

MODULE THREE

Law & Rights in Emergencies

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Introduction to module three

Modules one and two have concentrated on the conceptual, historical and ethical frameworks in which human rights and humanitarian standards appear defined and applied. In the course of our *learning journey*, we have already identified a number of inter-related processes and events which eventually transformed a set of 'revolutionary' ideas and principles into a comprehensive legal system: International Human Rights Law.

Human Rights Law represents a crucial point of reference for us: an objective framework by which people can assess the conduct of those social actors responsible for the guarantee and protection of human dignity and rights. The successful adoption of a rights-based approach, therefore, rests to a large extent in the recognition and effective implementation of such a legal framework.

Several studies have revealed that there is a pressing need, among humanitarian agencies, for better understanding and knowledge around the international law applicable in emergencies.¹ *"Knowing what the law is supposed to be, is the first step towards turning it into an enforceable right tomorrow".*²

Module three provides a basic introduction to the current international legal system related to the protection of human rights and humanitarian standards in situations of emergency.

Learning objectives:

- The participants will acquire a basic knowledge and understanding of the legal instruments applicable in emergencies: human rights law, humanitarian law and refugee law
- The participants will be more confident in the use of legal instruments as practical tools, particularly in their advocacy work
- The participants will be able to identify the main existing mechanisms for the implementation and enforcement of human rights

Guidance notes

Law may be an arid and complex subject of study. Following the recommendations set up by the BRCS/DEC Project³, we have opted for *extracting* the essence of such a legal framework, so that the participants may acquire a basic knowledge and understanding of the principles, standards and mechanisms which underlie it.

As we suggested earlier, it is often preferable to discuss in depth a few basic concepts than to overload the participants with detailed and complex basic rules and concepts. A presentation covering some basic messages will hopefully do the job. Following the presentation, it is important to allow the participants to familiarise themselves with the content and language of some key legal texts. **'Appendix M3'** gives you some guidelines to design an exercise in which the participants become human rights advocates in a practical setting.

Can laws protect in situations of emergency?

Can law govern war?

Is it possible to regulate human behaviour in situations of severe social tension or widespread violence, such as natural calamities and armed conflicts?

In other words,

Can law secure people's rights and dignity in situations of public emergency?

Is it possible to impose legal obligations on combatants to restrain their behaviour in war?

* * * * *

We have already said that law's main mission is to rule human beings. Law tries to provide solutions to conflicts and so maintain social order and peace, while protecting those fundamental values considered as essential by a particular community (module one).

But we also know that laws, as rights and obligations, are human inventions. Their 'power' depends on a wide range of factors, including the existence of a supporting institutional framework, widespread social recognition, and an effective system of enforcement. Hence, when those factors are lacking or seriously weakened, laws become 'dis-empowered'.

It is normally in armed conflicts and other situations of public emergency that legal systems' effectiveness is critically put to the test. War and violent conflicts often bring not only extreme economic, physical and psychological damage, but also the breakdown of those social and legal systems which bind societies together.⁴ The question then is:

Can law regulate human behaviour in situations of severe distress or violence?

The great Roman lawyer Cicero said more than twenty centuries ago: *Laws are silent among [those who use] weapons?*⁵. Yet history has seen multiple attempts to regulate armed conflicts, both through the imposition of military codes and disciplinary rules on combatants, and through the formulation of international standards to limit the use of armed force in warfare (e.g. international humanitarian law).

In addition, both international and domestic legal instruments usually institute specific mechanisms and guarantees to ensure that certain fundamental rights and freedoms are protected even through exceptional periods of emergency (e.g. human rights law).

The reality, however, demonstrates that the most serious violations of human rights tend to occur in those situations of emergency,

when 'those in power are, or think they are, threatened by forces which challenge their authority if not the established order of the society'.⁶



Our most recent history has been abundant in examples which illustrate the link between emergencies and the denial and violation of human dignity. Human rights may, over the last fifty years, have triumphed as an idea, but they have certainly failed as a reality.⁷

Why does the gap between words and actions remains so huge?

Modules one and two gave us some insights into the historical, political and ideological reasons behind such a tragic chasm. Module three focuses on the instruments, basic rules and legal principles which underpin the existing international system for the protection of human rights and humanitarian standards.

Section one establishes a frame of reference for discussion around a key question: *Can law protect in situations of emergency?* **Section two** outlines the basic legal instruments articulated in international law for the protection of human rights and humanitarian standards in emergencies. It covers International Human Rights Law, International Humanitarian Law and International Refugee. A brief section on Human Rights in National Legal Systems is also included. **Section three** offers you a unique 'menu' containing the main existing mechanisms for the implementation and enforcement of human rights. In **Appendix M3** you will find some guidelines and materials to design an exercise of rights-based advocacy.

* * * * *

Disasters and states of emergency

Legal aspects & Impact on human rights

Disasters and emergencies are realities which fall under the domain of a variety of academic and professional disciplines: geology, nutrition, logistics, development, humanitarianism, anthropology, sociology and law, just to mention a few.

As we noted in module one, from a humanitarian point of view, an emergency may be defined as *"any situation involving the severe disruption, distress, and suffering of large numbers of people"* and demanding a humanitarian response" (Oxfam Handbook, 1995:811). Emergencies may be caused by a variety of often inter-related factors: war, drought, floods, famine, etc.

A simple definition of an emergency

"sudden serious event or situation requiring immediate action... because of war , a natural disaster"

We also saw in module one that the term 'complex emergencies' has been recently adopted to describe those emergencies which combine, among other features, armed conflict, mass displacements of people, high rates of starvation, malnutrition and disease, systematic violence against civilians, and severe disruption of the social, political and economic fabric of the country affected.

From a legal point view the term '*emergencies*' - or '**states of emergency**' - refers to a number of situations or regimes in which 'exceptions' are made to the normal legal regime as a result of extraordinary events or circumstances.

As Fitzpatrick observes, when actual conditions endanger the life or security of a nation (e.g. a deadly epidemic), some extraordinary legal measures may be necessary.⁸ Such measures, which often include the suspension of certain basic rights recognised in international treaties, must be imposed following certain procedural guarantees (i.e. formal declaration and notification to any other state party under the relevant treaty).

In other cases, however, governments tend to impose 'formal' states of emergency without any genuine threat to the nation. This kind of 'extraordinary regimes' usually respond to individual – or vested - interests that have nothing to do with the national collective interest. Pinochet's military regime in Chile (1973-1990) resorted frequently to prolonged states of emergency and other states of exception (Fitzpatrick, 1996). Emergency measures of this kind are often disproportionate to the demands of the situation, and result in arbitrary abuse and deprivation of fundamental human rights.

Human rights and fundamental freedoms may be also severely curtailed when governments, even in the face of threatening conditions, decide to maintain its ordinary legal regime. On such occasions, very harsh measures may be adopted, or even incorporated into ordinary legislation, without following any procedural guarantee (e.g. formal declaration or notice).

Other types of 'regimes of exception' include the sudden increase in the implementation of repressive, permanent regulations (for instance, long periods of administrative detention to intimidate or get rid of opposition figures) independent of the occurrence of any emergency.⁹



Finally, there is also examples of governments maintaining exceptional repressive measures even after the termination of a formal emergency (e.g. South Africa in 1986).

Effects of states of emergency on human rights

In all the above situations, human rights are particularly imperilled. Arbitrary abuses of fundamental rights and freedoms – often committed by the security forces themselves – range from anonymous arrests, detentions and systematic torture to disappearances and extra-judicial killings.

