



# Human rights 2- Traditional levels of protection: Who is protecting our human rights?

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Human Rights in a Comparative  
Perspective 2 - Levels of protection

# The End of History and the Last Trouble

- Why do we need International Law then?
- What topics were not solved by domestic HR bills?

# The End of History and the Last Trouble

- Rights of foreigners
  - What to do after domestic remedies are exhausted?
  - Consular protection
  - International arbitration and International Law protection is better than „gunboat diplomacy“
  - Jay Commission 1794
  - Permanent Court of International Justice Case concerning certain German interests in Polish Upper Silesia – 1926 – human being has HRs wherever she is
  - UN GA Declaration on the human rights of individuals who are not nationals of the country in which they live

# The End of History and the Last Trouble

- Protection of diplomats
  - Since ancient Egypt
  - On one hand protection of communication between states
  - On the other hand protection of individuals realizing it
  - Now Vienna Convention on Diplomatic Relations 1961, and Vienna Convention on Consular Relations 1963

# The End of History and the Last Trouble

- Humanitarian Law – when?
  - Building on laws of war by Grotius - De jure belli ac pacis
  - Paradox of Jules Verne era
  - Lieber Code 1864 – American Civil War
  - Henry Dunant: A Memory of Solferino, International Committee of the Red Cross 1863, First Geneva Convention 1864
  - 1899, 1907 Haag, 1929 Geneva Conventions

# The End of History and the Last Trouble

- Humanitarian Law today: 4 Geneva Conventions:
  - First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1864
  - Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1906
  - Third Geneva Convention relative to the Treatment of Prisoners of War, 1929
  - Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949

# The End of History and the Last Trouble

- Humanitarian Law today: 3 Protocols:
  - Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts
  - Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts
  - Protocol III (2005) relating to the Adoption of an Additional Distinctive Emblem (for medical services)

# The End of History and the Last Trouble

- Humanitarian Law today: Lowest common denominator of HR for time of war:

- Art. 13 -14 of Third Geneva Convention: „*Article 13*

*Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.*

*Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.*

*Measures of reprisal against prisoners of war are prohibited.*

*Article 14*

*Prisoners of war are entitled in all circumstances to respect for their persons and their honour.*

*Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.*

*Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires.*



# The End of History and the Last Trouble

- Slavery:
  - biggest absurdity of modern age
  - Lord Mansfield: Somerset case (1772):  
*"Slavery is so odious, that nothing can be found to support it"*.
  - Vienna Congress 1815
  - Bilateral treaties with UK on prosecution of slavery on high seas
  - Convention to Suppress the Slave Trade and Slavery 1926

# The End of History and the Last Trouble

## ■ Minorities:

- Vienna Congress 1815 – do protect your Poles....
- Turkey, be nice to your minorities!
- Case Concerning the Question of Minority Schools in Albania (1935)
- Minorities as pioneers of some HRs: right to education, freedom of religion

# The End of History and the Last Trouble

- Refugees:
  - Huge trouble after WW1 (together with stateless people: Russian, Armenian and others)
  - Nansen International Office for Refugees 1930
  - Refugee Convention 1933
  - Convention relating to the Status of Refugees 1951 + UNHCR

# The End of History and the Last Trouble

- International Labour Organization 1919: risk of a race to the bottom at work conditions
  - Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week 1919
  - Convention concerning the Employment of Women before and after Childbirth 1919
  - Convention concerning the Age for Admission of Children to Employment in Agriculture 1921

# The End of History - 1945


- New structure after WW2 and its levels – „postwar union“ – perspective of anonymous European state...
- Instruments, organs, procedures
- General versus special organs
- Natural rights over positive rights
- Western versus socialistic versus Third world perspective
- Recent situation – literal introduction

# Recent structure – domestic level

- Literal trailer
- National bills of rights
- Courts
- Constitutional court
- Ombudsman
- Main function of all organs in modern liberal state.....

# Recent structure – EU

- Be patient....;-)



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# Recent structure – regional general



## ■ Council of Europe

- 1949
- 47 members (Europe – except of Belarus)
- Committee of Ministers
- Secretary General - Thorbjørn Jagland
- Commissioner for Human Rights



# Recent structure – regional general

- ECHR – confusing abbreviation – Court or Convention
- Court: President Jean-Paul Costa
- 47 judges
- 5 sections or Grand chamber



# Recent structure – regional general

- ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms + 14 Protocols (procedural and material)
- Before Protocol 11 – Court and Commission
- Competences (no quashing...): Art. 41:
  - *„If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.“*
- Victim of its own success – 57100 applications in 2009!



# Recent structure – regional special

- Under umbrella of CoE
  - European Social Charter 1961 (European Committee of Social Rights)
  - European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1967 (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment)
  - Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine 1997 (Steering Committee on Bioethics)
  - European Charter for Regional or Minority Languages 1992 (Committee of experts)
  - and many more....

# Recent structure – super-regional

- The Organization for Security and Co-operation in Europe (OSCE):
  - 56 member states „from Vancouver to Vladivostok“
  - Set up to guarantee security in Cold war 1975
  - 3 baskets: military and political; economic cooperation and.....HR! (Charta 77)
  - What are they used for now.....?

