

## § 3 Global human rights law

### I. The protection of an absolute minimum standard of human rights by mandatory customary public international law

#### 1) The existence of *ius cogens* human rights norms of customary public international law

- a global consensus dating already from the 19<sup>th</sup> century (prohibition of slavery) and growing since the end of the Second World War (prohibition of genocide etc.)

#### 2) The limitation of these norms to a prohibition of gross violations of elementary human rights

- of slavery and forced labour, genocide, ethnical cleansing, crimes against humanity...
- no global consensus on all or all important human rights as *ius cogens*

#### 3) The limited restriction of the sovereignty of the state by these norms

- an *inherent conceptual limit* of sovereignty
- the concept of *responsibility to protect*
  - adopted at the UN 2005 World Summit as a political concept rooting in, reflecting and operationalising already existing legal obligations under intern. treaties and *ius cogens*
  - mentioned in several resolutions of the UN Security Council
  - "entails the prevention of such crimes, including their incitement, through appropriate and necessary means"
  - also refers to the responsibility of the international community

#### 4) The problem of the enforcement of the prohibition of gross violations of elementary human rights

- enforcement only in case of large-scale gross violations, not in individual cases  
(→ example: unsanctioned murder of the journalist Jamal Khashoggi)
- non-military intervention of other states under the concept of responsibility to protect
- measures of the UN Security Council under Chapter VI, VII UN Charter
  - large-scale gross h.r. violations represent *threat to peace* (→ art. 39 UN Charter)
- military *humanitarian intervention*
  - on the basis of a Security Council resolution under Chapter VII
  - DISPUTED: in urgent cases also without such resolution?
    - PRO: can be imperative to ensure effectively minimum standards of elementary rights
    - CONTRA: high risk of abuse
    - YOUR OPINION:
    - historical example: military intervention in Kosovo 1999 to prevent ethnical cleansing and genocide
    - possible upcoming example: military humanitarian intervention in Myanmar

### II. The role of the United Nations (UN) to promote and encourage the respect for human rights

#### 1) The mission to promote and encourage respect for human rights

(cf. art. 1 no. 3, 55 UN Charter)

- in particular preparation of global h.r. treaties
- in particular monitoring the h.r. situation in its member states by its specialised institutions
- in particular consideration of h.r. issues in the context of measures under Chapter VI and VII

## 2) Special institutions for the promotion and protection of human rights

### a) The Human Rights Council (UNHRC)

- a political subsidiary body of the UN General Assembly (→ GA Resolution 60/251)
  - established in 2006 as successor of the UN Commission on Human Rights
- no judicial powers
- can make statements, reports and recommendations but no binding decisions
- 47 members (states), elected for 3 years by the General Assembly with geo-regional proportional representation
- has president, vice-presidents, working groups, Advisory Committee and forums
- 3 annual sessions and special sessions
- CORRUPTED AND POLITICISED by human rights hostile members who abuse their position to sabotage human rights protection

### b) The High Commissioner for Human Rights (UNHCHR)

- with important Office of the High Commissioner for Human Rights (OHCHR)

### c) The High Commissioner for Refugees (UNHCR)

### d) The Office on Genocide Prevention and the Responsibility to Protect

## III. Global human rights treaties

- see detailed presentation in Diagram 1
- the *problem of legitimate interpretation*: "dynamic interpretation", "living instruments"?
  - the risk to cross the border between legal interpretation and legal politics
- no source of law but politically important: the Universal Declaration of Human Rights (UDHR) of 1948

### 1) The International Covenant on Civil and Political Rights (ICCPR) of 1966

- the most important global human rights treaty, with Human Rights Committee (HRC)

### 2) The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966

- with Committee on Economic, Social and Cultural Rights (CESCR)

### 3) Global human rights treaties on special subjects

- Convention on the Prevention and Punishment of the Crime of Genocide of 1948
- Slavery convention of 1926; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956
- Forced Labour Convention of 1930; Abolition of Forced Labour Convention of 1957
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) of 1984
- Convention relating to the Status of Refugees (Geneva Refugee Convention) of 1951
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1966
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979
- Convention on the Rights of the Child (CRC) of 1989
- Convention on the Rights of Persons with Disabilities (CRPD) of 2006
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) of 1990

