

HUMAN RIGHTS AND FUNDAMENTAL RIGHTS  
AND THEIR IMPACT ON THE CIVIL LAW SYSTEM

## 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 on human rights, today a *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: a constitutional norm introducing slavery or authorising ethnic cleansing would be void
- However, *ius cogens* only prohibits the most serious violations of elementary rights (e.g. genocide, slavery, enforced disappearance, ethnic cleansing and torture); the details are **CONTROVERSIAL**.
- These minimum standards can be enforced by measures of the UN Security Council under Chapter VI, VII UN Charter; violations may be prosecuted by the International Criminal Court; the permissibility of a *humanitarian intervention* without the authorisation of the UN Security Council is **CONTROVERSIAL**.

##### II. Charter of the United Nations

- mission of the UN to promote and encourage respect for human rights (cf. art. 1 no. 3, 55 UN Charter)
  - includes the preparation of global human rights treaties
  - special UN institutions: Human Rights Council [UNHRC], High Commissioner for Human Rights [UNHCHR], High Commissioner for Refugees [UNHCR]
- Security Council takes human rights issues into consideration when taking measures under Chapter VI and VII UN Charter
  - serious systematic violations of human rights represent a threat to the peace in the sense of art. 39 UN Charter

##### III. Global human rights treaties

- the problem of the correct interpretation of international human rights treaties: "dynamic interpretation"? "Living instruments"? The danger of exceeding the boundary between legal interpretation and legal politics
- 1) *International Covenant on Civil and Political Rights [ICCPR]* (1966)<sup>1</sup>
    - 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 the Second Optional Protocol (not ratified by Vietnam)
    - 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, not used in practice), *individual complaints* under the (First) Optional Protocol (not ratified by Vietnam; the "views" of the HRC are not legally binding)
  - 2) *International Covenant on Economic, Social and Cultural Rights [ICESCR]* (1966)<sup>2</sup>
    - confirms the right to self-determination of peoples (art. 1)
    - comprehensive recognition of economic, social and cultural rights
      - includes even the right of everyone to an adequate standard of living for himself and his family, art. 11
    - obligation limited to take steps to achieve the realization of the rights progressively and without discrimination (art. 2(1, 2))

<sup>1</sup> Ratified by 168 states (not by China).

<sup>2</sup> Ratified by 162 states (not by the USA).

- monitoring body: Committee on Economic, Social and Cultural Rights [CESCR]
  - Control mechanisms: state reporting procedure (with public examination of the reports and recommendations of the CESCR in the form of concluding observations), general comments of the CESCR; individual complaints under the Optional Protocol (ratified by 14 states, not by Vietnam and Germany)
- 3) Global human rights treaties on special subjects (selection)
- a) Convention on the Prevention and Punishment of the Crime of Genocide (1948)<sup>3</sup>
    - 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)<sup>4</sup> (signed in 2013 but not yet ratified by Vietnam)
    - narrow concept of torture (art. 1)
    - worldwide punishment of torture activities (art. 4); orders from superiors cannot be invoked as a justification of torture (art. 2(3))
    - treaty bodies: Committee against torture [CAT]; Subcommittee on Prevention of Torture [SPT] (created by Optional Protocol)
    - control mechanisms: state reporting procedure, general comments of the CAT; interstate complaints (optional, not used in practice), individual complaints (optional), inquiries (on own initiative), visits by the SPT (has unrestricted access to all places of detention)
  - d) *International Convention on the Elimination of All Forms of Racial Discrimination [ICERD]* (1966)<sup>5</sup>
    - obligation to pursue an active policy of eliminating racial discrimination and promoting understanding among all races
    - treaty body: Committee on the Elimination of Racial Discrimination [CERD]
    - control mechanisms: state reporting procedure, general comments of the CERD, early warning procedures (to prevent situations from escalating), interstate complaints (not used in practice), individual complaints (optional)
  - e) *Convention on the Elimination of All Forms of Discrimination against Women [CEDAW]* (1979)<sup>6</sup>
    - 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
      - including measures to modify the social and cultural patterns of conduct of men and women
    - 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 (according to Optional Protocol of 1999, not ratified by Vietnam)
  - f) *Convention on the Rights of the Child [CRC]* (1989)<sup>7</sup>
    - 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
    - obligation to take measures to combat the illicit transfer and non-return of children abroad
    - Optional Protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography (2000)<sup>8</sup>
    - treaty body: Committee on the Rights of the Child [CRC]
    - control mechanisms: state reporting procedure, general comments of the CRC; individual complaints by children (see Optional Protocol of 2011, entered into force in 2014)
    - see also the Worst Forms of Child Labour Convention (1999)<sup>9</sup> (prepared by ILO)
  - g) *Convention on the Rights of Persons with Disabilities [CRPD]* (2006)<sup>10</sup>
    - obligation to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability
    - obligation to ensure accessibility
    - principle of full and effective participation and inclusion in society
    - special clauses on women and children with disabilities
    - treaty body: Committee on the Rights of Persons with Disabilities [CRPD]
    - control mechanisms: state reporting procedures, individual complaints under the Optional Protocol (not ratified by Vietnam)

