

HUMAN RIGHTS LAW

Diagram 2: Geo-regional human rights protection mechanisms

Preliminary remarks: Note that the effective protection of human/fundamental rights at any level is *primarily the mission of the state's courts of justice in the general context of their jurisdiction!* All other mechanisms, including proceedings before specialised national human rights courts, commissions or ombudsmen, are only complementary. If it is necessary to use them, this fact alone proves a failure of the institutions of the concerned state.

A. European human rights protection mechanisms

I. Pan-European human rights protection by the Organisation for Security and Co-operation in Europe [OSCE]

- a purely political mechanism (states not legally bound) in the context of prevention of or mediation in case of conflicts

II. Pan-European human rights protection by the Council of Europe

- a pan-European international organisation with 47 member states specialised on the promotion of human rights, democracy and the rule of law
- prepares in particular new European human rights treaties
- with a *Commissioner for Human Rights* with advisory functions (state reports, thematic reports etc.)

III. Pan-European human rights protection by the *European Court of Human Rights* in Strasbourg [ECHR]

- in case of alleged violation of the European Convention on Human Rights or its additional protocols
 - an important international court, whose decisions are legally binding
 - 47 judges (one of each member state); Court decides in Chambers and Grand Chamber
 - execution of the judgements is supervised by the Council of Europe's Committee of Ministers (art. 46)
 - a well-functioning "safety net" for the case of failure of the national protection of human rights
- 1) Interstate complaints (art. 33)
 - rare
 - 2) Individual complaints (art. 34)
 - an effective remedy for the protection of the individual citizen
 - applicant must be personally and directly affected by the alleged violation
 - applicant must first exhaust all domestic remedies
 - case must not have been submitted to another procedure of international investigation or settlement
 - ECHR can afford *just satisfaction (compensation)* to the injured citizen (art. 41)
 - up to 100.000 and even 180.000 €...
 - 3) Opinions of the ECHR
 - a) Opinions at the request of the Committee of Ministers (art. 47)
 - not on questions relating to the content or scope of the guaranteed rights - therefore very rare
 - b) Advisory opinions at the request of high courts and tribunals (Prot. 16)
 - non-binding opinions on questions of principle relating to the interpretation or application of Convention rights
 - only in the context of a case pending before the requesting court
 - request needs to be accepted by the ECHR

IV. Control mechanisms of European human rights treaties on special subjects

- *state reporting procedure* with recommendations of the Council of Europe's Committee of Ministers
- Advisory opinions of the ECHR (→ Convention on Human Rights and Biomedicine of 1997)
- collective complaints lodged by social partners and other NGOs (→ Revised Social Charter of 1996)
- visits (also preventive, unexpected visits) of detention facilities for the prevention of torture and inhuman treatment of detainees (Europ. Conv. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1997)

V. The enforcement of the fundamental rights in European Union law

- at Union level: by the European Court of Justice [ECJ]
 - in the general context of its jurisprudence - no special proceedings for the protection of fundamental rights
- at member states level: by *all* courts of justice in the member states, in the general context of their jurisprudence

B. American human rights protection mechanisms

I. American human rights protection by the *Inter-American Commission of Human Rights in Washington* and the *Inter-American Court for Human Rights in San José [IACHR]*

- treaty bodies of the American Convention on Human Rights of 1969 [ACHR]; the Commission is also an institution of the Organization of American States (OAS)
 - 1) Advisory functions of the Inter-American Commission of Human Rights
 - state reports, thematic reports
 - also non-binding recommendations in individual cases concerning states not bound by the ACHR
 - 2) State reporting procedure
 - for Optional Protocols
 - 3) Interstate complaints
 - optional, not yet in practice
 - 4) Individual complaints (art. 44 ACHR)
 - also collective complaints by NGOs
 - applicant must first exhaust all domestic remedies
 - two-stage proceedings: first before the Commission, then (only on submission by a state or the Commission) before the IACHR
 - in case of a violation of rights, the IACHR can order remedial action or compensation
 - IACHR judgements are legally binding (but no supervision of execution by OAS)
 - 5) Opinions of the IACHR (art. 64 ACHR)
 - at the request of states or OAS institutions
 - states may also ask for opinion on ACHR compatibility of domestic law

II. Control mechanisms of American human rights treaties on special subjects

- in particular state reporting procedure
- see in particular the co-called "*rappoteurships*" established by the Inter-American Commission of Human Rights

C. African human rights protection mechanisms

I. African human rights protection by the *African Commission on Human and Peoples' Rights in Banjul* and the *African Court on Human and Peoples' Rights in Arusha [ACHPR]*

- 1) Advisory functions of the African Commission on Human and Peoples' Rights
 - includes interpretation of Charter provisions upon request
- 2) State reporting procedure
- 3) Interstate complaints
- 4) Individual complaints (art. 56 et seq. Banjul Charta, 5 et seq. 34(6) ACHPR Prot.)
 - applicant must first exhaust all domestic remedies
 - two-stage proceedings: first before the Commission, then (only on submission by a state, the Commission or an African GO) before the ACHPR
 - optional (so far accepted by 8 states): directly before the Court by an NGO with observer status at the Commission or by the citizen
 - ACHPR can order remedial action or compensation (under ACHPR Prot.)
- 5) Opinions of the ACHPR (under ACHPR Prot.)

II. Control mechanisms of African human rights treaties on special subjects

- state reporting procedure (e.g. before the Committee of experts under the African Charter on the Rights and Welfare of the Child)

D. Arab human rights protection mechanisms

- sole mechanism: state reporting procedure before the Arab Human Rights Committee
- planned for the future: interstate complaints and complaints by accredited NGOs to an Arab Court of Human Rights

E. The missing Asian human rights protection mechanisms

- the failure of the ASEAN Intergovernmental Commission on Human Rights (AICHR)
 - in particular: elaboration of the much criticised ASEAN Human Rights Declaration without broad public discourse

More information on this course contribution at www.thomas-schmitz-yogyakarta.id. For any questions, suggestions and criticism please contact me in my office (Building A, room A.IV.11) or via e-mail at tschmit1@gwdg.de.

(Date: Diagram 2 (HRLaw-UGM))