

HUMAN RIGHTS LAW

Diagram 1

Sources of law for the protection of human rights

A. Global human rights law

I. Customary public international law

- As a consequence of the longtime worldwide debate, today an *absolute minimum standard of elementary human rights* is recognized as *ius cogens* in customary public international law. Insofar the sovereignty of the states is limited.
 - example: prohibition of slavery and forced labour, genocide, ethnical cleansing, crimes against humanity; a constitutional norm introducing slavery or authorising ethnic cleansing would be void
 - the political concept of *responsibility to protect*¹
- These minimum standards can be enforced in case of large-scale gross violations by measures of the UN Security Council under Chapter VI, VII UN Charter; this may include a military *humanitarian intervention*
 - DISPUTED: humanitarian intervention in urgent cases without authorisation by the UN Security Council
- violations may also be prosecuted by the International Criminal Court.

II. Charter of the United Nations

- the UN has the mission to promote and encourage respect for human rights (cf. art. 1 no. 3, 55 UN Charter)
 - this includes the *global monitoring* of the human rights situation and the *preparation of global human rights treaties*
- Security Council takes h.r. issues into consideration when taking measures under Chapter VI and VII UN Charter
- UN has created special UN institutions for the promotion and protection of human rights:
 - *Human Rights Council [UNHRC]* (→ General Assembly Resolution 60/251; does *Universal Periodic Review* of all states, Special Procedures on specific states or topics and Complaint Procedures to identify gross h.r. violations)
 - *High Commissioner for Human Rights [UNHCHR]* and High Commissioner for Refugees [UNHCR]
 - Office on Genocide Prevention and the Responsibility to Protect

III. Global human rights treaties

- the problem of legitimate interpretation: "dynamic interpretation"? Human rights treaties as "living instruments"?
 - the risk to cross the border between legal interpretation and legal politics
- 1) *International Covenant on Civil and Political Rights [ICCPR]* (1966)²
 - confirms the right to self-determination of peoples (art. 1)
 - important civil and political rights (except property), minority rights, obligation to prohibit propaganda for war and advocacy of national, racial or religious hatred
 - prohibition of death penalty under Second OP³
 - treaty body: Human Rights Committee [HRC]
 - control mechanisms: *state reporting procedure* (with public examination of the reports and recommendations of the HRC in the form of concluding observations), *general comments* of the HRC, interstate-complaints (optional), *individual complaints* under the (First) OP (if ratified; "views" of the HRC not legally binding)
- 2) *International Covenant on Economic, Social and Cultural Rights [ICESCR]* (1966)⁴
 - also confirms the right to self-determination of peoples (art. 1)
 - comprehensive recognition of economic, social and cultural rights
 - even of the right of everyone to an adequate standard of living (art. 11(1))
 - obligation limited to take steps to achieve their realization progressively and without discrimination (art. 2(1, 2))
 - monitoring body: Committee on Economic, Social and Cultural Rights [CESCR]
 - Control mechanisms: state reporting procedure, general comments of the CESCR; individual complaints under OP (ratified by few states only)

¹ Adopted by the 2005 UN World Summit and referred to in several UN Security Council resolutions.

² Ratified by 173 states (not by China).

³ Not ratified by Indonesia (but by the Philippines and Timor Leste).

⁴ Ratified by 171 states (not by the USA).

