

Economic, social and cultural rights - from hesitant recognition to extraterritorial applicability

by Michael Krennerich

20 years ago the final declaration of the World Conference on Human Rights (1993) in Vienna not only reinforced the universality of human rights, it also acknowledged the indivisibility, and thereby the coherence and interdependency of the various human rights. Since then we have seen an unmistakable increase in the significance of the long-neglected economic, social and cultural human rights (ESCR). This paper will cursorily follow up on the change in significance over the past few decades. Before this, however, it will deal with the problem of talking about three generations of human rights.

The misleading notion of different human rights “generations”

For a long time now the notion of different “generations” of human rights has established itself in human rights literature and teaching. According to this, rights of the “first generation” are the “classical” civil and political freedoms which have been formulated since the latter part of the 18th century. These include today, for example, the prohibition of torture, justice-related rights (such as equality before the law, the presumption of innocence, fair trials, etc.), the right to the freedom of religion or belief, opinion, assembly and association, as well as the participation in the administration of public affairs and the right to vote. The emergence of the rights of the “second generation” on the other hand is often linked to the economic and social rights which developed on the national level in the course of the “social question” of the latter part of the 19th century. Today they comprise, amongst others, the right to work, just and favorable working conditions, social security, health, adequate housing, food, clean drinking water and sanitation, as well as the right to freely participate in cultural life. Rights of the third generation are considered to be barely codified, increasingly collective rights, such as the right to development which only emerged in the course of the global expansion of industrial capitalisation and following the decolonialisation

of further parts of the “third world” (Felice 2009). However, talking about human rights generations is problematic for a number of reasons:

First of all a clear contemporary chronology of the emergence of human rights is assumed; an assumption which must be questioned to certain degree. It is true that most of the economic, social and cultural rights cannot be found in the influential civil rights documents of the latter part of the 18th century, but, for example, although it is considered to be a “classical freedom” from the outset and is generally attributed to the civil rights, the right to own property can, from a content point of view, be classed as an economic right. Also the early established prohibition of slavery, which goes back to the international anti-slavery movement (Grant 2010), demonstrates close links to the right to (freely chosen and accepted) work. Ultimately slavery, servitude and forced labour, all of which even today still remain reality for the lives and work of millions of people¹ are most abhorrent forms of economic exploitation of human labour.

First and foremost, however, the chronology of different “generations” of rights can, if at all, only refer to the development of rights on the national state level, but not to the entrenchment of universal human rights in international law. Notwithstanding the sometimes universalistic choice of term, the constitutional codification of civil and political rights and later also the economic and social rights concerns not human rights in the narrow sense, i.e. those which are afforded to all persons, but instead usually only those civil rights which were attached to national citizens only. Even more, for a long time entire population groups in the respective states were excluded from civil rights, including indigenous peoples, certain ethnic groups, those without means, and women.

Apart from the earlier attempts at internationalisation and universalisation (of, for example, working rights within the framework of the International Labour Organization, ILO), a *comprehensive* internationally recognised codification of civil, political, economic, social and cultural human rights with universal applicability did not take place until the second half of the 20th century. On the level of the United Nations, civil and political rights as well as economic, social and cultural rights were entrenched in the Universal Declaration of Human Rights (UDHR) and later in two separate pacts, namely the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 and the International Covenant on Civil and Political Rights (ICCPR) from 1966, both of which came into force in 1976. More recent UN human rights core conventions, such as the Convention on the Elimination of

¹ See, for example the corresponding reports of the International Labour Organisation (available at www.ilo.org) and of the UN special rapporteur for contemporary forms of slavery (available at www2.ohchr.org).

Discrimination against Women as well as the Convention on the Rights of the Child and the Convention of the Rights of Persons with Disabilities incorporate both kinds of right.

Ultimately the notion of human rights generations often goes hand in hand with a problematic weighting, whereby the classical civil and political rights are portrayed as the actual, basic human rights and as such are given priority over the economic, social and cultural rights. This view is based on the meanwhile outdated perception that only the civil and political rights amount to basic “negative rights” which must merely be respected by the state, whereas the economic, social and cultural rights are always resource-dependent “positive rights”, even luxury rights, which always required comprehensive activities on the part of the state. The dichotomy between negative rights here and positive rights there was for many decades characteristic of human rights discourse and was largely responsible for the fact that ESC rights were seen rather as a political goal than as “genuine” human rights, a view which was further reinforced for ideological reasons in the context of the East-West conflict.