Together with a multiple denial of rights, emergencies often alter the balance of power within the government, leading to the weakening or dissolution of some essential ‘democratic’ powers (e.g. the judiciary). In addition, civilian authorities frequently fall under the control of the military (Fitzpatrick, 1996).

But where are the boundaries within which States are legally authorised to impose restrictions on fundamental rights and freedoms?

As we will argue below, international human rights and humanitarian standards offer us a benchmark against which the legality of the behaviour of state and non-state actors in times of emergency can be measured. As Maurice points out, referring to armed conflicts, those standards represent an ‘exceptional legal order specially tailored to such situations’:

*Humanitarian action [...] is therefore above all a legal approach which precedes and accompanies the actual provision of relief. Protecting victims means giving them a status, goods and the infrastructure indispensable for survival, and setting up monitoring bodies. In other words the idea is **to persuade belligerents to accept an exceptional legal order** – the law of war or humanitarian law – specially tailored to such situations.¹⁰*

Guidance notes

Before covering the legal framework applicable in emergencies, the participants should perhaps reflect about the impact of different types of emergency on both the legal systems and the exercise and protection of human rights.

As we discussed in module one, states of emergency are increasingly frequent throughout the world.

Do we know the legal framework in which we operate?

* * * * *

The international legal protection of human rights and humanitarian standards

During the second half of the twentieth century, mainly under the auspices of the United Nations, a remarkable collection of international legal instruments have been articulated for the promotion and protection of human rights and humanitarian standards.

What are these relevant laws and standards?
 What legal rights and obligations do they create?
 Who is bound by those laws?
 How can they be implemented and enforced, if necessary?

At the international level, there are three main legal bodies regulating the protection and safeguard of the rights of individuals and groups, both in times of peace and war:



They may apply under different circumstances and be subject to different conditions. So

What is the relationship between human rights law, international humanitarian law and refugee law?

In the previous module, we had the opportunity to consider the debate around the convergence of two different traditions: humanitarianism and human rights. We placed the emphasis on ethical considerations.

Equally, from a legal point of view, humanitarian standards, human rights and the protection of refugees have in the past been seen as quite separate bodies of international law. In recent decades, however, there has been a growing acceptance of their basic unity (Gros Espiel & Merton in United Nations, 1992).*

* As Patrnoic (in United Nations, 1992) describes, since 1968, the UN General Assembly's agenda has included the issue of the protection of persons in time of war under the title "Respect for Human Rights in armed conflicts". In 1970 the Institute of Humanitarian Law in San Remo organised the Conference "Human Rights as the Basis of International Humanitarian Law".



Certainly they differ in their origins, historical development and formal methods of implementation. And their specific legal instruments are formulated differently. Yet their substance and objectives have **much in common**. Based on the core *principle of humanity*, human rights law, humanitarian law and refugee law are essentially concerned about the protection of human persons. In fact, certain human rights such as life, torture, non-discrimination and health are regulated and guaranteed by these three branches of law, increasingly seen as inseparable parts of the wider system of human rights.¹¹

Our next section focuses on the main legal instruments which form the general framework for the protection and guarantee of human rights and humanitarian standards. It includes Human Rights Law, International Humanitarian Law and International Refugee Law .

Guidance notes

We have said that the above mentioned legal bodies may apply under different circumstances and be subject to different conditions (e.g. Humanitarian Law applies in armed conflicts). It is important, therefore, to make sure that the topics covered in our training sessions are relevant to the context in which they are taking place. Needless to say, those participants working in a region regularly affected by drought or floods, but not by armed conflict, will probably find more interesting and relevant to talk and discuss issues around human rights law than about humanitarian law. Equally, refugee issues may be highly relevant in some contexts, but less pertinent in another ones.

I. International Human Rights Law

Definition and sources

We usually speak of Human Rights Law as all those rules and principles articulated for

- the protection of individuals and groups against abuse and violations of their internationally recognised fundamental rights, and
- the promotion of these rights.¹²

Basically, Human Rights Law includes any law aimed at promoting or protecting human rights. Yet such a broad formulation may lead us to some confusion. As we mentioned earlier, there are three different bodies of international law articulated for the protection of persons in different situations. It is therefore important to understand their key differentiating features as well as their specific sources. This section focuses on what is commonly called “International Human Rights Law”.

As we saw in module one, virtually all international legal instruments - including human rights law - are made by agreement among states. States make international laws “either

- explicitly through *treaties* (also called conventions, pacts, covenants, charters) or,
- less directly, through the repeated practice of states which becomes *customary international law*.”¹³

The sources of Human Rights Law are to be found primarily in **multilateral treaties** drafted within the United Nations system. This category of treaties includes a number of legal texts of universal character, such as the twin Covenants on Human Rights (1966), the Convention on the Elimination of All Forms of Discrimination against Women (1979) and the Convention on the Rights of the Child (1989). Furthermore, there are human rights treaties adopted by regional organisations (e.g. African Charter on Human and Peoples’ Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms).

Box 3.1 lists the main international and regional human rights instruments currently in force, showing the number of State Parties that have ratified them.

The rules established in such multilateral human rights treaties are legally binding on those particular states that have formally ratified them.

By **signing** a treaty, the negotiating States agree in principle to the general wording of the text. The signature of a treaty is often an expression of provisional consent.

Ratification is an international act by which a State gives its definitive consent to be bound by a treaty. A multilateral treaty usually enters into force when it has been ratified or accepted by a specified number of States.

In addition to international treaties, a significant number of human rights are equally declared and protected through the application of **customary international law**. This law reflects the common practice of States over time which eventually is accepted as a binding source of human rights. Some of the most evident are the prohibitions against slavery, genocide and torture.



Table 3.1 – Human Rights Treaties (Ratification) – as of 1 March 2000

Instrument	Number of State Parties	Instrument	Number of State Parties
Forced Labour Convention (1930)	150	Optional Protocol on the International Covenant on Civil and Political Rights: Right to Individual Petition (1966)	95
Statute of the International Court of Justice (1946)	187*	International Convention on the Elimination of All Forms of Racial Discrimination (1969)	155*
Convention on the Prevention and Punishment of the Crime of Genocide (1948)	130*	International Convention on the Suppression and Punishment of the Crime of Apartheid (1973)	101
Convention on the Suppression of the Traffic in Persons and of the Exploitation or the Prostitution of Others (1950)	73	Convention on the Elimination of All Forms of Discrimination against Women – CEDAW (1979)	165
Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956)	118*	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)	119*
Abolition of Forced Labour Convention (1957)	139*	Second Optional Protocol to the ICCPR Aiming at the Abolition of the Death Penalty	42
Vienna Convention on Diplomatic Relations (1961)	179	Convention on the Rights of the Child (1989)	191
International Covenant on Economic, Social and Cultural Rights – ICESCR (1966)	142	Statute of the International Criminal Court	42 (as October 2001)
International Covenant on Civil and Political Rights – ICCPR (1966)	144*		

