

OSCE/ODIHR
Supplementary Human
Dimension Meeting (SHDM)

“Rule of Law in the Promotion and Protection
of Human Rights”, Hofburg, Vienna
11-12 July 2013

*Very short - 10 mn? - introduction to
impossibly wide ranging:*
Effective National and International
Instruments to Protect Human Rights and
Prevent Human Rights Violations: Best
Practices, Current Challenges and
Solutions

by
Hans Thoolen

thoolen © July 2013

know who is talking

- Born 1947, Netherlands
- Started Dutch Lawyers Committee for human rights (national level)
- International Commission of Jurists, Geneva (international NGO)
- Director of National HR Institute (SIM) and co-founder HURIDOCS
- UNHCR: Geneva, Stockholm, Uganda, 50th anniversary (cartoon)
- Now retired and on Board of NGOs such as Martin Ennals Award for HRDs and True Heroes, Films for HRDs
- Blog: <http://thoolen.wordpress.com>



Some broad distinctions

- International (regional) human rights law
applies mostly in times of peace, but....
- Humanitarian law
applies mostly to war and conflict, but....
- International criminal law
holds individuals responsible for violations
- Refugee law (*applies to category without state protection – in that sense special*)

They are all designed to protect human dignity, are interlinked and complement each other.

Gva Coventions
do not contain
definitions

WAR & PEACE

- DISTINCTION **IMPORTANT** ^{h2}

Can human rights be limited during war/conflict?

Does humanitarian law apply (POW status)?

- DISTINCTION **DIFFICULT**

Level of violence (vs normal criminal law)

International conflict or internal disturbance

“Humanitarian” Intervention

- Highly controversial. Some think: misnomer and should not be taught in law course. Others see it as emerging norm
- Use of force legal only if authorised by SC under Ch. VII or in ‘self-defence’ (art 51)
- What about India in East Pakistan/Bangladesh, Tanzania in Uganda, Vietnam in Cambodia, NATO in Yugoslavia, USA in Iraq (2nd time)
- Droit d’ingérence – R2P (Myanmar 2008, DRC)

- h2** Common Article 3 to all 4 Geneva Conventions. Prohibits “at any time and in any place whatsoever” the use of specific acts on persons taking no active part in hostilities, including military who have laid down arms, have become wounded or detained. Acts mentioned: violence to life and person, including murder, mutilation, cruel treatment, and torture, and outrages upon personal dignity, such as humiliating and degrading treatment. Protected persons must be treated humanely at all times.

hans thoolen, 26/06/2013

Universality of human rights

- not confuse with *universalisation*
- all societies notions of justice, fairness
- until mid 20th century human rights at national level, laid down in ‘revolutionary’ documents, e.g. the American Declaration (1776) and the French Declaration (1789) and earlier: Magna Charta, Dutch Republic.
- Moreover, human rights concepts constantly changing. e.g. slavery considered acceptable for many centuries; franchise of women less than 85 years; new treaties / case law (e.g. sexual orientation, disabled)

international human rights law

- **Remember:** Individuals long time not a subject of international law; only states and international organisations bearer of rights. ^{h1}
- **Remember:** After World War II new notions develop, but States continue to cling to notion of ‘non-intervention in domestic affairs’ (art 2 (7) UN Charter “essentially”).
‘(interference’ vs ‘intervention’) ^{h4}

Today (after slow developments and explicitly in **Vienna !** **(20 years ago)**) accepted that human rights are legitimate int’l concern; moreover Security Council may use the threat to international peace and security.

Slide 8

- h1** 'States' for thousands of years treated with each other: agreements, treaties, conventions, protocols etc and so developed customary law. In this context agreed to give each others' citizens certain rights when abroad, (e.g. through diplomatic missions)
Break-up of empires (Austro-Hungarian, Ottoman) created 'national' minorities for which States agreed special protection regimes during League of Nations.
hans thoolen, 26/06/2013
- h4** OSCE participating States have accepted that implementation of OSCE human rights commitments is a matter of direct and legitimate concern to all participating States and is not an internal affairs (e.g. Preamble to the Moscow Document 1993)
hans thoolen, 28/06/2013