Interestingly, the impetus for incorporating the ESC rights in the UDHR came by no means originally solely or mostly from the socialist states, as is commonly assumed, and is therefore certainly not a socialist “legacy”. Instead it was rather the case that in respect of the ESC rights the authors of the UDHR had in mind the terrible experiences of the Nazi regime, for example the systematic discrimination, coercive measures and indoctrination in the areas of work, living, health, education, or cultural participation, from which many millions of people had suffered.

Moreover, in the run-up to the establishing of the United Nations, US President Franklin D. Roosevelt had provided the economic and social rights with a non-material impetus when in 1941 he defined the freedom from want as one of the “four freedoms” which were to serve as the basis for a new world order following the second world war (cf. Borgwart 2009). This impetus continued to have an effect although whilst drafting the UDHR the Truman administration (1945-1953) increasingly distanced itself from the ESC rights.

A little known fact is also that especially the Latin American submissions had significantly influenced the introduction of the ESC rights into the Universal Declaration of Human Rights (cf. Morsink 1999). Indeed the Latin American States really played a leading role in the introduction of these rights into the UDHR (Amos 2010: 147) undertaking to bridge the gap between civil, political, economic, social and cultural rights, all of which were already contained in the “American Declaration of the Rights and Duties of Man” of 1948.

However, when the decision was made to adopt two internationally legally binding pacts, all those positions which originated from the essential differences between the two “types” of human right prevailed. Prior to, during and following the drafting of the ICCPR and the IESCR of 1966 the international law and political debates in the United Nations were defined by quite contrary views of human rights between the East and the West and time and again fundamental differences between the two “types” of right were asserted with ideological poignancy.

In short, the West, and above all the USA, demanded from socialist states individual civil and political rights.² The Soviet Union on the other hand considered the domestic implementation of human rights to be a sovereign matter for the states and rejected any intervention from outside. Whilst it deprived its own (and also the foreign) population of fundamental civil and political rights, for ideological reasons and for the purpose of propaganda it campaigned for economic and social rights despite the fact that this did not lead to any “subjective,” actionable legal status of individual human rights in respect of a person’s own state. Individual enforceable claims could also not be derived from the ESC rights and indeed it was up to the state to grant these rights in the form of social benefits. In this way ultimately a collective human rights understanding was propagated that diluted the individual and defensive rights core of *all* human rights.

In addition to this decolonised or decolonising states in the “third world” campaigned for economic, social and cultural rights, but linked them with the collective right of self-determination, with criticism of an incredibly unjust world economic order, and with international demands for access to economic development resources. The rhetoric of the indivisibility of human rights and the emphasis of the ESC rights – for example at the first international conference for human rights in 1968 in Tehran (cf. Whelan 2010: 144 et seq.) – was as a result incorporated in the overarching topic of anti-colonialism and a just world order. In this sense the discussion surrounding human rights was not only characterised by the East-West conflict, but also influenced by the North-South conflict.

This all had consequences for the interpretation of the ESC rights in the West, which for a long time there were perceived as individually non-actionable collective rights – a view no longer held today, but which could still be found in human rights teaching materials for a long time. Likewise, the systematically non-convincing dichotomy between civil and political “negative rights” on the one hand and economic, social and cultural “positive rights” on the

² Ironically, the USA as the Western leading power discriminated openly against African-Americans in their own country well into the 1960s and during the East-West conflict supported the allied anti-communist dictatorships of the “third world”, which infringed civil and political human rights as well as social, economic and cultural human rights on a large scale.

other firmly established itself in politics over a period of decades. As such, for decades the UN social pact led a shadowy existence.

ESC rights on the upturn

Despite the passing (1966) and coming into force (1976) of the IESCR is binding under international law on the Member States, the economic, cultural and social human rights have only really seen an increase in significance since the 1990s. A prerequisite for this was the end of the East-West conflict which though it did not contribute towards a depoliticisation, almost certainly did contribute towards a de-ideologisation of the human rights debate and opened up political space to once more take up the discussion surrounding economic, social and cultural human rights in international and transnational human rights forums and to relate it to social problem situations throughout the world.

Together an increasing number of advocates of ESC rights in the institutions for global and regional human rights protection, at universities, and in human rights and development organisations played a part in getting the ESC rights onto the public agenda and them gaining in significance. They sought to substantiate the normative meaning of these rights, which had traditionally been dismissed as vague and non-specific, and to provide the ESC rights with a clear legal profile and stronger commitments in international law.

