for the sake of other foreign policy aims.

1. Human rights as an issue of international concern: its origins, historical development and normative framework

The development of human rights as positive international law binding upon states has its origins and roots, somewhat ironically, in the Westphalian system. The Peace of Westphalia was concluded in 1648 and consisted of a series of peace treaties between the warring Protestant and Catholic princes, aimed at ending the religious wars that had devastated large parts of Europe for decades during the Thirty-Year War. An earlier peace agreement, the Treaty of Augsberg (1555), which codified the principle that the religion of the ruler was also the religion of his state, had failed to contain the religious wars. As a result, the Peace of Westphalia, while laying the foundations of the modern state system on the twin pillars of the sovereignty and the equality of states, also provided for the protection of the religious rights of the rulers' subjects. The sovereignty of all parties to the Westphalian peace treaties, defined as "the right of the state to do as it sees fit within its jurisdictional domain",[9] was consequently restricted by these rights accorded to individuals and groups.

However, traditional international law was defined as the law between states, with only states being subjects of international law and individual human beings not having international legal rights as such. The source of the religious protections accorded to the ruler's subjects was the treaty obligations undertaken by states *vis-à-vis* one another.[10] Consequently, in the absence of any treaty obligations to

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8   Barkin, The evolution, p 3.
9   Barkin, The evolution, p 229.
10   T Buergenthal, *International human rights in a nutshell*. St Paul: West Publishing Co, 1995: 2.

this effect, a state was free to treat its citizens in any manner it saw fit, the constitutional relationship between government and governed being a matter of the exclusive domestic jurisdiction of the state.[11]

The practice whereby states addressed issues relating to the status of human beings in treaties was confirmed in subsequent centuries. Several treaties to ban slavery[12] and to protect Christian minorities in the Ottoman Empire were concluded in the nineteenth century, and the latter were relied upon by European states when interceding diplomatically and at times intervening militarily on behalf of the Christian minorities in the Empire,[13] although it has been argued that strategic rather than humanitarian concerns were at the root of these interventions. During the early part of the twentieth century the major contribution to the development of human rights was made by the Covenant of the League of Nations. While not containing any general provisions regarding human rights, it provided for a system of treaties designed to protect the interests of ethnic and religious minorities, especially in Eastern Europe. While the influence of humanitarian motives cannot entirely be ignored, the threat to peace and stability in Europe posed by the oppression of religious and ethnic minorities in the newly created nation states of Eastern Europe was of more concern to the European states. The threat to stability posed by factors such as nationalism, independence wars, refugees and irredentism caused sufficient international concern to secure a place for minority rights on the international agenda,[14] the victor states of the First World War requiring the new states created in Eastern Europe to undertake by means of special treaties to protect their ethnic, linguistic and religious minorities.[15]

11 Buergenthal, *International human rights*, p 3.
12 Between 1815, when the Congress of Vienna made a statement against the slave trade, and 1880 more than 50 bilateral agreements were concluded, while a treaty concluded at Brussels in 1890 was ratified by all European states and the USA. Cf J Melissen (red), *Diplomatie: raderwerk van de internationale politiek*. Assen: Van Gorcum, 1999: 98.
13 Buergenthal, *International human rights*, p 3.
14 Melissen, *Diplomatie*, p 10.
15 Buergenthal, *International human rights*, p 10.

The horrors of the Second World War gave rise to a heightened concern for the protection of human beings against unscrupulous governments, which was reflected in the Charter of the United Nations, founded in 1945 with the aim of securing international peace and security. The Charter was the first international instrument which specifically referred to the concept of human rights, while also directly linking such rights to the maintenance of international peace and security.[16] The Preamble makes reference to fundamental human rights, the dignity and worth of the human person and the equality of men and women, as well as to the economic and social advancement of peoples. A number of other references to human rights and fundamental freedoms are to be found in the text,[17] but without specifying particular human rights. This was done three years later in the General Assembly's Universal Declaration of Human Rights (UDHR), the instrument which would form the foundation of the international system of human rights protection. The Universal Declaration, not being a treaty, was not binding *per se* on states, but gave rise to the two principal treaties of the human rights system, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights of 1966. These two instruments identified specific rights to be protected. While civil and political rights (sometimes referred to as first-generation rights) are distinguished by their immediate nature, economic, social and cultural rights (the so-called second-generation rights) are of a promotional or programmatic nature.

Besides these treaties which have enjoyed almost universal participation, a number of other treaties dealing with specific human rights, like the Convention on the Prevention and Punishment of the Crime of Genocide (1948), the International Convention on the Elimination of all Forms of Racial Discrimination (1965), the Convention on the Elimination of all Forms of Discrimination against Women (1979), the Convention against Torture and other Cruel, Inhu-

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16 Cf C Heyns, The preamble of the United Nations Charter: the contribution of Jan Smuts. *RADIC* (African Journal of International and Comparative Law) 1995 7: 329 for the contribution of the South African statesman in this regard.