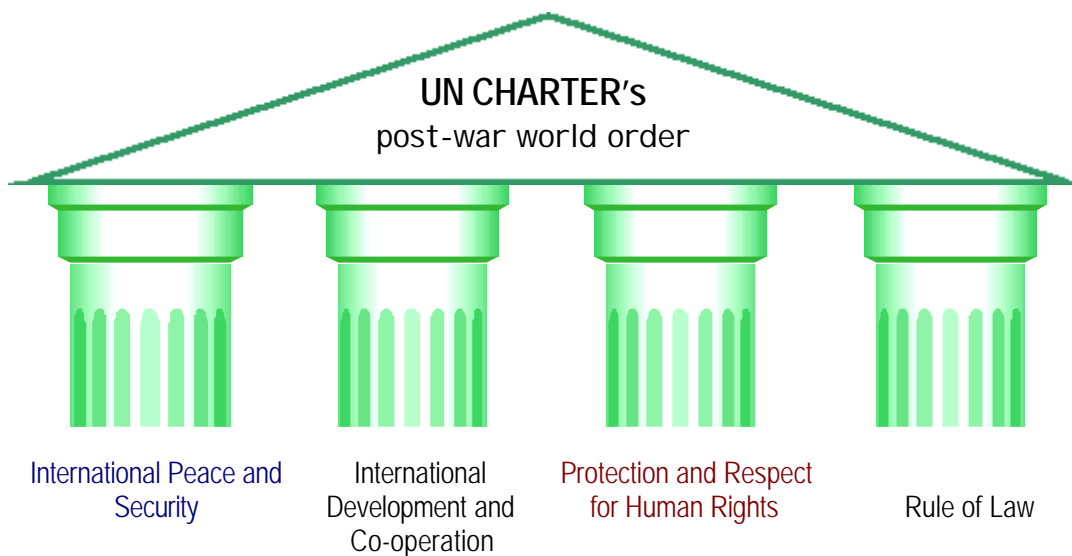
* Ratified by the United States

Adapted from Robertson. G. QC (2000:494 & 495)

THE INSTRUMENTS OF HUMAN RIGHTS LAW

The Charter of the United Nations and the principle of International Respect for Human Rights

The 1945 **UN Charter** can be seen as the ‘Constitution’ of the United Nations, that is the wider legal framework which establishes its basic functions and principles. At the time, the Charter laid down the fundamental pillars upon which to build the post-war world order: international peace and security, international development and co-operation, protection and respect for human rights and the rule of law.



By proclaiming the promotion and protection of human rights as one of its central purposes [article 1(3)], the UN Charter paved the way for the development and consolidation of human rights as internationally recognised legal rights. The Charter imposes a number of legal duties on member states, including the promotion of human rights (articles 55 y 56). The specification of those rights and obligations was left to subsequent declarations and treaties.

Less than four years later, in December 1948, the first step towards such a specification was taken: a Universal Declaration of Human Rights was adopted. Although lacking binding force, the 1948 Universal Declaration represents a decisive landmark in the struggle for human dignity. As Pérez de Cuéllar asserts, the Universal Declaration has become “the basic international code of conduct by which performance in promoting and protecting human rights is to be measured”.¹⁴

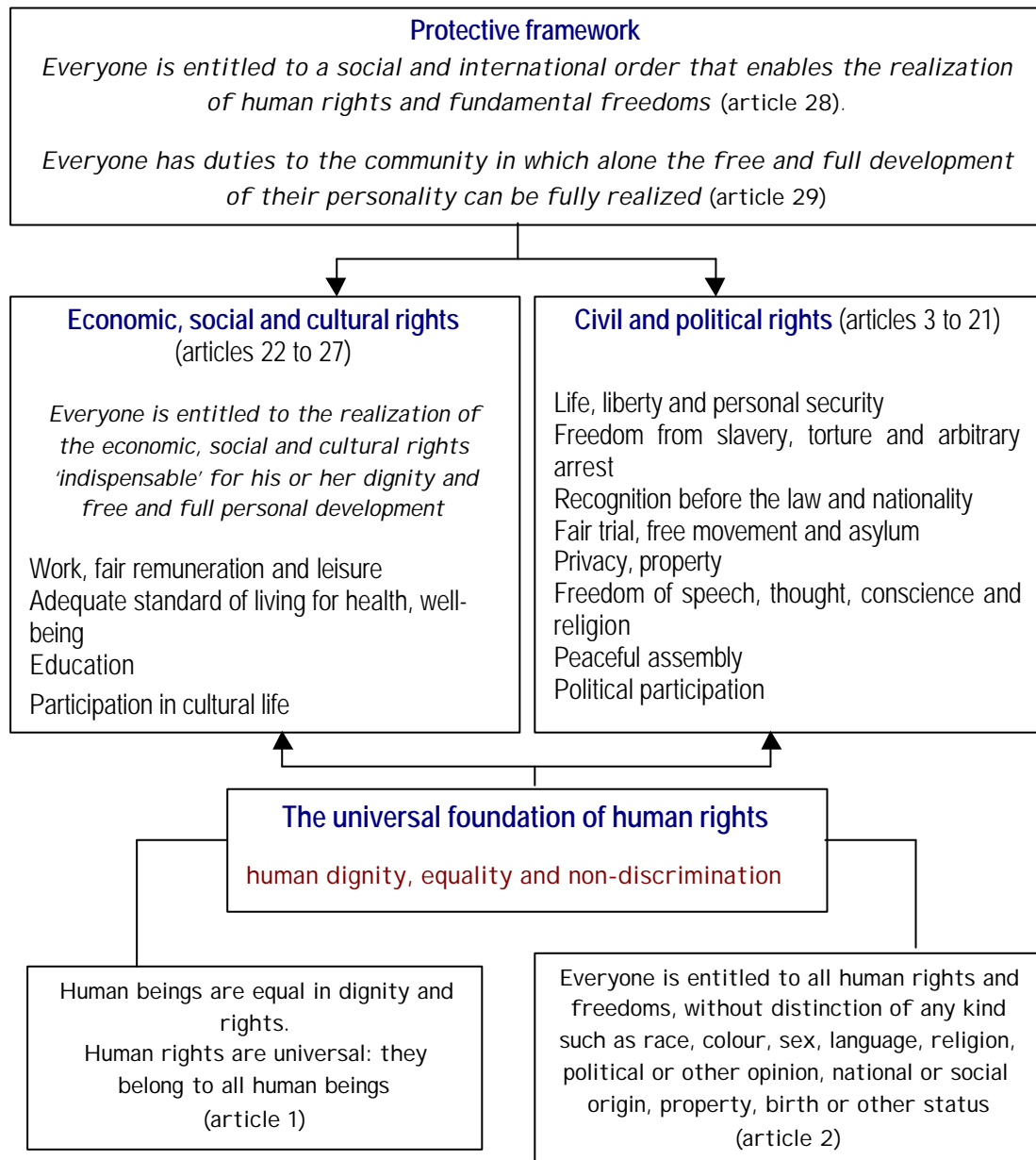
The Universal Declaration of Human Rights (UDHR) (adopted on December 10, 1948)

Within the international framework envisaged by the UN Charter, the UDHR came to establish

*“a common standard of achievement for all peoples and all nations,
to the end that every individual, and every organ of society [...] shall strive [...]
to promote respect for these rights and freedoms...” (Preamble).*

Human rights, based on every person's inherent dignity, appear as the foundation upon which rest freedom, justice and peace in the world. With the UDHR, a detailed list of human rights and fundamental freedoms was to be internationally recognised for the first time. The following diagram outlines the basic principles, substantive rights and protective framework embodied in the Universal Declaration.

Diagram 3.1. – Outlining the Universal Declaration of Human Rights



The Declaration does not establish any difference in value or importance between economic, social and cultural rights, on the one hand, and civil and political liberties, on the other. They are granted the same degree of protection.¹⁵

It is worth noting that the UDHR, as Robertson (2000) argues, was not formulated as a legal guarantee. It had no binding legal force. In addition, no enforcement mechanism was then instituted for the protection of international human rights. Yet its enormous value is undeniable. Its influence in the later



development of the human rights system has been extraordinary, inspiring numerous contemporary Constitutions, international treaties and court decisions, both international and national.