DEFINITION OF HUMAN RIGHTS

- Not in UN Charter itself.
- 1946 ECOSOC asks newly created Commission on HR to draft an “international bill of human rights”.
- Only 2 years later, 10 December 1948, GA meeting in Paris, adopts UDHR! 30 articles, brief and ‘generous’, but not legally binding instrument
- 20 years later (1966) two Covenants ready (separate: civil and political, AND social, economic and cultural rights). Another 10 years, 1976, for entry into force. Now appr *160 states parties!*

In short, human rights nowadays are:

1. Human rights standards codified in international and regional human rights law through treaties and conventions (and soft law instruments)
2. Incorporated into domestic law (constitutions, statutes, policies)
3. constitute a set of performance standards against which duty-bearers at all levels of society – but especially organs of the State – can be held accountable

Human Rights are not absolute

Limitation and Derogation

- **Limitation:** UDHR and most Treaties say: if determined by law, solely for the purpose of meeting the just requirements of morality, public order and the general welfare in a democratic society, and the rights and freedoms of others
- **Derogation:** Art 4 ICCPR: During **Public Emergency** which **threatens life** of nation, **officially proclaimed** and **notified to SG** of the UN, States may derogate to the extent **strictly required**. Para 2 stipulates that certain rights may never be suspended (such as the rights to life, freedom from torture, etc).

Limitations continued

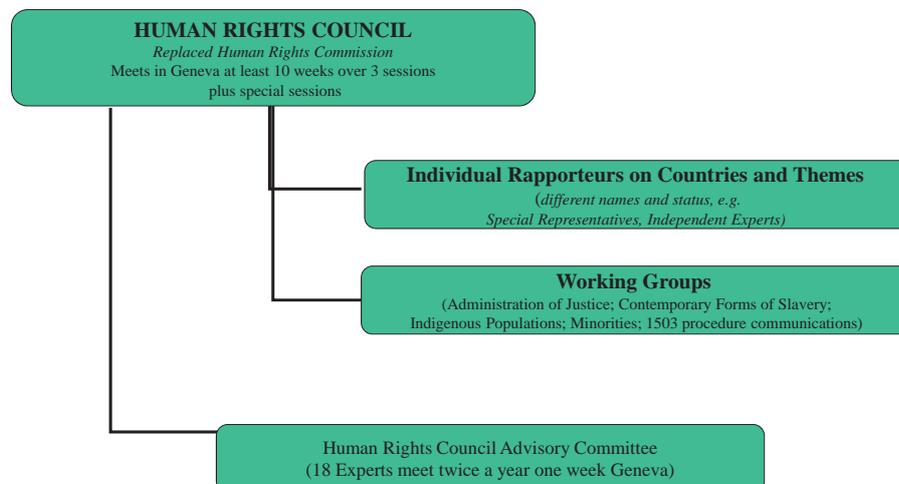
- international **case law** has determined that:
 - these limitations need to be interpreted strictly
 - only the grounds mentioned in the article can be used, e.g. national security -which is mentioned only for the other rights- cannot be used to justify limitations on the manifestation of one's religion.
 - the limitations must be directly related to and proportionate
 - the limitations must be 'limitations' and not completely wipe out right
 - the limitations cannot be imposed for discriminatory purposes.
- **Two other grounds for restriction art 20 ICCPR:** "shall be prohibited by law" any "propaganda for war", and any "advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence"

Mechanism in the UN

Important distinction!!

- **Charter-based mechanisms**
 - All countries (UN membership)
 - Not legally binding
 - Politics heavy role
- **Treaty-based mechanisms**
 - Only States Parties (ratification)
 - Legally-binding (but..)
 - Less political (experts)

CHARTER-BASED MECHANISMS



Treaty monitoring

- Periodic Reporting
 - Almost all; expert bodies;
- Inter-State Complaints
 - Almost all, but rarely used
- Individual complaints
 - Usually optional
- Preventive visits
 - optional protocol torture convention took effect in June 2006 (functions already at European Regional level)

Novelty in UN: UPR (Universal Periodic Review)

- derived from GA resolution 60/251 creating the Council
- Avoid selectivity and ‘politicisation’ (catchphrase)
- Universal Scope: review every State of the United Nations (not just members of Council) every 4 years
- Encourage cooperation and ‘dialogue’; *share best practices*
- Complement and not duplicate other mechanisms (SP and TB and capacity to react to urgent situations)
- Engage all stakeholders (*including NGOs*)
- Broad Basis for review: UN Charter, UDHR, HR instruments to which State is party, Voluntary pledges, Humanitarian law