# Recent structure – other regions

- American Convention on Human Rights (Pact of San José) 1969: Inter-American Commission on Human Rights and Inter-American Court of Human Rights (Organization of American States)
- African Charter on Human and Peoples' Rights (Banjul Charter) 1979: African Commission on Human and Peoples' Rights and African Court on Human and Peoples' Rights (African Union)
- Cairo Declaration of Human Rights in Islam 1990 (Organisation of the Islamic Conference)
- Inspired by CoE...

# Recent structure – United nations – Charter based bodies

- Documents?
- Charter + Universal Declaration of Human Rights 1948 (what is its character? Is it binding?)



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# Recent structure – United nations – Charter based bodies

- Preamble:

*"The General Assembly Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction."*

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) – thanks to *usus longaevis* it is now customary law

# Recent structure – United nations – Charter based bodies

- Bodies?
- UN General Assembly
- UN Security Council – both maintaining „peace and security“ – broad interpretation
- ICJ
- UNHCR
- Office of the United Nations High Commissioner for Human Rights (since 1993) – coordinates human rights activities throughout the UN System - now Navanethem Pillay



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# Recent structure – United nations – Charter based bodies

- Human Rights Council (plus Advisory Committee and its Working groups): established in 2006 (UN GA resolution A/RES/60/251) as a successor to the United Nations Commission on Human Rights
  - Universal periodic review of all UN states
  - Complaints procedure (let us try it)
  - Special Procedures (on topics like Arbitrary Detention or country – which one is most often condemned?) – answer is in political bloc voting....

# Recent structure – United nations – Treaty based bodies

- General: The Human Rights Committee (CCPR) – monitoring implementation of International Covenant on Civil and Political Rights 1966 (ICCPR) and its 2 optional protocols (on individual complaints and on abolishment of the death penalty); 18 members, experts nominated by states: closed meetings, output is opinion...

# Recent structure – United nations – Treaty based bodies

## ICCPR „Article 2

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.*
3. *Each State Party to the present Covenant undertakes:*
  - (a) *To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
  - (b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
  - (c) *To ensure that the competent authorities shall enforce such remedies when granted."*

# Recent structure – United nations – Treaty based bodies

## ■ Special:

- Committee on Economic, Social and Cultural Rights (CESCR) – monitors implementation of the International Covenant on Economic, Social and Cultural Rights 1966 by its States parties: soft law, reports to UN Economic and Social Council
- on 10 December 2008 the General Assembly unanimously adopted an Optional Protocol (GA resolution A/RES/63/117) to the International Covenant on Economic, Social and Cultural Rights which provides the Committee competence to receive and consider communications, now open to signatures

# Recent structure – United nations – Treaty based bodies

## Article 2 ICESCR:

- „1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*
- 2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
- 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to nonnationals.”*

# Recent structure – United nations – Treaty based bodies

- Michal Bobek:

*„Constitutional texts are the most difficult ones to be compared on the level of simple texts. In a comparative assessment of for instance human rights issues, the mere text says little. It is the context and the case-law which defines its content. A strong example here would be the various socio-economic rights, which may, at their face value, read the same in perhaps every second national bill of rights. However, depending on the fine fabric of the case law, statutes and derived legislation, a "right to adequate care for senior people" might mean, in one jurisdiction, a full-fledged system of social benefits, in other just a "not starving to death guaranty", in a third absolutely nothing and, in the fourth one, which does not have such right in its list at all, there might actually be a very provident state whose duties to provide for older people were derived from human dignity or equality."*

# Recent structure – United nations – Treaty based bodies

## ■ Special

- Committee on the Elimination of Racial Discrimination (CERD) 1965
- Committee on the Elimination of Discrimination Against Women (CEDAW) 1979
- Committee Against Torture (CAT) & Optional Protocol to the Convention against Torture (OPCAT) - Subcommittee on Prevention of Torture (SPT) 1984
- Committee on the Rights of the Child (CRC) 1989
- Committee on Migrant Workers (CMW) 1990
- Committee on the Rights of Persons with Disabilities (CRPD) 2008
- International Convention for the Protection of All Persons from Enforced Disappearance 2006 – not in force yet

# Recent structure – United nations – Treaty based bodies

- Competences of committees:
  - General comments – about concrete rights
  - Reports procedure: general reports from states every X years (for CRC, CMW the only procedure)
  - Inquiry procedure – visiting the countries (opt-out possibility)
  - Examination of inter-state complaints – not used
  - examination of individual complaints (CCPR, CERD, CAT and CEDAW, now CESCRC) – Opt-in provision



# Recent structure – United nations – Treaty based bodies

- Why are they unpopular?
- Several reasons:
  - Too many of them (back to Kafka) – not coordinated
  - Too many reports, not binding, no real power
  - Often politicized: HR Council
  - General comments are useful (by balanced experts)

# Other universal bodies

- International Criminal Court (ICC) - Rome Statute of the International Criminal Court 1998 (since 2002 effective) – after specialized tribunals
- International Labour Organization 1919