17 Art 1(3); Art 13(1)(b); Articles 55 and 56 (linking the protection of human rights to international stability); Art 62(2) and Art 68.

man or Degrading Punishment (1984) and the Convention on the Rights of the Child have been added to the mosaic of human rights protection.[18] In total more than two hundred multilateral and bilateral international agreements aimed at human rights protection have been concluded since the end of the Second World War.

While the original source of the human rights obligations of states are therefore treaties dependent on state consent, it is nowadays often argued that the civil and political rights enshrined in the UDHR have achieved the status of international customary law.[19] Although the extent of the rights that have as a result of state practice acquired customary status is still the subject of debate, a strong argument has been made that some core human rights, notably the prohibitions on torture, genocide, slavery and racial discrimination, have also achieved the status of *ius cogens*. This means that they have solidified into international law rules of a peremptory nature in the sense that they are binding on all states, irrespective of the consent of individual states. These human rights obligations are owed by states to the international community as a whole.[20]

Another important development is the fact that it is now widely agreed that, while the individual is not a subject of international law, states have obligations with regard to the protection of human rights, not only to other states and the international community, but also directly to the individual.[21] While such rights are primarily and often most effectively enforceable in the domestic legal order, the international legal system is the source of human rights. As a result of these developments, it is now widely accepted that human rights are an issue of international concern.[22]

18 H J Steiner & P Alston, *International human rights in context*. Oxford: Clarendon Press, 1996: 123.

19 M M Merryfield & R C Perry, *Teaching about international conflict and peace*. New York: State University of New York Press, 1995: 137; N M Shaw, *International law*. Cambridge University Press, 1995: 241.

20 Brownlie I, *Principles of public international law*. Oxford: Clarendon Press, 1993: 513.

21 R Higgins, *Problems and process: international law and how we use it*. Oxford: Clarendon Press, 1994: 96.

22 Higgins, *Problems and process*, p 96: "They [human rights] are thus rights that cannot be given or withdrawn at will by any domestic legal system".

Human rights are now also considered, at least within Western culture, to be universal in nature, inalienable, and owed to the individual simply on account of his or her status as a human being.[23] Besides individual human rights, the last few decades have seen the resurfacing of minority rights, defined as rights that can only be enjoyed in association with others in ethnic, linguistic and religious contexts, as well as the development of a category of rights accorded to indigenous peoples. While the existence of minority rights is still being denied by the majority of states, the disintegration of the Soviet Union and the ethnic wars in the Balkans during the past decade have given the concept a fresh force.

2. The international architecture for the protection and promotion of human rights

Since the Second World War an impressive international architecture aimed at the protection and promotion of human rights has been erected, a development which coincided with the multilateralisation of diplomacy that took place after the war. Today international organisations form the principal interface between human rights and diplomacy.

2.1 The United Nations system

In terms of Article 13 of the Charter, the General Assembly has some investigative and recommendatory powers with regard to human rights. The Security Council, in discharging its mandate to ensure international peace and security, often takes decisions and makes resolutions informed by human rights concerns.[24] The major human rights treaties entered into under the auspices of the United Nations oblige the states that ratify them to report regularly on their discharging of the obligations contained therein.

23 Higgins, *Problems and process*, p 96: "Human rights are rights held simply by virtue of being a human person. They are part and parcel of the integrity and dignity of the human being".

24 The link between the protection of human rights and international peace and security was especially evident during the Kosovo crisis of 1998-1999, the violation of the human rights of the Albanian minority by the Yugoslav government being an important element in Security Council deliberations (see eg resolutions 1160 and 1199 of 1998).

The UN Commission on Human Rights, a permanent body established in Geneva, forms the central pillar of the UN human rights system. The Commission makes use of several procedures in order to achieve its mandate. Special Rapporteurs are appointed to investigate the human rights records of specific countries, or particular themes like summary executions, torture, mercenaries and religious intolerance.[25] Special standing sub-commissions deal with the prevention of discrimination against minorities, the protection of minorities, racial discrimination and the status of women. The Commission consists of 53 members appointed as governmental delegates. Consequently its decisions are often politically biased while it also often deals selectively with charges of human rights violations brought against states.[26] The end of the Cold War allowed sufficient international consensus for the establishment of the position of a UN High Commissioner for Human Rights, a position with a preventative mandate.

2.2 Regional mechanisms

In Europe, the Americas and Africa, regional mechanisms have been established for the protection of human rights, the texture of protection being especially rich in Europe. The regional systems are treaty-based[27] and provide for human rights commissions and courts and inter-state complaints mechanisms.[28] The Council of Europe, with a membership of almost 50 European states, has also developed a number of agreements on human rights issues.[29] The Organisation for Security and Co-operation in Europe resulted from a dialogue between

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25 Shaw, *International Law*, p 204.

26 Buergenthal, *International human rights*, p 82.

27 The European Convention on Human Rights and Fundamental Freedoms in Europe, the American Convention on Human Rights and the Charter of the Organisation of American States in the case of the inter-American system, and the African Charter on Human and Peoples' Rights in the case of Africa.