“Today few international lawyers would deny that the UDHR has evolved into an instrument that creates legal obligations under International Law”.¹⁶

*Further Developments of Human Rights Law:
the articulation of the International Bill of Rights*

Article 28 UDHR (see diagram 3.1) contains an explicit call for some international enforcement system for the protection of human rights. An enforceable legal code was needed to translate the abstract and generic human rights of 1948 into effective legal rights. Such a road proved to be a long and arduous one. It was not until 1966 that UN members adopted two Covenants giving legal force to the Universal Declaration. Ten years later, in 1976, they entered into force. Through the Covenants, the whole catalogue of human rights and fundamental freedoms became formally binding international law.

International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966)

The twin 1966 Covenants form, together with the Universal Declaration of Human Rights, the core of International Human Rights Law. They are commonly known as the “International Bill of Rights”.



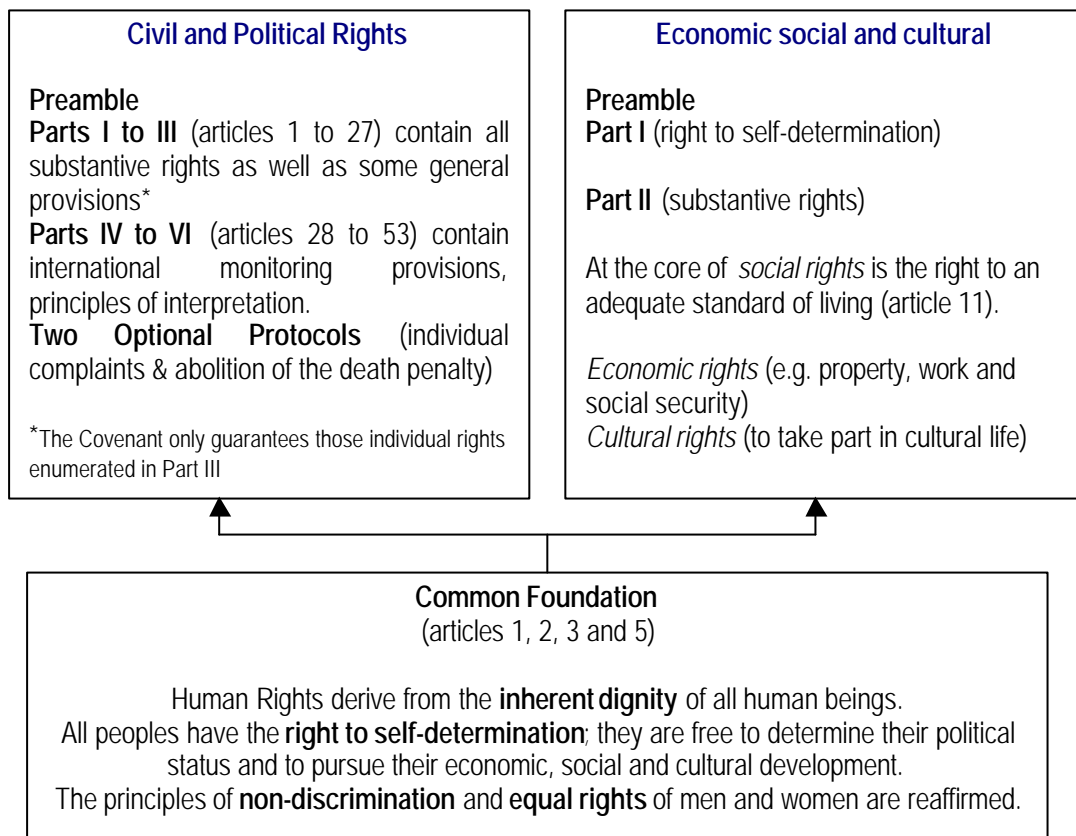
Some of you may have already wondered: **why two covenants?**
Human rights are supposed to be indivisible...

We are told that, originally, the United Nations conceived of a single human rights treaty, which would contain all fundamental rights and freedoms under a single legal system. Soon, however, the ideological tensions which were to characterise the Cold War period forced UN members to reach a political compromise.

Civil and political rights, it was argued by most Western countries, are different from economic, social and cultural rights. The former were seen as ‘negative’ rights (see below), and could be implemented immediately. The latter, on the contrary, required positive action from the governments, so their implementation and realisation could be only gradual and progressive.

As a result of these arguments, two separate covenants were formulated. One for each ‘different’ set of rights: a) civil and political rights; and b) economic, social and cultural rights. Each of them set up different implementation systems, monitoring bodies and procedures. And perhaps more importantly the obligations imposed on the States Parties were significantly different under the two covenants.

Diagram 3.2 - Basic structure and content of the twin Covenants



Obligations of State Parties under the two Covenants

Under the **International Covenant on Civil and Political Rights**, “each State party undertakes to **respect** and to **ensure** to all individuals within its territory and subject to its jurisdiction the rights recognised in the Covenant, without discrimination of any kind” [article 2(1)].

A fundamental principle of international law

Obligations undertaken by States and the international community under international human rights instruments shall be implemented in good faith

According to Hanski⁷,

- the obligation to **respect** reflects the ‘negative’ nature of civil and political rights. States parties fulfil their legal duties by refraining from restricting the exercise of such rights and freedoms;
- the obligation to **ensure**, on the contrary, implies a positive character of the rights and freedoms. Positive action must be taken by the State to ensure that individuals are able to enjoy their rights and freedoms. States must adopt laws and policies providing effective remedies to those whose human rights have been denied or violated. In addition, States parties have the obligation to establish the procedures and institutions necessary in order to safeguard the rights and freedoms of all. (Hanski, 1997:87). Finally, States are obliged to protect individuals against possible abuses of their civil and political rights committed by other private actors.



In clear contrast, the **International Covenant on Economic, Social and Cultural Rights** arbitrates a different system of State obligations. Its article 2(1) declares that

*Each state party only undertakes **to take steps**, individually and through international assistance and cooperation, especially economic and technical, **to the maximum of its available resources**, with a view to **achieving progressively** the full realization of the ESC rights recognized in the Covenant*

The deliberate 'ambiguity' of the language of this provision has been a key factor in the weak, not to say non-existent, commitment of many governments in the process of implementation and enforcement of such rights.

Yet it is vital to advocate for the fulfilment of such obligations by the State parties to the Covenant. As Hanski argues, States are allowed to implement the rights in a progressive manner. This, however, does not spare them from the obligation to **take immediate steps** – both individually and collectively - to that end, to the maximum of its available resources. Moreover, certain rights are still capable of immediate implementation and realization (e.g. equal pay for equal work, right to form and join trade unions, and, of course, the principle of non-discrimination) [Hanski, 1997].

But what happens when the State leaves the provision of social services and public goods in the hands of the private sector? Who is responsible for the implementation of the corresponding rights?

Over the last two decades many countries have witnessed an increasing trend towards the privatisation of public services, and their control by market forces. In some cases, housing, social security, health care or education are managed and provided by private individuals and corporations. Is the responsibility for the realisation of such basic rights transferred from the State to such private actors? The answer is no, at least in theory. The State, even in the case of privatisation of specific basic services, remains the ultimate responsible for the realisation of the economic and social rights formulated in the Covenant.

* * * * *

International instruments addressing specific human rights concerns

Since their inception, the international 'human rights' system has not ceased to expand. Together with the International Bill of Rights, various conventions have been adopted with the purpose of giving legal protection against specific human rights abuses (see box 3.1). Such an imposing legal system addresses a wide range of concerns: slavery, genocide, torture, social development, discrimination, religious tolerance, violence against women, and the status of refugees and minorities.

The following pages give us a brief description of some of the most relevant international legal instruments. The instruments dealing with the status and protection of refugees are included in our section: "*International Refugee Law*".