Of key importance were and are the interpretation guidelines of the corresponding UN treaty committees. With the support of and encouraged by experts at universities and in human rights organisations,³ above all the UN Committee on Economic, Social and Cultural Rights established in 1987 contributed significantly towards substantiating the content of the ESC rights and the state obligations resulting from them. In particular the General Comments of the Committee were positively received and attained considerable authority, both at a civil society and an international level. They determined not only the communication between the committee and the respective governments, but were also taken up by other UN committees and UN specialised agencies which took greater notice of the social human rights, thereby utilising the interpretation guidelines of the UN committee for ESC rights.

Further helpful impetus came from individual UN special rapporteurs who - partly in cooperation with civil society organisations – made use of their independent mandate to

³ Particularly worthy of note are two international conferences jointly hosted by the University of Maastricht and the International Commission of Jurists in 1987 and 1997. From these arose the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1987) and the Maastricht principles on the Infringement of Economic, Social and Cultural Rights (1997). The drafting of the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (2011) followed on from this tradition.

promote the understanding of ESC rights, for example the rights to food, education, adequate housing or later the rights to clean drinking water and sanitation.

At the same time intensive, ultimately successful international negotiations and transnational campaigns for the introduction of individual complaints procedures for ESC rights at the UN level animated the debate on the traditionally disputed justiciability of these rights. It is also important to note the interpretation of rights by and the decision-making practice of regional human rights supervisory bodies in the context of the European, Inter-American and African human rights protection, insofar as these directly or indirectly concerned the protection of ESC rights.⁴ Just as important for the inclusion of social fundamental rights is a series of more recent constitutions, for example in some South American states or in South Africa, as well as the progressive case law of national courts for the protection of ESC rights in individual states (cf. Gauri/Brinks 2008).

Especially at the civil society level, serious social injustices were increasingly being looked on in human rights terms and the overcoming of such problems demanded. After a number of organisations – for example the *Habitat International Coalition* (HIC), a worldwide alliance of NGOs, social movements and specialists, which had been founded already in 1976 and campaigned for the right to housing, or also the *FoodFirst Information Action Network* (FIAN), established in 1986, which campaigned for the right to food – had already campaigned very early on for ESC rights and input their expertise into the debate, in the meantime a large number of human rights organisations around the world have additionally started working on economic, social and cultural rights. Even traditional human rights organisations which were originally limited to basic civil and political rights have been taking up infringements of ESC rights for many years and making them public through the media. In particular it should be highlighted that also *Amnesty International* - took on individual ESC rights, clearly visible, for example, in its "*Demand dignity campaign*".

It also proved helpful that – following considerable initial difficulties – the development cooperation proved to be compatible with ESC rights, and that actively supported by international human rights organisations and transnational human rights networks, development policy issues were increasingly being presented in the language of human rights. In the meantime the specific and express promotion of ESC rights is a fixed component of multilateral and bilateral, state and non-state development cooperation. Numerous development organisations now adopt a human-rights-based approach or are at least campaigning to draw more attention to the ESC rights in the framework of

⁴ See, for example, Koch (2009); De Schutter (2009); Fáunder Ledesma (2005); Suárez Franco (2010); Nolan (2009); Murray (2009).

development cooperation.⁵ Development policy campaigns concerning the rights to food, water, health, housing or education are a clearly visible expression of this effort. The change in perspective from a needs-based to a rights-based approach in development cooperation provided the ESC rights with a considerable impetus. Particularly as regards the developing countries it also became clear just how important it is to consider the extraterritorial level of commitment and to demand that international organisations and transnational companies take responsibility for human rights.

However, the resistance to the ESC rights has by no means been overcome. Positions can still be found that view the economic, social and cultural rights as political targets without clear legal obligations and without the possibility of individual judicial enforcement. Sometimes also the danger is seen of „inflating“ human rights claims and of an exuberant juridification of politics which goes hand in hand with a devaluation of “classical” human rights and the undue limitation of the decision-making scope of (democratically legitimated) political decision-makers. The objections which are occasionally fuelled by (far too) wide-reaching human rights demands from the civil society (not everything which is socio-politically sensible and desired is also necessary in human rights terms) can, however, be countered by way of an appropriate substantiation and interpretation of the ESC rights.⁶

On an international level, above all the USA stands out among the critics. *“By the 1990s, the United States had become the chief opponent of economic and social rights on the international stage”* (Albisa 2009: 176). In the official domestic and foreign policy of the USA, economic and social rights still only possess *“a second-class, outsider status”* (Lewis 2009: 100), and are, albeit also more and more hesitantly and partly strongly opposed by numerous US academics, not viewed as real human rights (Riedel 2008: 78). Howard-Hassmann/Welch (2006: 13) observe with disappointment that after over 60 years the at one time visionary approach of Franklin D. Roosevelt has barely any influence on the political culture of the USA at all.