International criminal law

- No impunity; no amnesty for gross violations of int'l humanitarian law and – recently – of certain human rights
 - Nuremberg and Tokyo 1945
 - ICTFY 1993 and ICTR 1994 (SC creation!)
 - the 'hybrids' Sierra Leone, Cambodia, Timor, Iraq (Afghanistan, Lebanon possibly)
 - **Statute of ICC** adopted in Rome in 1998 and **entered into force 1 July 2002** – **seat** the Hague (2005 LRA, DRC, and Darfur with SC mandate)

Possible advantages of regional systems over global one

- more authentic expression of values and historical peculiarities of a particular region, resulting in more spontaneous compliance
- peer pressure is easier exerted in a smaller circle of likeminded countries
- easier access for victims
- But many regional systems outside Europe show weaknesses

European Convention (ECHR) and 14 Protocols

- 1953 entered into force. Commission and Court merged into a single and permanent Court in 1998.
- Originally only the **State complaint** procedure mandatory (there have been only 12; still, more than under any other treaty)
- The **individual complaint** procedure and jurisdiction Court were optional. Only the Commission or the State concerned could bring cases to Court. The Committee of Ministers (political body) decisions in all other cases
- 1998 big change. Jurisdiction and complaint procedures mandatory.
- Full-time judges try cope with increasing number of cases(64,500 allocated to a judicial formation in 2011 - on 31 January 2012 record of 152,000 pending applications)

h7

European Court continued

- judges (one from each country), elected by Parliamentary Assembly from list of 3 candidates, 6 years renewable.
- committee of 3 judges may strike out –unanimously – case as inadmissible, procedurally unsound (e.g. from the moment of exhausting domestic remedies, *6 months to file a complaint*).
- Chamber of 7 judges decides on the admissibility and merits of remaining cases. On average only 5% reaches decision on merits. Major cases referred to the Grand Chamber.
- Decision of the Court legally binding but enforced by domestic authorities. The Court can only award reparation.
- binding jurisdiction and interpretation of the ECHR by a truly independent court major influence on the standards of human rights in Europe.

Slide 19

- h7** Factors for large number: European system is now well-known among lawyers. New members often miss functioning domestic system (half the complaints are from former East!).
hans thoolen, 09/07/2013

Helsinki Final Act, 1975, “human dimension” of security

- Early principles expanded and reinforced in follow-up agreements: human rights as a central element of OSCE.
- The OSCE commitments in the field of human rights are broad and detailed, some go beyond those adopted by UN
- OSCE commitments adopted by consensus are immediately politically binding (cf UN standards to be ratified before enter into force)

Enforcement OSCE

- No court or individual petition body to enforce the implementation of OSCE commitments.
- This reflects the political character of the OSCE and the intention not to duplicate existing mechanisms

OSCE INDIVIDUAL HUMAN RIGHTS COMPLAINTS HANDBOOK- 2003_(update?)

- Meant for field personnel to assist field operations in making a ‘sound judgement’. Contains elaborate and practical information, e.g. principle of ‘*do no harm*’, i.e. it should be clear that any action taken by the mission will not worsen the situation for the victim.

Admissibility biggest hurdle:

- sufficient authority to act for victim (*actio popularis* not allowed)
- Thematic jurisdiction (e.g. other treaty bodies – *ratione materiae*)
- Ratification/reservations
- Exhaustion of domestic remedies (some exceptions) h6
- Abusive (claim inappropriate, frivolous, already rejected)
- Within 6 months

h6 urgent intervention by the Committee to stop an imminent action (or omission) by a State, which may cause you such harm. Such an intervention is called a “request for interim measures of protection”

hans thoolen, 09/07/2013

Simultaneous complaints

- Treaty bodies will not examine cases submitted to other international or regional procedures (e.g, ECHR) or another Committee (examination again under certain treaties and under certain conditions – but not an appeal procedure).
- ECHR considers “substantially the same” same persons, facts and complaints. (e.g. Pauer v. Austria) .

h8

Prevention

- Rarely specific but underlying all systems
- OSCE exception and generally credited with success esp. re national minorities
- System of prison visits (ICRC, torture)
-

- h8** UN Human Rights Committee and ILOs Committee on Freedom of Association have been recognised as another procedure of international investigation or settlement.
hans thoolen, 09/07/2013