

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
 - 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: also 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 involvement of children in armed conflicts, sale of children, child prostitution and 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
 - 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 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) International Convention for the Protection of All Persons from Enforced Disappearance [ICPPED] (2006)¹³
 - treaty body: Committee on Enforced Disappearances [CED]
 - control mechanisms: state reporting procedure, general comments of the CED, individual requests to find disappeared persons, interstate and individual complaints (optional)
 - j) Convention relating to the Status of Refugees [Geneva Refugee Convention] (1951)¹⁴
 - 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]

⁵ Ratified by 152 states.

⁶ Ratified by 171 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 2021.

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

¹⁰ Ratified by 187 states.

¹¹ Ratified by 182 states.

¹² Ratified by 56 states.

¹³ Ratified by 63 states (not by Indonesia).

¹⁴ Ratified by 146 states (not by Indonesia).

- 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

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)¹⁵ and 16 OPs
 - first geo-regional human rights regime, prepared by Council of Europe
 - confined to civil and political rights; some rights missing (freedom of occupation, 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 [ECHR]
 - 47 judges; has delivered more than 10.000 judgements
 - control mechanisms: interstate complaints (rare), *individual complaints* (very effective in practice), ECHR opinions (new: advisory opinions on request of high courts and tribunals)
 - ECHR sometimes affords just satisfaction (compensation) to the injured citizen
 - ECHR 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
- 2) European human rights treaties on special subjects
 - numerous human rights treaties prepared by the Council of Europe¹⁶; see in particular:
 - a) European Social Charter
 - original version of 1961¹⁷ and revised version with extended & enhanced rights of 1996¹⁸
 - economic and social rights; states only obliged to take measures to promote their realisation
 - monitored by Committee of Ministers of the Council of Europe
 - control mechanisms: state reporting procedure, general comments of C. M. (under revised version after examination by European Committee of Social Rights), complaints of NGOs (political procedure under OP)
 - 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 preventive control mechanisms, including *ad hoc visits* of places of detention
 - c) Framework Convention for the Protection of National Minorities [FCNM] (1995)
 - vaguely formulated obligations to respect, guarantee, promote, protect, recognize...
 - monitoring body: Committee of Ministers of the Council of Europe, assisted by Advisory Committee
 - control mechanism: state reporting procedure
 - d) European Charter for Regional or Minority Languages [ECRML] (1992)¹⁹
 - protection of linguistic diversity as part of the European cultural heritage
 - e) Convention on Human Rights and Biomedicine [CHRB] (1997)²⁰
 - prohibition of reproductive cloning of human beings and of making the human body and its parts a source of financial gain
 - ECtHR may be asked for opinions on interpretation
- 3) The Charter of Fundamental Rights of the European Union [ChFR]
 - the EU equivalent to the f.r. chapters in the national constitutions; necessary because EU exercises public power
 - binds EU institutions; binds member states when implementing and applying Union law
 - one of the most advanced fundamental rights catalogues in the world with a clear structure, new rights and various innovative approaches but no specific regulations of the fundamental rights' limits
 - elaboration was accompanied and influenced by a broad European public discourse

¹⁵ Ratified by all 47 member states of the Council of Europe.

¹⁶ See the list at the website of the Council of Europe, www.coe.int/en/web/conventions/full-list2.

¹⁷ Ratified by 27 European states.

¹⁸ Ratified by 36 European states.

¹⁹ Ratified by 25 European states.

²⁰ Ratified by 29 European states.

II. American human rights law

- 1) American Convention on Human Rights [ACHR] (1969)²¹
 - essential civil and political rights; central elements of the rule of law anchored as human rights
 - economic, social and cultural rights and prohibition of death penalty under OPs of 1988²² and 1990²³
 - treaty bodies: Inter-American Commission of Human Rights in Washington D.C., Inter-American Court for Human Rights [IACHR] 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)
 - IACTHR has declared national legislation, which violates the Convention, inapplicable²⁴
- 2) American human rights treaties on special subjects
 - 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 Charta] (1981)²⁵
 - civil, political, economic, social and cultural rights, right to asylum; central elements of the rule of law anchored as human rights; women' rights under Protocol (2003)
 - strongly influenced by the *African concept of human rights*: includes collective *rights of peoples* 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 [ACHPR]²⁶ in Arusha
 - control mechanisms: state reporting procedure, interstate complaints, opinions of the ACHPR (under ACHPR Prot.), individual complaints to the Commission (and then via submission by Commission, state or African GO to the Court)²⁷ or directly to the Court (optional)²⁸
- 2) African human rights treaties on special subjects
 - OAU-Convention Governing the Specific Aspects of Refugee Rights in Africa (1969), African Charter on the Rights and Welfare of the Child [ACRW] (1990), African Charter on Democracy, Elections and Governance (2007)

IV. Arab human rights law

- Arab Charter on Human Rights (2004)²⁹
 - prepared by the League of Arab States
 - criticised by UNHCHR Louise Arbour for not meeting international human rights standards
 - confirms equality between men and women only "within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws..." (art. 3(1))
 - allows death penalty for children (art. 7(1))
 - freedom of expression only if "exercised in conformity with the fundamental values of society" but not for critical views " (art. 32(2))
 - treaty body: Arab Human Rights Committee; projected: Arab Court of Human Rights
 - control mechanism: state reporting procedure; projected: interstate & NGO complaints but no indiv. complaints of citizens before the Arab Court of Human Rights

²¹ Ratified by 25 American states (not by the USA and Canada), in force since 1978.

²² Ratified by 17 American states; in force since 1999.

²³ Ratified by 13 American states.

²⁴ Cf. Inter-American Court of Human Rights, 18.09.2003, *Bulacio v. Argentina*, Nos. 117 f.

²⁵ Ratified by all 54 member states of the African Union.

²⁶ Established by the Protocol on the Establishment of the African Court on Human and Peoples' Rights of 1998 (ratified by 30 AU member states).

²⁷ Until 2020, ACHPR has only submitted 3 cases before the Court.

²⁸ Cf. art. 5(3), 34(6) ACHPR Prot.; so far accepted by 6 AU member states after four states have withdrawn.

²⁹ Ratified by 22 member states of the League of Arab States.

V. The missing Asian human rights law

- no Asian or ASEAN human rights treaties³⁰
- only a political declaration: *ASEAN Human Rights Declaration [AHRD] (2012)*³¹
 - 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 the missing of important rights (e.g. freedom of association) and 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". This can provoke misunderstandings because the constitutional rights must not be confounded with the natural, prestate "human rights" in philosophy or the "human rights" in international human rights treaties.
- monitoring and enforcement institutions: the 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, individual constitutional complaints before the constitutional court, individual complaints before national human rights institutions; 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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³⁰ 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.

³¹ www.asean.org/asean-human-rights-declaration.