The **1948 Convention on the Prevention and Punishment of the Crime of Genocide** defines genocide as

*"any of the following acts committed **with intent to** destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*



*killing members of the group;
causing serious bodily or mental harm to members of the group;
deliberately inflicting on the group conditions of life calculated to bring about its
physical destruction in whole or in part;
imposing measures intended to prevent births within the group;
forcibly transferring children of the group to another group"*

The treaty envisaged the establishment of an international criminal court to punish genocide. But as we will discuss later, the first international tribunal of that nature was not established until the 1990s (Former Yugoslavia). The Convention imposes a basic duty on the states parties "to prevent and to punish genocide", and contemplates both individual criminal responsibility and State responsibility.

According to the International Court of Justice, the principles which underlie the Genocide Convention have become part of customary international law (binding on all states). Yet our recent history shows that, despite its moral and legal force, States have failed once and again to fulfil their duties and enforce this legal instrument.

Still recent the memories of the atrocities committed during the Second World War in the name of racial superiority, the **International Convention on the Elimination of All Forms of Racial Discrimination** (1969) came to define and condemn racial discrimination.

The term racial discrimination is defined, in its article 1, as

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, or any other field of public life

Under this Convention, the State parties and their organs assume the following duties:

- to **condemn** racial discrimination and to **implement** policies aimed to eliminate racial discrimination, while encouraging integration among all races (article 2);
- to **declare punishable** by law certain offences concerning racism and racial discrimination, such as racist propaganda (article 4);
- to **adopt** immediate and effective policy measures, in the field of teaching, education, culture and information (article 7?).

The Convention sets up a number of procedures for reporting as well as the adjudication of complaints from states or individuals (articles 9 to 16).¹⁸

In the course of the *United Nations Decade for Women* (1976-1985), the **Convention on the Elimination of All Forms of Discrimination against Women** was adopted and entered into force (1981).

The nature and scope of this legal instrument is explored in module four.

Torture, Robertson reminds us, was for centuries considered as a "legitimate, and indeed necessary, method of obtaining information and confession".¹⁹ In 1987 the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** entered into force.



Torture and other inhuman or degrading treatments had been already contemplated in a number of universal and regional human rights instruments (e.g. article 5 of the Universal Declaration; article 7 of the Covenant on Civil and Political Rights; European Convention and American Convention; and the African Charter).

Despite its rigorous legal regulation, torture, however, remains a reality in many parts of the world. According to article 1 of the above-mentioned Convention, **torture** is defined as

- *any act by which severe pain or suffering, whether physical or mental*
- *is intentionally inflicted by or at the instigation of a public official on a person*
- *for such purposes as obtaining information or confession, punishment or intimidation.*

Under the Convention, States parties have the obligation not only to prevent acts of torture within their jurisdiction, but also to penalise any act of torture, any attempt to commit torture or any complicity or participation in torture (article 4).

Torture may not be justified by any exceptional circumstance (e.g. armed conflict, emergency or order from a superior). Any person suspected of having committed any of the acts prohibited in the Convention is subject to the principle of **universal jurisdiction** (articles 5 to 7).

The principle of Universal Jurisdiction

By virtue of this principle, certain offences are so serious that *any court anywhere* is empowered by international law to try it and to punish it, irrespective of its place of commission or the nationality of the offender or the victims

The *Pinochet Case* has become a landmark in the struggle for the recognition of criminal accountability in international law for acts of torture. Unfortunately, the Convention has not been widely ratified yet (see table 3.1)

In contrast, the **Convention on the Rights of the Child** – CRC - (1990) has been almost universally ratified. The Convention incorporates an exhaustive catalogue of human rights to which children are entitled.

The Convention defines a child as *every person under the age of 18 unless an earlier age of majority is established by law*. The legal system for the protection of children's rights rests upon the following fundamental principles:

- **Non-discrimination.** Every child no matter what race, creed or religion may be, come under the protection of the Convention²⁰ (article 2).
- Based on the recognition of children's inherent human value, the **bests interests of the child** will be a primary consideration in all legal, administrative or social policy actions concerning children (article 3).
- **Participation.** Under article 12, the opinion and views of the child should be heard and taken into account in all those situations where it is possible.



The following table contains a summary of the rights of the child recognised by the CRC

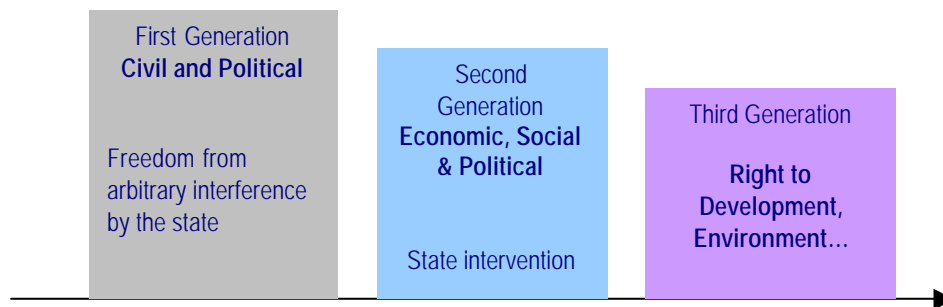
Table 3.2

<i>Articles 24-27</i>	Right to receive appropriate care, security and standards of living from the State they live in
<i>Throughout the Convention</i>	The State has an obligation to ensure the child's survival and development
<i>Article 32</i>	Protection from exploitation and work at inappropriate age
<i>Article 34</i>	Protection from being sexually exploited or abused
<i>Article 35</i>	Protection from being sold, abducted or trafficked
<i>Article 37</i>	Protection from torture, cruel treatment or excessive punishment
<i>Article 38</i>	Protection from conflict (humanitarian law)

* * * * *

The three generations of human rights

Human rights are the result of a multiplicity of forces, debates and interests. The ongoing debate over the nature and meaning of human rights favours their continuing reformulation as well as the emergence of new rights. In this regard, it has been common to refer to the existence of three generations of human rights. The use of the term 'generation' can be understood from a chronological point of view. More controversially, it can convey a sense of priority and importance.



REGIONAL HUMAN RIGHTS CONVENTIONS

The **European Convention for the Protection of Human Rights and Fundamental Freedoms** – ECHR - was adopted in 1950; the **European Social Charter** in 1961.

Certainly, the European Convention of Human Rights represented one of the '*first steps for the collective enforcement of certain rights stated in the Universal Declaration*' (ECHR Preamble). A list of core civil and political rights is specifically guaranteed in Part I of the Convention. Further rights have been gradually added through additional protocols



One of the most remarkable achievements of the European system of human rights has been the establishment of an effective enforcement machinery. It is comprised of two institutions: the **European Court of Human Rights** (ECHR) and the **European Commission of Human Rights** (the Commission).

As a complement to the ECHR, the European Social Charter was adopted with the aim to protect economic, social and cultural rights. Like the Convention, the Charter sets up a supervisory machinery. Yet, the two systems present major differences. The Convention, for instance, must be endorsed as a whole. States, however, are allowed to accept selectively the legal guarantees which are recognised in the Charter. In addition, the supervisory system established in the Charter does not include any procedure for complaints. Recently there have been some attempts to strengthen the legal force of Charter.

Other regional instruments adopted under the European system of human rights are the *European Convention for the Prevention of Torture* (1987) and the *Framework Convention for the Protection of National Minorities* (1995).

The **American Convention on Human Rights** (ACHR) entered into force in 1978, within the framework of the Organization of American States (OAS).