28 An African court on human rights has been provided for in the Protocol to the African Charter on Human and Peoples' rights on an African Court of Human and Peoples' rights, but has not been established as the Protocol, which was negotiated in 1997, has not yet entered into force.

29 Notably on torture, social matters, minority languages and the protection of national minorities.

the states of Eastern and Western Europe in the 1970s, at the height of the Cold War, which aimed at bridging the ideological divide between the two halves of Europe. It is based on a massive document, the Helsinki Final Act of 1975, which is not a legal document but a set of political commitments, of which respect for human rights formed an important part. Alleged non-compliance with commitments regarding human rights is dealt with by a process that allows for complaints between states which are part of the system, diplomatic exchanges, negotiations, mediation and fact-finding.[30]

The European Union (EU), while not founded with a human rights mandate in mind, has over time re-interpreted its constituting documents in order to incorporate human rights as an important factor in its external relations, in both the bilateral and the multilateral context. The general principles of community law have been interpreted so as to incorporate human rights as an integral part thereof.[31] The Treaty of the European Union provides for the Common Foreign and Security Policy (CFSP), one of whose central aims is to "develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms."[32] Instruments used by the Community to achieve this outcome include the Common Position, a co-ordination of actions in international organisations (to which national policies must conform) and the Joint Action, which provides that member states shall be committed to similar actions and initiatives with regard to foreign policy issues.[33] Other instruments employed by the Community since before the advent of the CFSP include diplomatic activities like demarches, declarations and statements,[34] sanctions, the human rights clause in bilateral and multilateral trade co-operation agreements (making the implementation of such agree-

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30   Buergenthal, *International human rights*, p 169.
31   B Brandtner & A Rosas, Human rights and the external relations of the European Community: an analysis of doctrine and practice. *European Journal of International Law* 1998 9: 469.
32   Article J. 1. The European Community Treaty and the Amsterdam Treaty contain similar provisions.
33   J King, Human rights in European foreign policy: success or failure for postmodern diplomacy? *European Journal of International Law* 1999 10: 324.
34   King, Human rights, p 325.

ments dependent on progress in the field of human rights), the linking of trade preferences to human rights and the provision of assistance for the development of democracy and human rights.[35] Co-operation with the Eastern European states, whether candidates for full membership or association agreements, has also been made dependent upon progress in the fields of human rights, democracy and the rule of law.[36]

Recent developments in international human rights law, namely the establishment of international criminal tribunals for the former Yugoslavia and Rwanda as well as the successful conclusion of the Rome Statute of the International Criminal Court (ICC), add a new dimension to human rights diplomacy. As a result of the authority of Security Council resolutions (in the case of the tribunals for the former Yugoslavia and Rwanda) and on the basis of consent in the case of the ICC, states will in future be obliged by law to extradite suspected violators of human rights to appear before these tribunals, even though such action may contradict their foreign policy aims or conflict with their national interests.[37] The developing principle of universal jurisdiction, the effect of which was illustrated by the recent decision of the British House of Lords to allow the extradition of the former Chilean dictator Pinochet from Britain to Spain to stand trial on charges of torture, will also affect the human rights policies of states. The dilemma that these developments may pose for

35 Brandtner & Rosas, Human rights, p 473.
36 Brandtner & Rosas, Human rights, p 479-84. While it has been argued that economic competition and conflicting national interests have restricted the Community's common foreign policy "to declarations of concern rather than action" (King, *Human rights*, p 313), especially with regard to Africa and the PRC, it is undeniable that the promise of benefits of closer association with the Community had positive effects on the human rights policies of Eastern European states. Considerable advances have been made in respect of the human rights situation in Turkey, which aims to obtain full membership. The actions of the European Parliament, which was much more critical of Turkey's human rights situation than individual member states (which were competing for a share in the lucrative Turkish export market) were crucial. Cf in this regard Mullerson, *Human rights diplomacy*, p 141.
37 See in general in this regard, A Bodley, Weakening the principle of sovereignty in international law: the International Criminal Tribunal for the Former Yugoslavia. *International Law and Politics* 1999 31: 417.

governments is illustrated by the fact that the Labour government allowed Pinochet to return to Chile in order not to put its good relations with that state at risk, despite its public commitment to an ethical foreign policy which has human rights as a central pillar.