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<sup>3</sup> Ratified by 146 states.

<sup>4</sup> Ratified by 155 states.

<sup>5</sup> Ratified by 177 states.

<sup>6</sup> Ratified by 188 states. See on this treaty and other treaties guaranteeing women's rights Kälin/Schnegg, "Women's Human Rights' App (W'sHR App), last updated 2014 (Android App, free download in the Google Play Store).

<sup>7</sup> Ratified by 194 states (not by the USA).

<sup>8</sup> Ratified by 156 respect. 167 states.

<sup>9</sup> Ratified by 179 states.

<sup>10</sup> Ratified by 147 states.

- h) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families [ICRMW] (1990)<sup>11</sup> (not ratified by Vietnam)
  - 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 complaints (optional, not used in practice), individual complaints (optional)
- i) Convention relating to the Status of Refugees [Geneva Refugee Convention] (1951)<sup>12</sup> (not ratified by Vietnam)
  - and Protocol (1967); see also the Convention relating to the Status of Stateless Persons (1954)
  - important sources of international humanitarian law with strong connection to human rights
  - rights in the state of residence, principle of non-refoulement
  - monitoring body: UN High Commissioner on refugees [UNHCR]
- 4) no source of law: *Universal Declaration of Human Rights [UDHR]* (1948)
  - no international treaty but a resolution of the UN General Assembly
  - not a legal but a political document (→ "soft law")
  - but 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)<sup>13</sup>
  - the first geo-regional human rights regime
  - the Convention is complemented by 16 optional protocols; it is confined to essential civil and political rights but more rights are guaranteed in the Optional Protocols Nos. 1, 4, 6, 7, 12 and 13
  - absolute prohibition of death penalty (even in times of war or emergency) by Optional Protocol No. 13 (2002)
  - treaty body: *European Court of Human Rights* in Strasbourg [ECHR]
  - control mechanisms: interstate complaints (rare), individual complaints (very effective in practice), opinions of the ECHR; in case of a violation of rights, the ECHR can afford just satisfaction (compensation) to the injured party
  - the ECHR has used the Convention as a *living instrument*, thus closing the gaps between the various guarantees and developing a sophisticated human rights doctrine that even includes a doctrine of duties of protection (obligations positives)
  - in Austrian law, the Convention enjoys the rank of constitutional law
- 2) European human rights treaties on special subjects
  - numerous human rights treaties prepared by the Council of Europe<sup>14</sup>
  - see in particular the European Social Charter (1961, revised 1996), which contains social and economic rights, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [ECPT] (1997), the Framework Convention for the Protection of National Minorities (1995) and the Convention on Human Rights and Biomedicine (1997)
- 3) Human rights in European Union law
  - have the same function as the fundamental rights in the constitution of the states; they are necessary because the European Union largely exercises supranational public power
  - binding the institutions of the European Union; binding the member states only when they are implementing and applying European Union law
- a) The Charter of Fundamental Rights of the European Union
  - one of the most advanced human rights catalogues in the world with a clear structure and various innovative approaches
  - the elaboration has been accompanied and influenced by a broad European public discourse
  - includes a chapter on solidarity (social rights)
  - includes rights of children, of the elderly and of persons with disabilities
  - includes fundamental prohibitions, which serve the protection of human rights (e.g. the prohibition of reproductive cloning of human beings and the prohibition of making the human body and its parts as such a source of financial gain)
  - lacks specific regulations of the fundamental rights' limits

<sup>11</sup> Ratified by 47 states.

<sup>12</sup> Ratified by 145 states.

<sup>13</sup> Ratified by all 46 member states of the Council of Europe.

<sup>14</sup> See the list at the website of the Council of Europe, <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?MA=44&CM=7&CL=ENG>.