It is worth mentioning that, together with a detailed list of civil and political rights, the American Convention on Human Rights includes the right to participate in government (article 23). Unlike the European Convention, the ACHR incorporates a number of economic, social and cultural rights (articles 26 to 42).

Under the American Convention, States parties have the duty to respect and to ensure (positive obligation) the rights enumerated in the Convention. As a result, States may be held accountable for the conduct of private actors engaging in human rights abuses, such as disappearances on a massive scale. The State must take appropriate action in order to avoid such violations of human rights. With regard to the economic, social and cultural right, States parties have the obligation to adopt measures with the object of achieving progressively the full realisation of such rights.

The *Inter-American Commission on Human Rights'* mandate includes the promotion and protection of human rights in all OAS member states. Besides its supervisory role, the Commission has three main functions: a) to process individual complaints, b) to prepare reports, and c) to propose measures to ensure respect for human rights in the region.

The main function of the *Inter-American Court of Human Rights* is to apply and interpret the provisions of the American Convention of Human Rights.

Efforts to establish a legal system for the protection of human rights in the African Region crystallised in the 1980s. The **African Charter on Human and Peoples' Rights**, which entered into force in 1986, was to place particular emphasis on African tradition and the peoples' rights to development.²¹

Except Ethiopia and Eritrea, the African Charter has been ratified by all the OAU member states. On paper, the African Charter is highly progressive. It includes a vast list of rights, both individual and collective. The Charter covers not only the traditional civil, political, economic, social and cultural rights, but also a number of rights considered as part of the so-called third generation of human rights (e.g. rights to development and to a satisfactory environment).



Article 21 declares the sovereignty of the peoples over their wealth and natural resources. In consequence, States parties have the right to free disposal of their resources.

A significant feature of the African Charter is its emphasis on the recognition of duties as well as rights. According to article 27, the individual has duties towards his family and society, the State and other legally recognised communities and the international community. And article 29(4) provides that each person has a duty to preserve and strengthen social and national solidarity, particularly when the latter is threatened. This provision, however, may grant governments excessive power to restrict and limit individuals rights, simply by declaring that there is threat against national solidarity.

The Charter also contains a series of clauses which may substantially undermine individual rights and freedoms. Article 8, for instance, states that the right to freedom of conscience, profession and religion are *subject to law and order*. As experience shows, appeals to law and order often hide illegitimate interests.

The effectiveness of the African system of Human Rights is further weakened by the lack of appropriate enforcement and monitoring mechanisms. Despite the existence of the African Commission and the African Court on Human and Peoples' Rights, the record of both the Commission and the Court so far has been highly disappointing.

Human Rights in National Law

In module one we argued that our system of international law relied, to a large extent, on the will of sovereign States in order to create, implement and enforce its provisions and standards. For that reason, international human rights standards may be secured only if they have been effectively incorporated into national legal systems.

Guidance notes

When studying human rights, we usually tend to place greater emphasis on the analysis of their international legal instruments. Certainly they form the wider framework to which national legislation and policies must adjust. Yet it is important to allow space for reflection and discussion about domestic legislation and policies into our learning programmes. Knowing the content and scope of such instruments may play a key role in the formulation of our rights-based analysis (see module five).

Thus the declaration, protection and promotion of human rights are primarily the responsibility of national law. As Gros Espiell (1992) observes, *"it is in and by the State [...] that legislation is drawn up to govern and safeguard such rights"*.

By formally adopting international treaties, States assume legal obligations, one of which is the effective implementation of such an instrument into their domestic law and policies. This may be done through a variety of methods. In some cases, treaties become part of domestic law automatically as a consequence of their ratification by the State in question. The formal act of ratification acts as the State's will to be bound by the treaty.

In other cases, States need to enact a separate domestic legal instrument to incorporate the international provisions into their national systems. Sometimes, the implementation of international law forces States to amend (modify) some relevant domestic laws and policies for the purpose of harmonising them with the content of the international instruments.

Similarly, the application of international law by national courts constitutes an essential element of International Law itself. Its efficacy greatly depends on the active co-operation of all the legal institutions which form the particular national systems.

Derogation and limitation of Human Rights

Earlier in the module we talked about ‘emergencies’ and their impact on human rights. We saw that when **states of emergency** are declared certain ‘exceptions’ to the normal legal regime may be introduced. In such cases, some basic rights are likely to be restricted or suspended. Somewhere else, however, we have argued that human rights, being ‘universal’ and ‘inherent’, apply at all times. They cannot be taken away. So

Are human rights legally protected in situations of public emergency?

Let us have a look at what different international legal provisions say.

According to the *International Covenant on Civil and Political Rights*, when a State formally imposes a ‘state of emergency’ it can suspend only certain rights and freedoms. There is a core set of human rights that can never be suspended or restricted. This is the list of **non-derogable** rights included in article 4 of the Covenant:

- Right to life
- Right to recognition as a person before the law
- Freedom of thought, conscience and religion
- Freedom from torture
- Freedom from slavery
- Freedom from imprisonment for debt
- Freedom from retroactive penal legislation

Other rights can only be suspended, or derogated from, in the following circumstances:

- There must a public emergency which threatens the life of the nation;
- The public emergency must be officially declared
- The Secretary General of the UN must be informed immediately
- Any suspension of rights must be confined strictly to the demands of the situation (principle of proportionality)
- Any suspension must be in accordance with international law
- Any suspension must not be based solely on grounds of discrimination

It must be said that the catalogue of non-derogable rights established in the Covenant on Civil and Political Rights needs, in situations of armed conflict, to be completed by adding some specific human rights guaranteed by humanitarian legal instruments (e.g. prohibition of carrying out the death penalty on pregnant women in Two Additional Protocols to the Geneva Conventions).

Interestingly enough, the *International Covenant on Economic, Social and Cultural Rights* contains no derogation provision. In 1997, the Committee on Economic, Social and Cultural Rights sought clarification from the UN Security Council on whether UN-authorized economic sanctions might not themselves constitute human rights violations according to the relevant Covenant.²²

Certain specialised international treaties include explicit derogation provisions, like the 1984 Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment. Torture can never be justified.

II. International Humanitarian Law²³

The UN Charter established in 1945 that war no longer constituted an acceptable means of settling disputes between States. Only under some exceptional circumstances States were granted the right to use armed force to defend themselves, individually or collectively. The Charter, however, did not prohibit States to resort to force in situations of internal armed conflict.

The fact is that since 1945 the number of armed conflicts has multiplied alarmingly. Just in 1997, 25 major armed conflicts were waged in 24 places around the world.²⁴ But it is not only the quantity of the conflicts what has changed. As we noted in module one, the quality (nature) of contemporary has equally undergone a significant transformation.

Against this background, we undertake this analysis of a unique body of law: international humanitarian law.

What is international humanitarian law?

One night, a camel driver came to the fire where the Englishman and the boy were sitting.

"There are rumors of tribal wars", he told them [...]

... They had been taking careful precautions in the desert, but the camel driver explained to the boy that oases were always considered to be neutral territories, because the majority of the inhabitants were women and children [...] the tribesmen fought in the desert, leaving the oases as places of refuge [...]

With some difficulty, the leader of the caravan brought all his people together and gave them his instructions [...] Then he asked that everyone, including his own sentinels, hand over their arms to the men appointed by the tribal chieftains

"Those are the rules of war", the leader explained.

*"The oases may not shelter armies or troops" [...]*²⁵

* * *

Under the generic term 'International Humanitarian Law' (IHL), we refer to that systematic body of international principles and rules aimed at protecting civilian populations in times of war and other armed conflicts. Such a legal body has developed over the last two centuries.



