

§ 2 International human rights law

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

1) The guarantee of an absolute minimum standard of human rights by mandatory customary public international law and its enforcement by the United Nations

a) Basic *ius cogens* human rights norms in customary public international law

- a global consensus on absolute minimum standards binding all human civilisations
 - a consensus starting already in the 19th century (prohibition of slavery) and growing since the end of the Second World War (prohibition of genocide etc.)
- but these norms only *prohibit gross violations of elementary human rights*
 - such as slavery, forced labour, genocide, ethnical cleansing, crimes against humanity...
 - no global consensus on all or all important human rights as *ius cogens*

b) The limited restriction of the sovereignty of the state by these norms

- an inherent conceptual limit of sovereignty
- the concept of *responsibility to protect*
 - a political concept adopted at the UN 2005 World Summit that reflects and operationalises the already existing legal obligations
 - "entails the prevention of such crimes, including their incitement, through appropriate and necessary means"
 - also refers to the responsibility of the international community

c) The problem to enforce 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

2) The general mission of the United Nations to promote and encourage respect for human rights (cf. art. 1 no. 3, 55 UN Charter)

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

3) The institutions of the United Nations 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

II. 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) as treaty body
- 2) The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966
- with Committee on Economic, Social and Cultural Rights (CESCR) as treaty body
- 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
 - not ratified by Indonesia
 - 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

III. 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**
- 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)

3) 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 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

IV. Geo-regional human rights law (overview)

1) European human rights law

a) The European Convention on Human Rights (ECHR) and its protocols

aa) The guaranteed rights (see → list from another course)

- essential civil and political rights and complementing prohibitions for an effective basic human rights protection
- some classical rights are missing but have been partially compensated in the jurisprudence (e.g. freedoms of press, arts, science derived from art. 10 [freedom of expression])
- a strong point: central elements of the rule of law anchored as human rights
 - abundant jurisprudence on these rights shaped and consolidated rule of law in Europe

bb) Specific limitation clauses for a sophisticated, differentiated h.r. protection

- many freedoms may only be subjected to restrictions that are
 - prescribed by law and
 - necessary in a democratic society (with pluralism, tolerance, openness etc.)
 - in the interests of national security or public safety, for prevention of disorder or crime, protection of health or morals or rights and freedoms of others
- problem: human rights restrictions for the protection of morals?
 - enforcement of morality not a legitimate mission of the state but task of society

cc) *The European Convention as a "living instrument"*

- in decades of coherent and consistent jurisprudence, ECtHR has developed the Convention to a powerful h.r. regime far beyond its wording
 - wide interpretation of the rights, closing gaps and compensating for missing rights
 - restrictive interpretation of the outdated limitation clauses
 - development of a consistent, sophisticated human rights doctrine

b) **The European Court of Human Rights (ECtHR)**

- an international court, whose decisions are legally binding
 - 47 judges; has delivered more than 10.000 judgements
 - can find that the Convention has been violated but cannot annul the attacked decision
- hears individual complaints by individuals, groups of persons or NGOs (art. 34 ff.)
 - only after domestic remedies have been exhausted
- also hears interstate complaints and gives opinions and advisory opinions (on request of high courts)
- can afford just satisfaction (compensation) to the injured party (art. 41)
- execution of judgements supervised by Council of Europe's Committee of Ministers (art. 46)

c) **European human rights treaties on special subjects (selection)**

- European Social Charter (original version of 1961 and revised version of 1996)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) of 1997
 - control mechanisms include ad hoc visits of places of detention
- Convention on Human Rights and Biomedicine (CHRB) of 1997
 - prohibits reproductive cloning of human beings and making human body source of financial gain

d) **The Charter of Fundamental Rights of the European Union**

- an own f.r. catalogue for the EU (since it also exercises public power)
- one of the most modern and innovative f.r. catalogues in the world
 - clear structure, classification of rights, contemporary and precise wording
 - anti-neoliberal approach (social rights, business restrictions etc.)
 - restrictions of biomedicine (art. 3(2)), freedom to conduct a business (art. 16), protection of cultural, religious and linguistic diversity (art. 22), rights of child and of elderly (art. 24, 25)
- weak point: a substandard system of f.r. limits

2) American human rights law

a) **The American Convention on Human Rights (ACHR) of 1969**

aa) *Guaranteed rights*

- essential civil and political rights, central rule of law elements; economic, social and cultural rights under OP of 1988
- prohibition of death penalty under OP of 1990
- IACtHR has declared incompatible national legislation inapplicable

bb) *Control mechanisms*

- state reporting procedure (for OP)
- state reports of the Commission
- opinions of the IACtHR (art. 64)
- interstate complaints (not in practice)
- individual complaints by individuals, groups of persons or NGOs (art. 44)
 - first petition and procedure before Commission, then, where appropriate, submission of the case to the Court by Commission or a state (art. 61)

b) **The Inter-American Commission of Human Rights in Washington D.C.**

- OAS institution and ACHR treaty body with 7 members
- monitors, works on priority thematic areas and deals with indiv. complaints