- 3) Global human rights treaties on special subjects (selection)
 - a) Convention on the Prevention and Punishment of the Crime of Genocide (1948)⁵
 - large concept of genocide - not just killing (art. II)
 - b) Slavery convention (1926), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), Forced Labour Convention (1930) and Abolition of Forced Labour Convention (1957)
 - c) *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [CAT]* (1984)⁶
 - worldwide punishment of torture activities (art. 4); orders from superiors no justification (art. 2(3))
 - treaty bodies: Committee against torture [CAT]; Subcommittee on Prevention of Torture [SPT] (under OP)
 - control mechanisms: state reporting procedure, general comments of the CAT; interstate complaints (optional), individual complaints (optional), inquiries (on own initiative), regular visits by the SPT (optional)
 - d) *International Convention on the Elimination of All Forms of Racial Discrimination [ICERD]* (1966)⁷
 - obligation to pursue active policy of eliminating racial discrimination and promoting inter-racial understanding
 - treaty body: Committee on the Elimination of Racial Discrimination [CERD]
 - control mechanisms: state reporting procedure, general comments of the CERD, early warning, interstate complaints, individual complaints (optional)
 - e) *Convention on the Elimination of All Forms of Discrimination against Women [CEDAW]* (1979)⁸
 - obligation to ensure the equality of women and men before the law
 - in particular to ensure the same legal capacity and the *same rights and responsibilities during marriage* and as parents
 - obligation to take "appropriate measures" to eliminate discrimination in society
 - treaty body: Committee on the Elimination of Discrimination against Women [CEDAW]
 - control mechanisms: state reporting procedure, general comments of the CEDAW, individual complaints and inquiries (under OP of 1999)
 - f) *Convention on the Rights of the Child [CRC]* (1989)⁹
 - with OPs on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography
 - civil, political, economic, social and cultural rights, specific children's' rights
 - basic principles: best interests of the child as primary consideration, no discrimination, best possible development of the child, participation in the decision in own affairs
 - obligation to take measures to combat the illicit transfer and non-return of children abroad
 - treaty body: Committee on the Rights of the Child [CRC]
 - control mechanisms: state reporting procedure, general comments of the CRC; individual complaints by children (under OP of 2011)
 - see also the Worst Forms of Child Labour Convention (1999)¹⁰ (prepared by ILO)
 - g) *Convention on the Rights of Persons with Disabilities [CRPD]* (2006)¹¹
 - obligation to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability
 - obligation to ensure accessibility; principle of full and effective participation and inclusion in society
 - treaty body: Committee on the Rights of Persons with Disabilities [CRPD]
 - control mechanisms: state reporting procedures, individual complaints (under OP)
 - h) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [ICRMW] (1990)¹²
 - treaty body: Committee on the Protection of the Rights of All Migrant Workers and Members of their Families [CMW]
 - control mechanisms: state reporting procedure, general comments of the CMW, interstate and individual complaints (optional)
 - i) Convention relating to the Status of Refugees [Geneva Refugee Convention] (1951)¹³
 - and Protocol (1967)
 - important source of international humanitarian law
 - rights in the state of residence; principle of non-refoulement
 - monitoring body: UN High Commissioner on Refugees [UNHCR]
- 4) no source of law: *Universal Declaration of Human Rights [UDHR]* (1948)
 - just a political resolution of the UN General Assembly (→ "soft law")
 - however, important in the global dialogue on human rights

⁵ Ratified by 152 states.

⁶ Ratified by 170 states.

⁷ Ratified by 182 states.

⁸ Ratified by 189 states. See the free Android App of *Kälin/Schnegg*, Women's Human Rights' App (W'sHR App), last updated 2018.

⁹ Ratified by 196 states (not by the USA).

¹⁰ Ratified by 187 states.

¹¹ Ratified by 182 states.

¹² Ratified by 55 states.

¹³ Ratified by 146 states.