The basic purpose of IHL is to limit the negative effects of armed conflict on human beings. IHL may be considered as part of the so-called **laws of armed conflict**: those rules which cover both “the conduct of military operations (methods and means of combat) and the protection of the victims of conflict (the wounded, the sick, prisoners, civilian populations, etc.).²⁶

This body of rules is technically known as *jus in bello* (the set of laws that come into effect once a war has begun), to differentiate it from another branch of law (*jus ad bellum*). The latter regulates the engagement of States in war, defining the criteria by which waging war may be legitimate or just.

As Nabulsi puts it, “under international law, there are two distinct ways of looking at war – the reasons why you fight” [*jus ad bellum*] “and how you fight” [*jus in bello*].²⁷

The law of armed conflict (*jus in bello*) have been traditionally divided into two main categories or branches:

1. *The Law of the Hague* includes those interstate rules which establish reciprocal rights and duties of combatants;
2. *The Law of Geneva* aims to protect military personnel *hors de combat* (not fighting) and civilian non-combatants.

This section of module three focuses on the second category.

The 1949 Geneva Conventions and the 1977 Additional Protocols

The four 1949 Geneva Conventions, updated and supplemented by the two 1977 Additional Protocols, constitute the crystallisation of a long historical process of development of “Humanitarian Law” (or the Law of Geneva).

General scope of application

According to the Common Article 1, the Conventions must be respected ‘*in all circumstances*’: They apply to any international armed conflict (article 2, p.1), even if one of the powers in conflict is not a party to the particular Convention. Those belligerents who are parties to the Conventions are obliged to observe the provisions of the Conventions both

- a) in their mutual relations; and
- b) with regard to those belligerents who, although non-parties to the Conventions, abide by them

Another fundamental change introduced by the 1949 Conventions was the extension of the provision of humanitarian protection to those cases of non-international armed conflicts. The greater part of the Conventions refers to international armed conflicts. Yet Article 3 (common to all four Conventions) imposes certain obligations on all the parties to any ‘internal’ armed conflict (see below).



Two Additional Protocols to the Conventions were adopted in 1977 with the view of expanding the protection and fundamental guarantees granted to civilians and other persons not taking part in the hostilities. They also established further limits to the means and methods of warfare. Protocol I applies during international armed conflicts. Protocol II applies during non-international ones.

General Principles of International Humanitarian Law

In module two we explored the set of principles which guide humanitarian action (e.g. principle of neutrality, impartiality and independence). A different system of general principles must be taken into consideration. I refer to those legal principles which inform the adoption and application of humanitarian rules.

1. Under the **principle of distinction**, the Parties to an armed conflict are at all times obliged to distinguish between persons taking part in the hostilities on the one hand, and members of the civilian population, on the other. The latter must be spared as much as possible. It also includes the obligation to respect the distinction between military objectives and non-military objectives (Part IV, Protocol I). Basic goods for people's survival or subsistence (livestock, foodstuffs, drinking water supplies, etc.) should not become military targets.
2. **Methods and means of warfare.** Certain methods and means of combat are expressly prohibited by IHL. As Protocol I, article 35, declares, *"the right of parties to a conflict to choose the means and methods of combat is not unlimited"*. Thus the employment of weapons that cause **superfluous or unnecessary injury or suffering** is prohibited.

It is equally prohibited the use of **indiscriminate** means and methods of combat (PI, article 51, 4-5). This general principle includes the prohibitions to use any weapons directed at the civilian population, to use blind weapons (i.e. nuclear weapons), and to use weapons in a manner that there is no proportion between the suffering caused to the civilians and the military advantage achieved.

3. The use of **perfidious means and methods** of combat in armed conflicts is prohibited by Protocol I, Article 37. Perfidy is understood as the use of any means and installations functioning as traps even if they do not directly produce fatal effects (e.g. land mines).
4. The **Martens clause** (PI, article 1(2)) establishes that *"in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience"*

Historically the first group of civilians protected by IHL were combatants not civilians (casualties, medical personnel, prisoners of war). In 1949, the Geneva Conventions enunciated the first comprehensive set of rules protecting combatants and non-combatants. Focus on civilians

Protection of civilians: persons protected

The 1949 Fourth Geneva Convention only applies to civilians in the hands of an adverse party or an occupying power of which they are not nationals. Only Part II of this Convention includes a number of general rules which concern the entire populations of those countries in situation of armed conflict. These rules apply regardless of nationality, race, religion or political opinion (principle of non-discrimination).

The 1977 Protocols came to enlarge the limited scope of the Geneva Conventions. As a result, they now apply to all those persons who are civilians (article 50(2)). A civilian is defined as a person not directly involved in hostilities. Consequently the direct involvement in hostilities becomes the key criteria in order to distinguish between combatants and civilians.

Protocol I also includes specific provisions granting special protection to women (articles 75(5) & 76) and children (articles 77 & 78).

With regard to non-international armed conflicts, civilians are protected by virtue of Common Article to the Geneva Conventions, supplemented and strengthened by the 1977 Protocol II.

Protection of civilians: rights of protected persons

The Geneva Convention and their Protocols contain numerous provisions of a substantive character concerned with the meaning and scope of 'protection' and the rights derived from it. They can be summarised as follows:

- a) The Four Conventions require that 'protected persons' must be treated humanely, with no adverse distinction founded 'on race, color, religion or faith, sex, birth or wealth, or any other similar criteria'. "The following are prohibited in all circumstances:
 - Violence to the life, health, or physical or mental well-being of persons, in particular murder, torture, corporal punishment and mutilation;
 - Outrages upon personal dignity, in particular humiliating or degrading treatment, rape, forced prostitution and any form of indecent behaviour;
 - The taking of hostages; collective punishment;
 - Threats to commit any of the above acts".²⁸
- b) Wounded, sick and other persons in need of care must be cared for (Protocol I, article 10[2]).
- c) Civilians are entitled to respect for their persons, honour, family rights, religious convictions and practices, manners and custom.²⁹

Common Article 3 of the Geneva Conventions establishes a basic principle requiring humane treatment without adverse discrimination. This important article prohibits violence to life and person, the taking of hostages and outrages upon personal dignity.



- d) Protected persons are entitled to communicate with the 'protecting power' or any of the organisms substituting it (usually the International Committee of the Red Cross). Those persons arrested, detained or interned as a result of the conflict have the right to know the reasons of their arrest, detention or internment. They also have the right to a proper judicial trial in accordance with the requirements of fair trial and the rule of law (Protocol I, articles 73[3 & 4]).

Special protection articulated for specific categories of persons

Alien civilians in the territory of a party or in occupied territory are, in principle, entitled to leave and return to their home state. Their status and civil capacity must not be adversely affected as a result of any changes in the law enacted by the occupying power.

Women must be protected, in particular against rape and forced prostitution...

Special care must be provided for children under 15, particularly for orphans or children separated from their families. Under article 77 of Protocol I, children under 15 must not be recruited into the armed forces.

The implementation of IHL

The State parties to international humanitarian treaties have the obligation to comply with the rules established by them. They must respect and ensure respect for the legal rights and guarantees legally established 'in all circumstances'.

To such effect, States must take concrete legislative measures, disseminate knowledge of humanitarian law and give the necessary instructions and training – especially to military personnel (Common articles 47, 48, 127 & 144 of the Geneva Conventions; and article 183 of Protocol I). They must also supervise the implementation and execution of such measures and instructions (article 80, Protocol I).

The Geneva Conventions also sought to ensure the application and respect of its rules and principles by formally adopting the institution of the 'Protecting Power'. In other words, a neutral state designated by one belligerent and entrusted with the safeguard and defence of the interests of a party to an armed conflict and its nationals in the hands of the opposing belligerent (Fourth Geneva Convention, article 9; and article 5 of Protocol I). In some cases, the International Committee of the Red Cross may replace the Protecting Power in its functions, as long as it offers all guarantees of impartiality and efficacy.