- b) Complementing general principles of European Union law
- developed in the jurisprudence of the European Court of Justice in Luxembourg [ECJ]

## II. American human rights law

- 1) American Convention on Human Rights [ACHR] (1969)<sup>15</sup>
  - essential civil and political rights; economic, social and cultural rights according to the Optional Protocol (1988)
  - treaty bodies: Inter-American Commission of Human Rights, Inter-American Court for Human Rights [IACHR] in San José
  - control mechanisms: interstate complaints (optional, not in practice), individual complaints (also by NGOs, first before the Commission, then before the IACHR), state reports of the Commission, state reporting procedure (for OP), opinions of the IACHR; in case of a violation of rights, the IACHR can order remedial action or compensation
  - the IACHR has declared national legislation, which violates the Convention, inapplicable<sup>16</sup>
- 2) American human rights treaties on special subjects
  - see the Inter-American Conventions to Prevent and Punish Torture (1985), on Forced Disappearance of Persons (1994) and on the Prevention, Punishment and Eradication of Violence Against Women (1994)

## III. African human rights law

- 1) African Charter on Human and Peoples' Rights [Banjul Charta] (1981)<sup>17</sup>
  - civil, political, economic, social and cultural rights, right to asylum
  - strongly influenced by the *African concept of human rights*: includes collective rights of the peoples (to self-determination, development, peace etc.) and duties of the individual, stresses the importance of the community
  - special rights of women under an Optional Protocol (2003)
  - treaty bodies: African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights [ACHPR] in Arusha
  - control mechanisms: state reporting procedure, interstate complaints, individual complaints (restricted, must be accepted by the Commission); opinions of the ACHPR (under OP); in case of a violation of rights, the ACHPR can order remedial action or compensation (under OP)
- 2) African human rights treaties on special subjects
  - see the OAU-Convention Governing the Specific Aspects of Refugee Rights in Africa (1969), the African Charter on the Rights and Welfare of the Child (1990) and the African Charter on Democracy, Elections and Governance (2011)

## IV. Arab human rights law

- Arab Charter on Human Rights (2004)
  - prepared by the League of Arab States; replaces a controversial religious Charter of 1994 that never came into force
  - confirms equality between men and women
  - treaty body: Arab Human Rights Committee
  - control mechanism: state reporting procedure

## V. The missing Asian human rights law

- no Asian or ASEAN Convention on Human Rights or other Asian human rights treaties
- no source of law: *ASEAN Human Rights Declaration [AHRD]* (2012)<sup>18</sup>
  - just a political declaration, but potentially important in the Southeast Asian dialogue on human rights
  - 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 failing to include important rights (e.g. the freedom of association) and for including clauses that dilute or restrict the significance or substance of the human rights (e.g. art. 6, 7)

<sup>15</sup> Ratified by 25 American states (not by the USA and Canada), in force since 1978.

<sup>16</sup> Cf. Inter-American Court of Human Rights, 18.09.2003, *Bulacio v. Argentina*, Nos. 117 f.

<sup>17</sup> Ratified by all 53 member states of the African Union.

<sup>18</sup> [www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration#](http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration#).

## C. National human rights law

- With regard to the *sovereignty* and the corresponding *ultimate responsibility* of the state, the *national fundamental rights* are the most important source of law for an efficient protection of human rights-
- Nowadays in most states the fundamental rights are granted as directly binding constitutional rights in a *catalogue of fundamental rights* in the national constitution (see for Vietnam Chapter II [art. 14 et seq.] of the Constitution of 2013; see for Germany art. 1 et seq., 20(4), 33, 38, 101 et seq. Basic Law). In federal states, they may also be granted in the constitutions of the federated states (see the examples of the USA and Germany).
- monitoring and enforcement institutions: courts, constitutional courts, ombudsmen/human rights commissioners, special national human rights institutions
- control mechanisms: respecting and enforcing f.r. when providing legal protection (all courts are directly bound to the f.r.), constitutional review (preventive/subsequent, abstract/concrete), constitutional complaints (individual complaints before the constitutional court), individual complaints before the ombudsman or national human rights institution; in practice, a thorough instruction of all judges in f.r. doctrine is the most effective way to ensure the protection of human rights in a state

More information on this course at [www.thomas-schmitz-hanoi.vn](http://www.thomas-schmitz-hanoi.vn). For any questions, suggestions and criticism please contact me in my office (room A.603) or via e-mail at [tschmit1@gwdg.de](mailto:tschmit1@gwdg.de).

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