- c) **The Inter-American Court of Human Rights in San José (IACtHR)**
- international court and treaty body, whose decisions are legally binding
 - 7 part-time judges; jurisdiction only for states who recognized (art. 62))
 - cases can only be submitted by states and Commission (art. 61(1))
 - can adopt provisional measures and order remedial action or compensation (art. 63)
- d) **American human rights treaties on special subjects (selection)**
- Inter-American Conventions
 - to Prevent and Punish Torture (IACPPT) of 1985
 - on Forced Disappearance of Persons (IACFDP) of 1994 (→ indiv. complaints)
 - on the Prevention, Punishment and Eradication of Violence Against Women of 1994 (→ indiv. complaints)
 - against all Forms of Discrimination and Intolerance of 2013
 - on Protecting the Human Rights of Older Persons of 2015

3) African human rights law

- a) **The African Charter on Human and Peoples' Rights (Banjul Charta) of 1981**
- *African human rights concept* (collective rights of peoples, duties of the individual, importance of the community, elimination of foreign economic exploitation)
- aa) *Guaranteed rights*
- civil and political rights, central rule of law elements, economic, social and cultural rights
 - also right to asylum (art. 12(3))
 - rights of women under OP of 2003
 - collective rights of the peoples (equality, self-determination, development, peace and security, free disposal of natural resources etc., art. 19 et seq.)
- bb) *Control mechanisms*
- state reporting procedure (art. 62)
 - interstate complaints (art. 47 et seq.)
 - opinions of the ACtHPR (art. 4 ACHPR Protocol)
 - individual complaints (art. 56 et seq.)
 - first petition and procedure before Commission, then submission of the case to the Court by Commission, a state or an African government organisation
 - or direct submission to Court by NGO with observer status or citizen (2020 accepted by 6 states))
- a) **The African Commission on Human and Peoples' Rights in Banjul**
- ACHPR treaty body with 11 members
- c) **The African Court of Human and Peoples' Rights in Arusha (ACtHPR)**
- international court and treaty body, whose decisions are legally binding
 - 11 judges; jurisdiction only for states who ratified ACtHPR Protocol
 - cases can be submitted by Commission, states, government organisations, and also by NGOs and citizens (in 6 states)
 - can adopt provisional measures and order remedial action or compensation (art. 27)
 - execution of judgements monitored by AU Council of Ministers (art. 29(2))
 - 2020 crisis after 4 states have withdrawn from accepting direct individual complaints
- d) **African human rights treaties on special subjects**
- OAU-Convention Governing the Specific Aspects of Refugee Rights in Africa of 1969
 - African Charter on the Rights and Welfare of the Child (ACRW) of (1990)
 - African Charter on Democracy, Elections and Governance of 2007
 - provides for AU sanctions in case of case of unconstitutional changes of government

4) The controversial Arab human rights law

a) The Arab Charter on Human Rights of 2004

- prepared by League of Arab States
- essential civil and political rights, rule of law elements, some social, economic and cultural rights; control mechanism: state reporting procedure
- *falls behind universal human rights standards*
 - men and women only equal "within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws..." (art. 3(3))
 - allows death penalty for children (art.7(1))
 - freedom of expression only if "exercised in conformity with the fundamental values of society" (art. 32(2))

b) The projected Arab Court of Human Rights in Manama City (Bahrain)

- see Statute of the Arab Court of Human Rights of 2014 (not yet in force)
- criticised because cases can only be submitted by states and by NGOs accredited in the ' concerned state (optional)

5) The missing Asian human rights law

- no Asian or ASEAN human rights treaty to date but ASEAN principles include adherence to rule of law and human rights (cf. art. 2(2) lit. h, i ASEAN Charter)
 - until the 90s, "Asian values" were invoked to reject the idea of human rights
- the ASEAN Human Rights Declaration (AHRD) of 2012
 - a political declaration with little practical impact
 - prepared by a inter-governmental body without public discourse or consultation of the civil society
 - civil and political rights (art. 10 et seq.), justice rights (art. 5, 20), economic, social and cultural rights (art. 26 et seq.)
 - important rights missing (e.g. freedom of associations)
 - some innovative approaches (e.g. right to safe drinking water and sanitation, art. 28 lit. e)
 - criticised for clauses that dilute or restrict the significance or substance of the rights (cf. art. 6, 7)