3. The role of new actors and technology in the development of human rights diplomacy

Buergenthal[38] highlights the important role that non-governmental organisations (NGOs) have played in the evolution of the international human rights system. While all major NGOs in the human rights field have an institutional link to the most important international organisations, they also provide a counterbalance to these often politicised international organs. NGOs act as international lobbyists by focusing attention on specific cases of human rights violation, provide input in the negotiation of treaties[39] and strengthen the reporting system of the various UN bodies. They also play an important role in influencing and criticising the human rights aspects of the foreign policies of states,[40] although their exact impact on policy formulation is difficult to determine. However, a number of cases are on record where NGOs have in fact been much more accurate in reporting human rights abuses than foreign ministries, notably in the cases of Indonesian abuses in East Timor and the abuses in Argentina in the 1970s and 1980s, which were grossly underestimated by the US State Department.[41] Major human rights NGOs, notably Amnesty International, Article 19, the International Commission for Jurists and Human Rights Watch, have played important roles in the set-

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38 Buergenthal, *International human rights*, p 319.
39 NGOs played an invaluable role in this regard during the Rome Conference on an International Criminal Court.
40 The protest from domestic and international human rights organisations to the South African government on its handling of the so-called Mengistu affair in 1999 is a case in point. The criticism by Amnesty International that the British Foreign and Commonwealth Office is not sensitive enough to human rights abuses around the world, applying lower standards to commercially important states, is another example. Cf *The Daily Telegraph*, 21 July 2000.
41 A Cohen, Conditioning US security assistance on human rights practices. *American Journal of International Law* 1982 76: 276.

ting of standards and norms and in the negotiation of treaties. They have also been instrumental on a number of occasions in bringing human rights abuses to the international diplomatic agenda.[42]

In an era of instant communications and globalisation the mass media and public pressure also have an increasing influence in setting the international human rights agenda and persuading democratic governments to take human rights issues into consideration in formulating foreign policy.

Mullerson refers in this regard to the "CNN factor" as having brought humankind closer together, resulting in the "something must be done" syndrome in the case of well-publicised gross abuses of human rights.[43] The Internet provides a new vehicle for disseminating information and influencing public opinion which is almost impossible for authoritarian governments to control. The role of high-profile individuals in putting human rights on the international and diplomatic agenda also deserves attention. The former Irish Prime Minister, Mary Robinson, who illustrates a clear commitment to human rights and was the first person to occupy the position of UN High Commissioner for Human Rights, has lent considerable *gravitas* to this office. Chris Patten, the last British governor of Hong Kong, tasked with ensuring the transfer of the colony to the People's Republic of China (PRC), has almost single-handedly (and against strong opposition from the PRC, the Hong Kong business community and individuals in the British government) placed human rights on the agenda of the negotiations for the transfer. In this way a number of provisions aimed at the protection of the human rights of Hong Kong citizens were included in the final agreement.[44]

42 Cohen, Conditioning US security, p 34.

43 This syndrome was especially influential in the Western European democracies during the Kosovo crisis of 1998/99. Mullerson (*Human rights diplomacy*, p 91) also refers to the role of the uncensored electronic media, like the BBC, the Voice of America, Radio Liberty and Radio Free Europe, which informed millions of listeners in the USSR and Eastern Europe about world events during the Cold War. Public concern about Saddam Hussein's repression of the Kurds in the wake of the Gulf War pushed the governments of the Allied forces to enforce the exclusion zone in Northern Iraq.

44 See Dimbleby J, *The last governor: Chris Patten and the handover of Hong Kong*. London: Little Brown & Co, 1997; Patten C, *East and West*. London: Macmillan, 1998.

4. Salient issues in human rights diplomacy

4.1 Which human rights?

It has been pointed out that the prohibitions on torture, genocide, slavery and racial discrimination have achieved the status of *ius cogens* in international law and are consequently binding upon all states. The promotion and protection of such rights should therefore form the minimum norm to which a serious human rights-based foreign policy should conform. A broader approach would include all the civil and political rights enshrined in the UDHR which are considered to have achieved customary law status.[45] These rights can be summarised as the rights to equality and equal protection before the law; non-discrimination; the prohibition of slavery, torture and cruel, inhuman or degrading treatment; the right to a fair legal process; freedom of movement and residence; freedom of a family and personal life; freedom of religion, thought, opinion and expression; the right to property; the right to full participation in political life, and the right to cultural life. In the practical application of human rights diplomacy these basic rights are nowadays almost inevitably linked to the rule of law and democracy by individual states and multilateral bodies.[46] The rights of minorities have over the last number of years also featured prominently in the foreign policies of European states and multilateral organisations, mainly within a European geographical context but also with regard to the repression of the Kurdish minority by Iraqi leader Saddam Hussein.

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45 In theory states are bound to customary international law unless they have persistently objected to the formation of such a rule (this is the basic distinction from *ius cogens* rules which do not allow states to opt out of obligations). Cf Shaw, *International law*, p 60.

46 Buergenthal, *International human rights*, p 167. A statement by the British Foreign and Commonwealth Office on the British Government's human rights-based foreign policy reads as follows: "We shall work through international forums and bilateral relationships to spread the values of human rights, civil liberties and democracy we demand for ourselves". Human rights in foreign policy, on the website <http://hrpd.fco.gov.uk/>.