Progress in the interpretation of ESC rights and state obligations

The increase in significance of the ESC rights in the past two decades was due less to the entrenchment of new rights than it was to the “rediscovery” and “reinterpretation” of already existing rights. Through the substantiation and further development of their content,

⁵ See, for example, Selchow/Hutter (2004); Krennerich (2008); Kämpf/Würth (2010).

⁶ The author has endeavoured to present the substantive content of the individual ESC rights, making use of the commentaries, decisions, reports and recommendations of human rights committees, as well as a number of other sources, and to illustrate these with the help of examples; see Krennerich (2013).

especially at the UN level, the understanding of these rights has changed in several respects: the reinterpretation concerned the nature and substantive content of the existing rules as well as the questions as to who are the bearers of the ESC rights and who do they obligate in what way. At the same time proof of the material justiciability of these rights was given, that is of their suitability, in principle, to be examined (effectively) judicially by grievance committees and courts, even though appropriate procedures have still to be developed.

The traditional view that the nature of ESC rights is fundamentally different to that of the civil and political rights - as these are merely positive rights - has been called into question and revised over the past few years. Also the ESC rights are oriented towards freedom, are aimed at the autonomous self-fulfillment of the person, and work towards the realisation of a social order in which together with others the individual persons can develop themselves freely with self-determination. On the one hand the ESC rights create a social freedom for a self-determined way of life for the people, which neither the state nor third parties may unreasonably restrict. The ESC rights thereby enable the individual persons to protect themselves from exploitation, inhuman working conditions and damage to their health, to feed themselves, to preserve a safe living environment, to being educated and to not be prevented from exercising their own culture or be excluded from cultural life. On the other hand the legal, institutional, procedural and material prerequisites must be met in order that the people can in fact act autonomously and lead a self-determined life in the community with others. This includes active measures, for example against extreme poverty, insufficient education, unemployment, inhuman working conditions, illnesses, housing shortages and social exclusion.

Thus, the ESC rights go together with "negative" and "positive" freedoms, and are freedom rights in the truest sense of the word. At the same time the ESC rights – like all other human rights – are linked to the requirement that they apply to all people equally and as such represent equality rights. This is not about socially levelling down the differences between the ways of life of the people. In the forefront is more the requirement that all persons should have the equal opportunity to find and realise their own "particular" way of life in freedom – for themselves and in community with others (Bielefeldt 2011: 123). It corresponds to the solidarity nature of the ESC rights and other human rights that their implementation is always dependent on social interaction, solidarity and the protection against social exclusion. Conversely the ESC rights inevitably leave their marks on the community: when the people make use of their human rights, respect those of their fellow citizens, and the state respects, protects or creates the corresponding areas of freedom, also the community changes in that the people - in an ideal situation – live and act jointly with

others as socially and politically autonomous persons. In short: all human rights, and that includes the ESC rights, are to be understood as freedom, equality and solidarity rights.

As such supposed essential differences and abstract hierarchisation between the human rights are obsolete. It is true that the indivisibility of the human rights does not mean that dependent on the context and perspective individual human rights aspects cannot be ascribed empirically different significance, but abstract weightings between important and less important human rights are highly problematic and cannot establish a priority of civil and political rights over ESC rights (cf. Krennerich 2010).

In the course of the lively discussion surrounding the ESC rights in the past few years, a number of traditional reservations towards the ESC rights were shown to be just as untenable, for example the assertion that the ESC rights are far too vague in comparison with the civil and political rights, and that they are not adequately determinable. Even though the legal profile of these rights needs to be sharpened in future grievance and court proceedings, the ESC rights have been substantiated to a notable extent. The categories of availability, accessibility, acceptability and adaptability, which were made popular by the former UN special rapporteur on the right to education, Katharina Tomaševski,⁷ proved helpful when it came to interpreting the substantive content of these rights. The UN committee for ESC rights applied these or similar categories to numerous other ESC rights and substantiated these in its General Comments and reports. The interpretation efforts of the committee were supplemented by reports, decisions and recommendations of other international and regional human rights organs as well as in places by the decision-making practice of national courts.

