

§ 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 19th 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 ethnic 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 (3rd cycle since 2017; 4th cycle will start 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