Basic economic and social rights are also found in the UDHR: notably the rights to work, to an adequate standard of living (including health care and housing) and to education. These rights are, however, of a programmatic nature, making it more problematic to set an international standard to which states should adhere, and consequently a much more difficult focus for human rights diplomacy. However, as Mullerson[47] points out, experience in Third World states has shown that it is difficult for human rights, democracy and the rule of law to take root in states with a low level of economic development. The other side of the coin is that some Asian states with developed or developing economies argue that "Asian values" prescribe that economic growth is more important to their populations than civil and political rights, thus justifying their repressive or authoritarian regimes.[48]

4.2 Human rights and state sovereignty

The UN Charter, the source from which the law of international human rights has developed, contains an inherent contradiction as it also aims at perpetuating the Westphalian state system of sovereign equality and non-interference in domestic affairs. Art 2(7) prohibits intervention by the UN in matters essentially within the domestic jurisdiction of a state. Human rights as a constitutional issue between the government and the governed was in this way enclosed within the reserved domain of sovereignty. It is therefore not surprising that states violating the rights of their citizens would use sovereignty and Art 2(7) as a defence against efforts by other states to influence their policies and actions in this regard. South Africa's policy of apartheid is a case in point, while more recently the Federal Republic of Yugoslavia used the same arguments with regard to the repression of the Albanian minority in its Kosovo province. However, the development of the international law of human rights with its *erga omnes* character, defined as "the law that deals with the protection of individuals and groups against violations by governments of their internationally guaranteed rights,"[49] has established human rights

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47   Mullerson, *Human rights diplomacy*, p 129.
48   Notably the PRC and Singapore: this argument is one of the central themes of the so-called cultural relativity debate.
49   Buergenthal, *International human rights*, p 1.

issues within international boundaries as an issue of legitimate international concern, thus piercing the veil of sovereignty. Some scholars have explained this change of the relationship between sovereignty and human rights by arguing that the content of sovereignty has changed over time: not only does it include the relationship of a state to other states (external sovereignty), but it also has an internal dimension, of which the *locus* is in the population and not the government. Whatever legal and theoretical constructions are used to explain the notion of sovereignty, it is clear that this development, which may well accelerate in the era of globalisation, has ensured that human rights will remain and further increase in importance on the future international agenda.[50]

4.3 The cultural relativity debate

The major international debate in the field of human rights today pitches the ideas of universalism against cultural and political relativity. In theory the UN instruments implicitly assumed that the concept of human rights is universal, in other words that a uniform standard of protection should exist everywhere in the world.[51] However, many states in Asia and the developing world have argued that the international human rights standards evolved out of Western cultural concepts like Christianity and political liberalism,[52] which are foreign to large parts of the world. This debate continues in the North-South (developed/developing) context as well as in a religious (West-Islam) framework. The argument for universalism is often interpreted by non-Western states as a manifestation of cultural imperialism and arrogance. Non-Western states like the PRC also argue in this context that socio-economic rights are more important for poor, developing populations than civil and political rights which, according to this viewpoint, are only of theoretical importance to such populations. While acknowledging the impact of cultural factors on state practice with regard to human rights, the rebuttal of Western commentators is that the concept of human rights is not inherent to

50 See in general in this regard Barkin, The evolution.
51 Mullerson, *Human rights diplomacy*, p 73. Cf in this regard J J Tiley, Cultural relativism. *Human Rights Quarterly* 2000 22: 501.
52 Steiner & Alston, *International human rights*, p 75.

Western civilisation.[53] They point out that while the content of moral principles may differ from society to society, such principles are found in the works of "sages, philosophers, prophets and poets from different countries and many faiths on all continents".[54] It can be expected that in the age of globalisation, with its strong push for the spread of ideas, universality will become more acceptable.

4.4 Realism versus idealism/self-interest and double standards

Especially during the Cold War, it was often argued that both the Soviet Union and Western states applied double standards with regard to human rights, using the concept as a tool in the ideological and political struggle for dominance.[55] Western assistance to autocratic regimes that violated human rights was often informed by strategic and realist considerations,[56] while idealism had to take a back seat. Since the end of the Cold War, when it became more difficult for states to justify unpopular actions on the basis of strategic and security considerations, the focus of the debate has shifted somewhat to include trade and economic activity within its ambit. In a time when trade and export promotion have become crucial aspects of diplomacy, human rights pressure groups often argue that trade and economic engagement with states with negative human rights records should be placed under sanction in order to induce progress in the human rights field. The counter-argument advanced by foreign ministries is that trade and engagement, rather than sanctions, bring about political and human rights reforms.[57] While other debates sur-

53 Mullerson, *Human rights diplomacy*, p 75.
54 Mullerson, *Human rights diplomacy*, p 75. This debate has strong emotional undertones, as is illustrated in the following excerpt from a speech by British Foreign Secretary, Robin Cook, in London on 17 July 1997: "Do African mothers not weep when their sons or daughters are killed or maimed by agents of repressive rule? Are not African fathers saddened when their children are unjustly jailed or tortured?" <http://hrpd.fco.gov.uk/>.
55 Mullerson, *Human rights diplomacy*, p 103.
56 Steiner & Alston, *International Human rights*, p 835.
57 "Economic reforms and liberalisation represent the best chance of making China easier to live with, both by creating internal pressures for more political freedom and by strengthening China's interest in getting on with the rest of the world" (Mullerson, *Human rights diplomacy*, p 135).