B. Geo-regional human rights law

I. European human rights law

- 1) Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention] (1950)¹⁴ and 16 OPs
 - the first geo-regional human rights regime, prepared by the Council of Europe
 - confined to civil and political rights; some important rights missing
 - no freedom of occupation, no general right to equality
 - central elements of the rule of law anchored as human rights
 - powerful treaty body: *European Court of Human Rights* in Strasbourg [ECtHR]
 - 47 judges; has delivered more than 10.000 judgements
 - control mechanisms: interstate complaints (rare), *individual complaints* (very effective in practice), ECtHR opinions (new: advisory opinions on request of high courts and tribunals)
 - ECtHR can afford just satisfaction (compensation) to the injured citizen
 - ECtHR has used Convention as a *living instrument*, thus closing gaps and developing a *sophisticated h.r. doctrine*, which has strongly influenced the development of constitutional law in Europe
 - in Austria, the Convention enjoys the rank of constitutional law
 - 2) European human rights treaties on special subjects
 - numerous human rights treaties prepared by the Council of Europe¹⁵; see in particular:
 - a) European Social Charter
 - aa) Original version (1961)¹⁶
 - economic and social rights (also in Additional Protocol)
 - states only obliged to take measures to promote their realisation
 - monitoring body: Committee of Ministers of the Council of Europe
 - control mechanisms: state reporting procedure, general comments of Committee of Ministers, collective complaints of NGOs (political procedure) under OP
 - bb) Revised version (1996)¹⁷
 - recapitulation, extension and enhancement of the economic and social rights
 - improved control mechanisms: general comments of Committee of Ministers after examination by European Committee of Social Rights (ECSR)
 - b) European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [ECPT] (1997)
 - treaty body: European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)
 - enhanced control mechanisms to prevent torture, including visits (also *ad hoc visits*) of places of detention by CPT delegations
 - c) Framework Convention for the Protection of National Minorities [FCNM] (1995)
 - no definition of national minority
 - vaguely formulated obligations to respect, guarantee, promote, protect, recognize...
 - monitoring body: Committee of Ministers of the Council of Europe, assisted by an Advisory Committee on the Framework Convention for the Protection of National Minorities
 - control mechanisms: state reporting procedure
 - d) European Charter for Regional or Minority Languages [ECRML] (1992)¹⁸
 - protection of linguistic diversity as part of the European cultural heritage
 - e) Convention on Human Rights and Biomedicine [CHRB] (1997)¹⁹
 - prohibition of reproductive cloning of human beings (absolute prohibition under Additional Protocol of 1998)
 - prohibition of making the human body and its parts as such a source of financial gain
 - ECtHR may be asked for opinions on interpretation
- 3) Human rights in European Union law
 - the equivalent to the constitutional fundamental rights in the states; necessary because EU exercises public power
 - binds EU institutions; binds member states when implementing and applying Union law
 - a) The Charter of Fundamental Rights of the European Union [ChFR] (binding law since 2009)
 - one of the most advanced fundamental rights catalogues in the world with a clear structure and various innovative approaches but no specific regulations of the fundamental rights' limits
 - elaboration was accompanied and influenced by a broad European public discourse

¹⁴ Ratified by all 47 member states of the Council of Europe.

¹⁵ See the list at the website of the Council of Europe, www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/results/subject/44.

¹⁶ Ratified by 27 European states.

¹⁷ Ratified by 34 European states.

¹⁸ Ratified by 25 European states.

¹⁹ Ratified by 29 European states.

- includes chapter on solidarity (social rights), rights of children, elderly and persons with disabilities
 - includes fundamental prohibitions serving the protection of human rights (e.g. of reproductive cloning of human beings and of making the human body and its parts as such a source of financial gain)
- b) Complementing general principles of European Union law
- developed in the jurisprudence of the European Court of Justice in Luxembourg [ECJ]

II. American human rights law

- 1) American Convention on Human Rights [ACHR] (1969)²⁰
 - essential civil and political rights; some central elements of the rule of law anchored as human rights
 - economic, social and cultural rights under OP (1988)²¹
 - prohibition of death penalty under OP to Abolish the Death Penalty (1990)²²
 - treaty bodies: Inter-American Commission of Human Rights in Washington D.C., Inter-American Court for Human Rights [IAtCHR] in San José
 - control mechanisms: state reporting procedure (for OP), interstate complaints (optional), individual complaints (also by NGOs, first before Commission, then before IACtHR), state reports of the Commission, opinions of the IACtHR; in case of a violation of rights, the IACtHR can order remedial action or compensation
 - IACtHR has declared national legislation, which violates the Convention, inapplicable²³
- 2) American human rights treaties on special subjects
 - see the Inter-American Conventions to Prevent and Punish Torture [IACPPT] (1985), on Forced Disappearance of Persons [IACFDP] (1994), on the Prevention, Punishment and Eradication of Violence Against Women (1994), on the Elimination of all Forms of Discriminations against Persons with Disabilities (1999), against Racism, Racial Discrimination and Related Forms of Intolerance (2013) and on Protecting the Human Rights of Older Persons (2015)

III. African human rights law

- 1) African Charter on Human and Peoples' Rights [Banjul Charter] (1981)²⁴
 - civil, political, economic, social and cultural rights, right to asylum; some central elements of the rule of law anchored as human rights
 - rights of women under Protocol (2003)
 - strongly influenced by the *African concept of human rights*: includes collective rights of the peoples (equality of peoples, rights to self-determination, development, peace etc.) and duties of the individual; stresses the importance of the community
 - treaty bodies: African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights [ACtHPR]²⁵ in Arusha
 - control mechanisms: state reporting procedure, interstate complaints, opinions of the ACtHPR (under ACtHPR Prot.), individual complaints to the Commission (and then via submission by Commission, state or African GO to the Court)²⁶ or directly to the Court (optional)²⁷; in case of a violation of rights, ACtHPR can order remedial action or compensation
- 2) African human rights treaties on special subjects
 - see the OAU-Convention Governing the Specific Aspects of Refugee Rights in Africa (1969), the African Charter on the Rights and Welfare of the Child [ACRW] (1990) and the African Charter on Democracy, Elections and Governance (2007)