At the same time also the international law obligations of the states in respect of the implementation of the ESC rights were substantiated. Of increasing importance were the three duties "respect-protect-fulfil," originally following on from Henry Shue (1980) and characterised by Asbjørn Eide,⁸ which were taken up, used and widely propagated by the UN committee for ESC rights. According to this the states are obliged to not hinder individual people in the exercising of their rights (obligation to respect), to protect individuals from the interference by third parties in their rights (obligation to protect) and to enable the exercising of the human rights by taking positive action (obligation to fulfil). Human rights violations occur then if the state inadmissibly prevents or hinders the people from exercising

⁷ See, for example, UN Doc. E/CN.4/1999/49, 13th January 1999; E/CN.4/2000/6, 1st February 2000; E/CN.4/2001/52, 11th January 2001; E/CN.4/2002/60, 7th January 2002.

⁸ See UN Doc. E/CN.4/Sub.2/1984/22, 3rd July 1984; E/CN.4/Sub.2/1999/12, 28th June 1999.

their respective rights or also if, despite possibilities existing, it obviously fails to undertake anything or undertakes too little to protect and guarantee human rights.

Contrary to the traditional view, such duties can also go together with individual defensive, protection and positive rights which can be actionable depending on the case. Most likely to be accessible to an (effectively) judicial examination are state interventions in the ESC rights and acts of discrimination. This can be the case, for example, when state authorities arbitrarily evict the people of their country from their homes or deny them access to state education and health facilities, to name just a few of many examples. But also omissions of the state can amount to a human rights violation, for example if the state knowingly, and despite the existence of possibilities to intervene, for example allows third parties to exploit, evict or discriminate against the people, or otherwise hinder them from exercising their rights.

Difficult, but not impossible is an (effectively) judicial examination in cases where the state has to take comprehensive measures to overcome hunger, education deficiencies, housing shortages and other social problems. The states have a large scope for political discretion and action when it comes to deciding how they want to deal with the problems. Moreover, many social problems cannot be resolved overnight – especially where resources are scarce. However, a scarcity of resources cannot serve as an excuse for not acting. The states are then obliged to progressively implement the ESC rights and must take specific, targeted measures, exhausting their possibilities to as far as possible make progress with the implementation of the ESC rights. Above all, however, there are always aspects of the ESC rights which can be implemented directly, in particular the aspects of respect and protection.

The three duties have become significantly more important in legal dogma terms over the past few years. Besides the UN committee for ESC rights in the meantime also other global and regional human rights institutions, national courts of individual states, and a large number of human rights experts at universities and in NGOs are referring to the three levels of obligation when dealing with ESC rights. However, the three duties have not established themselves as terminology when interpreting the civil and political rights. But it is not actually such a big change: ultimately the obligations tie in with the well-known distinction between “negative” and “positive” duties to act. What is new, however, is that in respect of the ESC rights not only guarantee duties but also in particular protection and omission duties are mentioned, and conversely with civil and political rights protection and guarantee duties which go beyond the duties to respect are being asserted.

The three duties make it clear that even though they place a greater emphasis on the resource-dependent positive components than civil and political rights do, ESC rights are not in fact merely expensive positive rights. Similarly they call into question the traditional view that the implementation of civil and political rights does not require any state measures and resources. Evidently also the implementation of these rights is not cost free. We can consider the national measures taken to prevent torture and inhuman or degrading treatment or punishment as demanded by the optional protocol to the UN torture protocol which came into force in 2006. Or to make it even clearer: in many developing or transition countries the constitutional and political institutions (independent courts, ombudsmen, electoral commissions, etc.) still even have to be established with considerable effort and using considerable resources before the people can make effective use of their civil and political rights.

As such the following applies to both and civil and political rights and to economic, social and cultural rights: *"They both impose negative and positive duties which sometimes require significant resources and sometimes do not, and which can sometimes be implemented immediately and sometimes not"* (Felner 2009: 407).

Extraterritorial obligations of the states and obligations beyond the state

In the past few years the discussion surrounding the ESC rights has in many respects gone beyond the classical construction of international law human rights protection, according to which the states as parties to international conventions are mutually obliged to implement the human rights in respect of those persons under their sovereign jurisdiction.

In the light of the trans-border effects of state activity, first of all the question arises whether the governments and other organs of state must only respect, protect and guarantee the human rights "at home", or also abroad. To what extent are the states as international actors obligated in respect of human rights? It is here that the discussion surrounding the "extraterritorial state obligations" picks up. Especially advocates of the ESC rights started off the debate on the extraterritorial state obligations, which has since picked up speed considerably.