rounding the question of human rights diplomacy have a somewhat theoretical air, the question of self-interest versus idealism probably presents the most difficult challenge to governments. The British Labour government's "ethical foreign policy", based on values held strongly within the party, has become increasingly controversial since Labour's accession to power in 1997. On the one hand, the policy has created high expectations from human rights groups that might never have surfaced under the previous Conservative government with its more realist view of international relations. This resulted in severe criticism from human rights groups when the expected high standards set by the Labour Party in its policy documents were not maintained.[58] On the other hand, the policy is criticised on the basis that a policy based on moralism does not take account of practical considerations such as strategic interests, the gap between the desirable and the possible and the fact that different situations ask for different approaches and solutions.[59]

4.5 Openness versus quiet diplomacy

Despite the move away from the so-called "old" diplomacy (with its emphasis on secrecy) that has taken place since the First World War, it is still often argued that in order to be effective, diplomacy should

58 Foreign Office is criticised on human rights. *The Daily Telegraph* 21 July 2000. The report states that the Foreign Office was criticised by Amnesty International as applying double standards on human rights and "sacrificing human rights on the altar of commercial expedience."

59 P Carrington, Cant, hypocrisy and double standards — the ethical foreign policy. *The Daily Telegraph* 22 November 1999; D Hurd, *The search for peace.* London: Little, Brown & Co, 1997. The difficult issues of the PRC, Burma and Kosovo versus Chechnya have apparently forced a rethink within the Labour government about the soundness of a policy that focuses too explicitly on human rights issues. The Government, in view of lucrative trade prospects in the PRC, decided not to back a motion censuring the PRC's human rights record at the UN, and proceeded with the sale of British military planes to Indonesia despite human rights abuses by that government in the East Timor province. The constraints faced by Britain and the West in general in influencing Russian action in Chechnya, compared to the very similar situation in Kosovo, also exposed the inherent contradictions between ethics and reality. Cf A Parker & A Ward, Cook creates an ethical millstone. *Business Day* 17 April 2000.

be conducted quietly and away from the limelight in order to reach understandings and agreements.[60] On the other hand, the effective promotion of human rights depends on openness and publicity, the strategies followed by the human rights interest groups. Governments and foreign ministries, following their natural instincts, tend to approach human rights issues behind closed doors, an approach that more often than not results in criticism from interest groups and the media. The criticism attracted by South African President Mbeki's quiet diplomacy *vis-à-vis* Zimbabwe during the recent spate of farm invasions and the human rights abuses by the Zimbabwean government illustrates this point.

5.   Inducements for human rights diplomacy

The contradictions and complexities of human rights diplomacy and a foreign policy aimed at promoting and protecting human rights mean that this form of diplomacy is probably one of the most controversial and difficult to apply in practice. What then are the factors that induce governments to embark on such a perilous journey?

The influence of pressure groups, the media and public opinion in democratic states has already been referred to. The international human rights movement has become so strong and organised that no open, democratic society can today ignore the issue of human rights, domestically or internationally. There is consequently a clear link between a state's domestic political culture and its international commitment to human rights: in states like the Netherlands and the Nordic countries, the domestic social-democratic tradition ensures that their commitment to human rights-based foreign policies is widely supported and uncontroversial. The British Labour government's somewhat controversial ethical foreign policy is also formally based on the domestic values of human rights, civil liberties and democracy.[61] This is also the basis of the human rights dimension of

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60   Melissen (*Diplomatie*, p 94) quotes a practising diplomat as saying: "Open diplomacy is a contradiction in terms: if it is open it is not diplomacy."

61   The place of human rights in UK foreign policy, on the website <http://hrpd.fco.gov/>

South Africa's foreign policy.[62] A strong argument has also been made to the effect that gross violations of human rights, especially of civil and political rights and the rights of minorities, constitute a threat to international stability. The events in the Balkans in the 1990s illustrate that human rights abuses can result in civil war, refugee problems and dysfunctional states, which may in turn pose a threat to entire regions.[63] There is also the argument that regimes hostile to human rights, like Iraq, Libya, North Korea, Sudan and Iran, tend to develop into "rogue" states, which threaten international security.[64] Some states consequently base foreign policies aimed at the promotion and protection of human rights on the notion that this ensures international stability, peace and economic growth, so serving the national interest,[65] and it has also become commonplace that respect for human rights is linked directly to liberal-democratic political values.

6. Instruments of human rights diplomacy

In choosing which instruments to apply in human rights diplomacy, a state has to make choices on three issues: whether to apply positive or negative measures, whether to apply a general recipe or differentiated actions designed to suit specific cases, and whether to act through multilateral fora or to engage a problem individually by means of bilateral action.