IV. Arab human rights law

- Arab Charter on Human Rights (2004)²⁸
 - prepared by the League of Arab States; replaces a controversial religious Charter of 1994 that never came into force
 - criticised by UNHCHR Louise Arbour for not meeting international human rights standards
 - confirms in principle the equality between men and women, but only "within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws..." (art. 3(1))

²⁰ Ratified by 25 American states (not by the USA and Canada), in force since 1978.

²¹ Ratified by 17 American states; in force since 1999.

²² Ratified by 13 American states.

²³ Cf. IACtHR, 18.09.2003, Bulacio v. Argentinia, Nos. 117 f.

²⁴ Ratified by all 54 member states of the African Union.

²⁵ Established by the Protocol on the Establishment of the African Court on Human and Peoples' Rights of 1998 (ratified by 30 AU member states).

²⁶ Until 2020, *no state has submitted any case* and the Commission has only submitted 3 cases before the Court, cf. *Nicole De Silva, A Court in Crisis: African States' Increasing Resistance to Africa's Human Rights Court*, in: Opinio Juris 19.05.2020, <http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court>.

²⁷ Cf. art. 5(3), 34 (6) ACtHPR Prot.; so far accepted by 6 AU member states only after *four states have withdrawn*.

²⁸ Ratified by 22 member states of the League of Arab States.

- allows death penalty for children (art. 7(1))
- guarantees freedom of expression only if "exercised in conformity with the fundamental values of society" (art. 32(2)) but not for critical views
- treaty body: Arab Human Rights Committee; projected: Arab Court of Human Rights in Manama City, Bahrain, without complaints by individual citizen (see Statute of 2014, not yet in force)
- control mechanism: state reporting procedure; projected: interstate and NGO complaints before the Arab Court of Human Rights

V. The missing Asian human rights law

- no Asian or ASEAN Convention on Human Rights or other Asian human rights treaties²⁹
- no source of law: *ASEAN Human Rights Declaration [AHRD]* (2012)³⁰
 - just a political declaration, but potentially important in the Southeast Asian dialogue on human rights
 - prepared by an intergovernmental advisory body without public discourse or consultation of the civil society
 - proclaims civil, political, economic, social and cultural rights, a right to development and a right to peace
 - criticised by experts for failing to include important rights (e.g. the freedom of association) and for including clauses that dilute or restrict the significance or substance of the human rights (e.g. art. 6, 7)

C. National human rights law

- With regard to the *sovereignty* and *ultimate responsibility* of the state, the *national fundamental rights* are the most important source of law for an efficient protection of human rights.
- In most states the national constitution grants fundamental rights as *directly binding constitutional rights* in a *fundamental rights catalogue* (see for Indonesia Chapter XA of the Constitution of 1945). In federal states, they may also be granted in the constitutions of the federated states (e.g. in the USA and Germany).
- Some constitutions (Vietnam, Indonesia) use the term "human rights" instead of "fundamental rights" for the constitutional rights. This can provoke misunderstandings because the constitutional rights must not be confounded with the natural, pre-state "human rights" in philosophy or the "human rights" in international human rights treaties.
- monitoring and enforcement institutions: courts (→ h.r. enforcement a primary mission of the courts), constitutional courts, ombudsmen/h.r. commissioners, other special national h.r. institutions
- control mechanisms: respect and enforcement by all courts (who are directly bound to the f.r.), constitutional review, constitutional complaints (individual complaints before the constitutional court), individual complaints before the ombudsman or national human rights institution; in practice, the elimination of corruption at the courts and a thorough instruction of all judges in fundamental rights doctrine is the most effective way to ensure the protection of human rights in a state

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(Datei: Diagram 1 (IntHRLaw))

²⁹ See the criticism of *Hien Bui*, The ASEAN Human Rights System. A Critical Analysis, Asian Journal of Comparative Law, 11 (2016), 111 ff., www.researchgate.net/publication/304340474_The ASEAN_Human_Rights_System_A_Critical_Analysis.

³⁰ Www.asean.org/asean-human-rights-declaration.