## IV. Mechanisms to control the compliance with global human rights law

### 1) Instruments of the UN Human Rights Council

#### a) Universal Periodic Review (UPR)

- a political "peer review" to assess h.r. compliance of all UN member states in a cycle of 4.5 years (4<sup>th</sup> cycle has started in 2022)
- serves also to document achievements, exchange experiences on best practices and identify needs of technical assistance
- assessment with regard to standards in UN Charter, UDHR, intern. treaties to which the state is party and voluntary commitments of the state
- assessment by the *UPR Working Group* (all 47 Council members), assisted by a *Troika* of three members (states) as rapporteurs (selected through drawing of lots)
- assessment based on 3 reports and an interactive oral discussion:
  - national report of the state under review
  - OHCHR report on information from reports and recommendations of UN institutions and treaty bodies
  - OHCHR report on information from other states, national h.r. institutions, NGOs (!)
  - 3.5 hours interactive discussion during which other states can ask questions or give comments and recommendations
- *outcome report*, including the recommendations of other states, drafted by the Troika and adopted at a plenary Council session in which states and NGOs can comment
  - state must report at next UPR how it has implemented recommendations

#### b) Special Procedures

- on special topics or the situation in specific states
- by independent special rapporteurs, experts or working groups serving in their personal capacity
- report to the Council at least once a year
- may include country visits, thematic studies, expert consultations
- can in some cases also serve the protection of individuals

#### c) Complaint Procedure

- no procedure to protect individuals but to reliably identify gross h.r. violations
- complaints by victims, their families or NGOs are examined by a working group of the Advisory Committee and, if relevant, the Working Group on Situations who submits a report and recommendations to the Council, which then may give recommendations
- confidential and therefore not very effective

### 2) Control mechanisms under the UN human rights treaties

- control of compliance by expert *treaty bodies*
  - see for a list the **Links (C.) at the course website**
  - most important treaty body: Human Rights Committee (under ICCPR)
- procedures under different treaties often rather similar

#### a) **State reporting procedure**

- treaty states must submit periodically reports on the relevant measures they have adopted and on the progress made
- public examination of the reports by the treaty body in dialogue with the state
- recommendations of the treaty body in the form of *concluding observations*
- written follow-up procedure

- b) General comments of the treaty body**
  - on general questions concerning the interpretation and implementation of rights
  - important for the development of human rights doctrine
- c) Interstate complaints (optional)**
  - instrument until now not used
- d) Individual complaints (optional)**
  - under *optional protocols, not ratified by Indonesia*
    - OP ICCPR ratified by 116, OP CEDAW by 113 states!
  - applicant must claim to be victim of a violation of a treaty right
  - admissible only after all domestic remedies have been exhausted
  - case must not be examined under another international procedure
  - decision of the treaty body not legally binding
  - under some OP also collective complaints by groups or NGOs (e.g. OP ICESCR)
- e) Others**
  - inquiries on own initiative (e.g. under CAT, CEDAW)
  - preventive visits of detention facilities (under OP CAT)

## V. The complementary human rights protection by the international criminal justice

- 1993/94 - 2014 criminal prosecution of most serious human rights violations by the ad hoc International Criminal Tribunals for Rwanda and the former Yugoslavia
- since 2002 subsidiary criminal prosecution of genocide, crimes against humanity, war crimes and crimes of aggression by the *International Criminal Court (ICC)* in Den Haag
  - legal basis: Rome Statute of the ICC of 1998 (ratified by 123 states but not by USA, China, Russia, Iran)
  - own Office of the Prosecutor which can initiate proceedings
  - can only prosecute crimes committed within its territorial jurisdiction or by a national of a state that is within its territorial jurisdiction
  - CRITICISED by African states of disproportionately targeting African leaders