6.1 Positive versus negative measures

Positive measures focus on development: such action aims at integrating the citizens of a state into the development of a democratic culture and institutions. It therefore has a financial basis and is aimed at the population rather than the government.

62 Policy document of the Chief Directorate: Social Affairs of the Department of Foreign Affairs.
63 Mullerson, *Human rights diplomacy*, p 29; 50; 174. The repression of the Albanian minority in Kosovo by the Yugoslav government could possibly have destabilised the whole of southern Europe, a factor that was absent in the case of the Russian action against Chechnya, which did not result in concerted Western action.
64 Mullerson, *Human rights diplomacy*, p 23.
65 Mullerson, *Human rights diplomacy*, note 61.

Negative measures aim to punish governments for not living up to expected standards, and in practice may include economic, cultural or sport sanctions as well as the withdrawal of aid or technical assistance. Factors that must be taken into account in deciding to apply negative measures are whether the target government will be responsive to such pressures, or antagonised to such an extent that more human rights abuses will follow, and whether the population, especially its poorer sections, will not be hit harder than the government and the ruling elite (a salient point in the debate on UN sanctions against Iraq).[66] The implementation of such drastic measures is preceded by diplomatic communications in the form of demarches or public declarations.

6.2 General recipes or differentiated action

Like human rights diplomacy in general, this question appears to contain an internal contradiction: while human rights-based diplomacy will not be successful unless it has a consistent basis, its practical implementation requires differentiated approaches. Target states differ immensely in terms of their international status, power and influence, their level of economic development, their likely response to different approaches, their cultural orientation and their levels of internal stability, to name but a few factors. While aiming to avoid double standards, any state implementing a human rights-based foreign policy in a pragmatic way has to realise that it will be easier to influence the actions of an isolated leader of a weak state than those of the leader of a nuclear state with a Security Council veto. The obvious ability of the PRC to withstand and even ignore pressure relating to its domestic human rights record and its occupation of Tibet, even apart from the obvious economic benefits of relations, is a major factor influencing policies towards it. It should also be borne in mind that states, and even international organisations, have only a limited capacity to change the behaviour of other states by means of diplomacy or force, which means they must select target states from the menu of available human rights-abusing states.[67] The

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66   Steiner & Alston, *International human rights*, p 865.
67   Cf in general in this regard Mullerson, *Human rights diplomacy*, p 118-22, Hurd, *The search for peace*.

end of the Cold War has made it easier to apply human rights poli-
cies in a consistent way and to avoid obvious cases of double stan-
dards, but every situation is unique and hard choices on the practical
application of policy are still unavoidable. Mullerson comes to the
conclusion that there is no standard recipe: policy formulation in
each individual case should take into account factors such as the ap-
plicable international law principles, the context and consequences of
human rights violations, the characteristics and international legiti-
macy of the violator state, the danger posed to international stability
and the probable effect of a chosen strategy.[68]

6.3 Multilateral versus bilateral human rights diplomacy

Multilateral measures have several advantages over bilateral measures:
they have greater legitimacy, carry more weight, are more impartial
and consequently have less negative impact on inter-state relations.
Multilateral action is also less vulnerable to changes of government
and other domestic political factors.[69] Multilateral diplomacy em-
ployed in a regional context such as Europe can also effectively apply
considerations specific to that region, eg association with and mem-
bership of the EU. Despite criticism of the effectiveness of the UN
machinery and the continued restricting influence of national inte-
rests in the EU context, it is undeniable that great strides have been
made over the last three decades in co-ordinating effective responses
to the violation of human rights. The strict criteria set by the EU have
already resulted in the improvement of the human rights standards of
prospective members. It also appears that close integration, as in the
case of the EU, is conducive to improved effectiveness. Hence member
states of less integrated organisations like the Southern African Deve-
lopment Community (SADC) have to place greater emphasis on bila-
teral action in pursuing human rights diplomacy. The Common-
wealth is a further example of a large, loosely integrated organisation
that is not very effective in applying its human rights principles.

68 Mullerson, *Human rights diplomacy*, p 118. The important question of respon-
siveness to a specific policy line is illustrated by the South African government's
policy in attempting to find a solution to the Zimbabwean land problem and
the human rights situation in that country.

69 Mullerson, *Human rights diplomacy*, p 137.

7.   The limits of diplomacy: humanitarian intervention

In cases of gross abuses of human rights that may result in threats to peace and stability, the stakes involved in successfully applying preventive diplomacy are raised. This results in the practice of forcible intervention in order to terminate gross human rights violations by states. This practice has its roots in the intervention of European states in the Ottoman Empire in order to protect the minority Christian populations, but was firmly outlawed by the UN Charter, which only permits the use of force if sanctioned by the UN or in self-defence.[70] This prohibition, together with the prohibition on intervention in the domestic jurisdiction of a state contained in Article 2(7) and the deficiencies of the UN system, allowed governments to practise gross abuse of the rights of their citizens without fear of effective reprisals from the international community.[71] Several recent military interventions in states in order to terminate civil wars or gross abuses of human rights have given rise to the new doctrine of humanitarian intervention which, although open to abuse, now seems to have been firmly established by NATO's unilateral action in 1999 against Yugoslavia over Kosovo. While the legal basis of such a doctrine is still controversial and the subject of a case pending before the International Court of Justice,[72] it can be expected that it will gain increasing ac-

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70   A Duxbury, Rejuvenating the Commonwealth: the human rights remedy. *The International and Comparative Law Quarterly* 1997 46: 3440. Article 2(4): "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."