Each state still has the primary responsibility for implementing the human rights in its own country; however, it can either be significantly hindered or supported in doing so by the bilateral and multilateral actions of other states. We can therefore be curious as to what significance the "Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights" (2011) will develop and whether the *comprehensive*

recognition of these obligations will prevail. That is anything but what was agreed on. Certainly there is increased acknowledgement that states may not themselves infringe the human rights in the course of their bilateral and multilateral relations; however, extraterritorial protection and guarantee obligations which go beyond this are still disputed and corresponding demands are still being met with a tremendous amount of political and judicial resistance.

Continually moving in international law and at the same time controversial is, second, the human rights commitment of international and supranational organisations. Binding coercive measures by the UN Security Council are just as much under scrutiny as, for example, trade agreements of the European Union (cf. Paasch 2011). Also much discussed and criticised are the human rights effects of the activities of international financial institutions such as the World Bank (e.g. McBeth 2010) or the trade and patent regulations of the World Trade Organisation (cf. Hestermeyer 2007). As such this begs the question whether international organisations are bound by human rights, even if they have not acceded to human rights conventions. Corresponding obligations can either be indirectly derived from the extraterritorial obligations of the states involved, which are represented in the international organisations, or directly where social human rights are already protected by customary law, something which would have to be examined in each case. In addition, internal organisation guidelines and regulations – such as, for example, the *Safeguard Policies* of the World Bank – can by all means be used to assert the protection of human rights within the organisation. An assured human rights obligation on the part of international organisations cannot, however, be derived from this (cf. Kälin/Künzli 2008: 100).

Finally, much discussed in the past few years has been the question of the human rights obligation on the part of non-state actors, above all transnational companies which can significantly influence not only the rights to work and to fair working conditions, but the entire range of human rights – both positively and negatively.⁹ Also transnational companies are subject in principle to regulation by any state in which it carries out its business and must strictly speaking abide by the national laws and provisions which prohibit or should sanction business practices that are in violation of human rights. However, in many states – in particular those which are weak, corrupt or even just competing for locational advantages – such laws are either non-existent or ineffective, or they are simply ignored and circumvented. In some cases the companies also profit from human rights violations.

⁹ Corresponding human rights violations are documented, for example, on the website of the *Business & Human Rights Resource Centre* (www.business-human-rights.org). See e.g. also Human Rights Watch (2008); Saage-Maaß (2009); Burghart/Hamm/Scheper (2010).

The discussion about the ESC rights has notably reanimated the debate on the human rights responsibilities of non-state actors and given impetus to demands that transnational companies should be made more responsible for human rights, not only in the host country but also in the home state or by way of international regulation. At the same time there have been demands for the self-commitment of companies with regards to human rights.

As a frame of reference for the discussion meanwhile the former UN special representative for human rights and transnational and other companies, John Ruggie's three-pillar guiding principles have established themselves, according to which the states protect the rights (duty to protect), the companies respect the people (corporate responsibility to protect) and both should ensure the access of those concerned to remedies and redress (access to remedy).¹⁰ Up until now the discussion of the guiding principles concerned mainly the second pillar, i.e. the voluntary measures companies should take in order to meet their human rights responsibilities. However, it must be noted that the guiding principles also provide for international law obligations on the part of the states to protect persons on their sovereign territory from human rights violations by companies by granting those concerned access to judicial and non-judicial remedies.

Ruggie's guiding principles do not, however, contain a state obligation to regulate company activities in other countries. In contrast to the "Maastricht Principles on Extraterritorial Obligations of States in the area of ESC Rights" the extraterritorial state obligations to protect are expressly denied by Ruggie. Here it remains to be seen whether not the international law will develop further in the sense of the Maastricht Principles. On the other hand, the direct commitment of companies in international law as was at one time provided for in the draft for the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights from 2003¹¹ is currently unlikely to be implemented. The resistance from companies, governments and international organisations, including the United Nations, is just too high.

Outlook

Notwithstanding the unmistakable increase in significance of the economic, social and cultural human rights in the past two decades, the reservations and uncertainties when it comes to interpreting these rights has still not been overcome. Above all the implementation of the ESC rights – and indeed also other human rights - remains the big problem.

¹⁰ See UN Doc. A/HRC/17/31, 21st March 2011; A/HRC/RES/17/4, 6th July 2011.