71   The systematic repression of the Kurdish population of Iraq by Saddam Hussein over two decades and the activities of the Pol Pot regime in Cambodia are but two illustrations.

72   An intense debate is presently raging about the legality of NATO's action. Member states use a number of arguments justifying the action, ranging from interpreting self-defence in terms of Art 51 to include the defence of "common interests and values", to a re-interpretation of the values of human rights enshrined in the Charter and the somewhat tenuous link which it establishes between human rights and international peace and stability. Canada, a state with a noted emphasis on human rights in its diplomacy, is leading international efforts to create more effective mechanisms to protect populations from abuse by their governments. Cf in general in this regard B Simma, NATO and the use of force: legal aspects. *European Journal of International Law* 1999 10: 23;

ceptance. The existence of a doctrine that allows for forcible intervention in a state which grossly and systematically violates the basic human rights of its own citizens will enhance the capacity and effectiveness of preventative human rights diplomacy.

8. Institutional responses: human rights diplomacy and foreign ministries

Because of its built-in contradictions, human rights diplomacy is probably one of the most difficult and most controversial aspects of modern diplomacy to give practical effect to. The international focus on human rights, the influence of the non-governmental community and the revolution in information and communications technology mean that no democratic state can today deny human rights an important place in its diplomacy. This necessitates changes to the principal institutions implementing diplomacy, namely foreign ministries, and the way in which diplomatic functionaries approach their tasks. It is therefore not surprising that the foreign ministries of democratic states have over the last four decades established specialised human rights sections within their establishments.[73] The US State Department employs diplomats with a specialised knowledge of human rights at embassies in states where human rights are an issue, and the annual State Department report on human rights is compiled from their submission.

J Currie, NATO's humanitarian intervention in Kosovo: making or breaking international law. *The Canadian Yearbook of International Law* 1998: 303; J Mertus, Beyond borders: the human rights imperative for intervention in Kosovo. *Human Rights Review* 1(2) 2000: 78.

73 In the case of South Africa, two directorates on human rights issues were established after the 1994 elections, forming part of the Chief Directorate: Social Affairs. South Africa's human rights policy focuses mainly on multilateral (UN) organs. The British Labour Government has not only formulated a detailed policy, but also established a Global Citizenship Unit within the Foreign and Commonwealth Office, which *inter alia* assists and advises British companies conducting business in foreign states with regard to human rights issues and standards.

The complicated nature of human rights and the international protection machinery requires diplomats dealing with human rights in a multilateral context to have a specialised knowledge of the subject. In a bilateral context the diplomatic function of gathering information on conditions in a host state poses its own challenges. The diplomat serving in eg the PRC or Turkey and reporting on human rights issues should also understand local conditions, politics and culture, and liaise with government as well as with non-governmental institutions in order to gain a clear picture of developments and be able to advise his or her government. Action in multilateral fora by a sending state regarding human rights issues in a host state may place a diplomat in the position of having to explain and interpret to his host government. He or she may also be required to communicate unpopular messages to the host government in whatever manner will do the least possible damage to bilateral relations. The modern diplomat, an all-rounder by nature, consequently needs proper formal training on human rights, whether in an academic context or as part of foreign ministry training schemes.[74]

9. Conclusion

Since the end of the Second World War, human rights have become an issue of international concern. The force of human rights in international relations has become so great that it is now resulting in a re-interpretation of the international constitution, the UN Charter. Globalisation and revolutionary developments in information and communications technology, where non-governmental actors play an increasingly important role in mobilising emotions and public opinion as well as setting agendas, will further serve to sustain human rights as an issue in diplomacy and foreign policy.

Human rights diplomacy, due to its inherent contradictions, is one of the most difficult modes of diplomacy to apply in practice. Due to its preventative nature and the close link between human

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74 Melissen (*Diplomatie*, p 105) argues that a diplomat owes allegiance to his/her state and its national interest, but also serves the interest of peace and the world community as a whole, which is expressed in the notion of human rights and which must consequently be an important personal motivation for the diplomat.

rights and international peace and stability, it is also one of the most important. Democratic states will in future be obliged to devote more time, effort and resources to human rights diplomacy. The significant progress that has been achieved in the promotion and protection of human rights in many countries on all continents, including Africa, augurs well for the future. Human rights may well be one of the saving graces of the ancient institution of diplomacy, the effectiveness of which is often doubted in an age of instant communication. Conversely, if diplomacy does not contribute to the promotion and protection of human rights in the world, it may lose legitimacy.