¹¹ UN Doc. E/CN.4/Sub.2/2003/12/Rev.2.

The prerequisites for this have certainly improved in that those affected and their supporting groups are able to enforce the ESC rights by way of public demands and protests. The tirelessly repeated declarations, the numerous reports and recommendations and the supportive efforts of international human rights committees formulate conduct expectations and standards which the members of the international community of states cannot simply disregard. Now and then also learning processes may be defined showing how the ESC rights can be better implemented. Yet still the ESC rights are being infringed around the world on a large scale and the states and the community of states are doing far too little to respect, protect and guarantee these rights nationally as well as globally.

The implementation of the ESC rights is though not only dependent on constitutional, participatory and democratic structures, but also on minimum welfare state conditions. A corresponding basic understanding of social state functions – something which is, for example in the USA with its strongly libertarian approach to constitutional rights, not very developed – is decisive for whether and how far even established constitutional democracies recognise and implement social rights. Strong market-liberal and anti-state-dominated notions of order demonstrate in this respect obvious weaknesses and gaps, as the market alone is unable to guarantee social human rights, instead itself leading to many cases in social insecurity.

No less important is the organisation of global political and economic activity in conformity with human rights. The international human rights regime is still primarily aimed at encouraging the individual government to implement the ESC rights in their own country or supporting them in doing so. In contrast, the social human rights barely regulate international and transnational relations and in this sense have not really established themselves as “global social rights” (Fischer-Lescano/Möller 2012). A comprehensive human rights approach therefore requires that the states and the community of states adopt global policies which help the ESC rights to become important also in the context of economic globalisation processes. The current globalisation processes create so many “social losers” who are not able to cope with economic pressure of globalisation, that the need for human rights action and regulation is tremendous. The recognition and implementation of extraterritorial state obligations and an effective human rights commitment on the part of international organisations and transnational companies would be an initial, important step towards tackling the enormous social problems which in particular go hand in hand with economic globalisation processes and can no longer be overcome by the individual nation states alone.

Literature

Albisa, Catherina 2009: Economic and Social Rights in the United States: Six Rights, One Promise, in: Soohoo, Cynthia et al. (eds.): Bringing Human Rights Home. A History of Human Rights in the United States, Philadelphia: University of Pennsylvania Press, 173-197.

Amos, Jennifer 2010: Unterstützen und Unterlaufen. Die Sowjetunion und die Allgemeine Erklärung der Menschenrechte, 1948-1958, in: Hoffmann, Stefan-Ludwig (Hrsg.): Moralpolitik. Die Geschichte der Menschenrechte im 20. Jahrhundert, Göttingen: Wallstein Verlag, 142-168.

Bielefeldt, Heiner 2011: Auslaufmodell Menschenwürde? Warum sie in Frage steht und warum wir sie verteidigen müssen, Freiburg et al.: Herder.

Borgwart, Elizabeth 2009: FDR's Four Freedoms and Wartime Transformations in America's Discourse of Rights, in: Soohoo, Cynthia et al. (eds.): Bringing Human Rights Home. A History of Human Rights in the United States, Philadelphia: University of Pennsylvania Press, 40-67.

Coomans, Fons/ Künnemann, Rolf (eds.) 2012: Cases and Concepts on Extraterritorial Obligations in the Area of Economic, Social and Cultural Rights, Cambridge et al.: intersentia.

De Schutter, Olivier 2009: The European Social Charter, in: Krause, Caterina/ Scheinin, Martin (eds.): International Protection of Human Rights: A Textbook, Turku/ Åbo: Åbo Akademi University, 425-442.

Faundez Ledesma, Héctor 2005: The Validity of Economic, Social and Cultural Rights in the Inter-American System, in: Windfuhr, Michael (ed.): Beyond the Nation State. Human Rights in Time of Globalization, Uppsala: Global Publications Foundation, 192-210.

Felner, Eitan 2009: Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights, in: Journal of Human Rights Practice, Vol. 1, No. 3, 402-435.

Fischer-Lescano, Andreas/ Möller, Kolja 2012: Der Kampf um globale soziale Rechte, Berlin: Wagenbach.

Gauri, Varun/ Brinks, Daniel M. (eds.) 2008: Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World, Cambridge et al.: Cambridge University Press.

Grant, Kevin 2010: Die Menschenrechte und die Staatliche Abschaffung der Sklaverei, 1885-1965, in: Hofmann, Stefan-Ludwig (ed.): Moralpolitik. Die Geschichte der Menschenrechte im 20. Jahrhundert, Göttingen: Wallstein Verlag, 199-225.

Hestermayer, Holger 2007: Human Rights and the WTO. The Case of Patents and Access to Medicines, Oxford: OUP.

Howard-Hassmann, Rhoda E./ Welch, Claude E. Jr. (eds.) 2006: Economic Rights in Canada and the United States, Philadelphia: University of Pennsylvania Press.

Human Rights Watch 2008: On the Margins of Profit, Rights at Risk in the Global Economy, New York: Human Rights Watch

Ignatieff, Michael (ed.) 2005: American Exceptionalism and Human Rights, Princeton: Princeton University Press

Kälin, Walter/ Künzli, Jörg 2008: Universeller Menschenrechtsschutz, Basel: Helbing Lichtenhahn/Nomos, second edition.

Kämpf, Andrea/ Würth, Anna 2010: Mehr Menschenrechte in der Entwicklungspolitik, Berlin: Deutsches Institut für Menschenrechte.

Koch, Ida Elisabeth 2009: Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights, Leiden: Martinus Nijhoff Publishers/ Brill Academic Publishers..

Krennerich, Michael 2008: Entwicklung und Menschenrechte, in: Hinze, Daniela (Hrsg.): Für Freiheit und Menschenwürde. 60 Jahre Allgemeine Erklärung der Menschenrechte, Berlin: FES, 48-82.

Krennerich, Michael 2010: Wider Hierarchien, Verdrossenheit und Lamento – ein Streifzug durch den aktuellen Menschenrechtsdiskurs, in: Zeitschrift für Menschenrechte. Journal for Human Rights, Vol. 4, No. 1, 190-203.

Krennerich, Michael 2013: Soziale Menschenrechte – zwischen Recht und Politik, Schwachbach/Ts: Wochenschau-Verlag.

Lewis, Hope 2009: „New“ Human Rights? U.S. Ambivalence Towards the International Economic and Social Rights Framework, in: Soohoo, Cynthia et al. (eds.): Bringing Human Rights Home. A History of Human Rights in the United States, Philadelphia: University of Pennsylvania Press, 100-141.

McBeth, Adam 2010: International Economic Actors and Human Rights, London et al.: Routledge.

Morsink, Johannes 1999: The Universal Declaration of Human Rights. Origins, Drafting, and Intent, Philadelphia: University of Pennsylvania Press..

Murray, Rachel 2009: African Union Commission and Court of Human Rights, in: Forsthye, David P. (ed.): Encyclopedia of Human Rights, Vol. 1, Oxford: OUP, 12-18.

Nolan, Aoife 2009: Addressing Economic and Social Rights Violations by Non-state Actors through the Role of the State: A Comparison of Regional Approaches to the “Obligation to Protect”, in: Human Rights Law Review, Vol. 9, No. 2, 225-255.

Paasch, Armin 2011: Menschenrechte in der EU-Handelspolitik – zwischen Anspruch und Wirklichkeit, in: Zeitschrift für Menschenrechte. Journal for Human Rights, Vol. 5, No. 2, 146-162.

Riedel, Eibe 2008: Zur Durchsetzung wirtschaftlicher, sozialer und kultureller Rechte im Völkerrecht, in: Giegerich, Thomas/ Zimmermann, Andreas (Hrsg.): Wirtschaftliche, soziale und kulturelle Rechte im globalen Zeitalter, Berlin: Duncker and Humblot, 71-93.

Saage-Maaß, Miriam 2009: Transnationale Unternehmen im nationalen und internationalen Recht, in: Zeitschrift für Menschenrechte. Journal for Human Rights, Vol. 3, No. 2, 102-122.

Selchow, Ulla/ Hutter, Franz-Josef (Hrsg.) 2004: Menschenrechte und Entwicklungszusammenarbeit. Anspruch und politische Wirklichkeit, Wiesbaden: VS Verlag.

Shue, Henry 1980: Basic Rights, Subsistence, Affluence, and U.S. Foreign Policy, Princeton, N.J.: Princeton University Press.

Suárez Franco, Ana Maria 2010: Die Justiziabilität wirtschaftlicher, sozialer und kultureller Menschenrechte. Eine Untersuchung über den aktuellen Zustand in Lateinamerika, unter Beachtung der völkerrechtlichen Mindeststandards. Kolumbien als Beispiel, Frankfurt/M.: Lang.

Whelan, Daniel 2010: Indivisible Human Rights: A History, Pennsylvania: University of Pennsylvania Press.