* * * * *

III. Human Rights & Forced Displacement

Some 50 million people are directly affected by forced displacement around the world. Increasingly over the last decade, calls for international assistance and protection of refugees and other displaced persons have followed one another as fears of new humanitarian disasters built up.

Such humanitarian crises have seriously challenged the ability (often the willingness) of the international community to deal with the problem of forced displacement. There is, however, a remarkable body of international legal instruments designed to ensure and protect a wide array of human rights, including the rights of refugees and displaced persons.

This section of the module outlines the main international legal instruments and institutions articulated for the protection and assistance of refugees and internally displaced persons (DPs). It also highlights some of the main features of the current international system as regards forced displacement.



Rwandan refugees on move in Tanzania

Roger Yates

Defining refugees

To put it simply,

“refugees are people who have left their homeland because they fear that they will lose their lives or their freedom if they stay”.³⁰

Unlike internally displaced persons (who remain within their own national boundaries), refugees are forced to flee across an international border. The 1951 Convention Relating to the Status of Refugees (Refugee Convention) spells out the internationally-recognised definition of a refugee. Box 1 contains its three key components.

Box 3.1 – Who is a refugee?

- *a person outside the country of her/his nationality*
- *owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion*
- *(s)he is unable to or, owing to such fear, is unwilling to avail her/himself of the protection of the country of her/his nationality*

Subsequent definitions, adopted by regional treaties³¹, have extended their scope of application to include

- *those compelled to leave their country of origin as a result of armed conflict, generalised violence or natural disasters*

In any case, it is the absence of effective national protection which forces refugees to rely on the hospitality of neighbouring countries and/or on international protection and assistance – especially in cases of mass displacement.

Table 3.3 - **A list of relevant international and regional instruments**³²

1948	UN Universal Declaration on Human Rights	1969	OAU's Convention Governing the Specific Aspects of Refugee problems
1949	Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War	1977	Two Additional Protocols to the Geneva Conventions
1951	UN Convention relating to the Status of Refugees	1981	African Charter on Human & People's Rights
1966	Covenant on Civil and Political Rights & Covenant on Economic, Social and Cultural Rights	1984	Declaration of Cartagena
		1984	Convention against Torture
1969	Inter-American Convention on Human Rights		

Refugee status: determination

The determination of refugee status is declaratory, not constitutive. In other words, a person becomes a refugee as soon as (s)he meets the corresponding legal requirements (see above).

The various refugee conventions and declarations do not specifically refer to procedures concerning the determination of refugee status. In practice, the application of the definition varies according to the particular context. In the absence of fixed criteria for assessment, refugees are often denied a fair



procedure which conforms with the minimum legal guarantees (e.g. rights to an interpreter, to legal assistance and to appeal).

Developed primarily to deal with individual cases, the international legal framework has often been tested as a result of large-scale displacements. Status determination, in such instances, is done on a 'group' basis.

In this respect, we have recently seen the emergence of the notion of temporary protection (e.g. Bosnian refugees in 1993). This flexible approach addresses the refugees' immediate needs for protection and assistance, while preserving the interests of the host state. In the long term, 'temporary protection' is based upon the assumption of eventual return home of the refugees.

The application of this form of protection, however, has been controversial. Firstly, it has allowed more restrictive interpretations of the host state's legal responsibilities towards refugees. Secondly, temporary protection has been used as a mechanism to deny refugees some of their fundamental rights. In 1993, for instance, most refugees from Bosnia were denied access to the refugee determination procedures established by the 1951 Convention.

The Refugee Convention does not apply in all circumstances. Article 1.F, for instance, contains a number of **exceptions** to the general rule of application. Consequently, it does not extend its legal protection to those persons who have committed a war crime, a crime against humanity or a serious non-political crime.

In practice, the operation of the exclusion clause presents serious obstacles, particularly in cases of mass displacement. As the tragic events that took place in the African Great Lakes region in the 90s illustrate, refugee camps may witness the cohabitation of legitimate civilians seeking asylum together with gangs of armed aggressors. In such circumstances the law is hard to apply.

Human rights of refugees

"Today's human rights abuses are tomorrow's refugee movements"³³.

Certainly, the lives and experiences of millions of refugees could be described as a long sequence of denial and violation of their most basic rights. Yet, contrary to a widespread public perception, refugees (at least in theory) are entitled to a fairly extensive list of rights and freedoms. As noted above, several major international and regional legal instruments contain explicit provisions regarding their protection and assistance.

*The **Universal Declaration of Human Rights** declares everyone's rights*

- *to leave any country, including his/her own, and to return to his/her country [article 13 (2)]; and*
- *to seek and to enjoy in other countries asylum from persecution [article 14 (1)].*

Although host states are not obliged to grant protection to asylum seekers, equally they may not forcibly expel or return (refouler) an individual to a country where his/her life or freedom would be at risk. This is the fundamental principle of **non-refoulement** affirmed by the 1951 Refugee Convention (see below).

States also have a duty not to discriminate against refugees "as to race, religion or country of origin" (article 3, 1951 Convention).



Overall, the granting of refugee status results in the legal recognition of certain rights, entitlements and duties attached to such status. Box 2 contains a basic catalogue of the main rights and freedoms explicitly established by law.

Box 3. 2 – A Summary of Human Rights of Refugees

CIVIL RIGHTS & FREEDOMS

- **Freedom of Movement** (Covenant on Civil and Political Rights 1966 – CCPR -, article 12)
- **Freedom from torture or cruel, inhuman or degrading treatment or punishment** (CCPR 1966, article 7)
- **Freedom of thought, conscience and religion** (CCPR 1966, article 18; 1951 Refugee Convention, article 4)
- **Right of association** (CCPR 1966, article 22; 1951 Refugee Convention, article 15)
- **Right to free access to the courts of law, including legal assistance** (1951 Refugee Convention, article 16)
- **Right to acquire property** (1951 Refugee Convention, article 13)
- **Artistic rights and industrial property** (1951 Refugee Convention, article 14)

ECONOMIC & SOCIAL RIGHTS

- **Right to work, including wage-earning employment, self-employment and practice of a liberal profession** (Covenant on Economic, Social and Cultural Rights – CESCR - 1966, article 6; 1951 Refugee Convention, articles 17, 18 & 19)
- **Right to housing** (1951 Refugee Convention, article 21)
- **Right to education** (CESCR 1966, article 13; 1951 Refugee Convention, article 22)
- **Right to public relief and assistance** (1951 Refugee Convention, article 23)
- **Right to social security, including medical care** (CESCR 1966, article 9; 1951 Refugee Convention, article 24)

In addition to the general instruments of protection outlined above, **women and child refugees** are further entitled to special protection. Such specific entitlements respond to their particular vulnerability to discrimination and human rights abuses. Regrettably, stories of sexual and physical violence and abuse, prostitution, forced recruitment into armed forces and widespread discrimination in aid delivery constitute a common feature of the experiences of many women and child refugees.

The following international legal instruments contain further special provisions for their care and protection:

- 1974** Declaration on the Protection of Women and Children in Emergency and Armed Conflict
- 1979** Convention on the Elimination of All Forms of Discrimination Against Women

1989 Convention on the Rights of the Child

Finally, it is worth noting that in some cases (e.g. state of emergency) host states may lawfully restrict certain rights of refugees, such as freedom of movement or freedom to work. This restriction, however, must be exceptional and never arbitrary or discriminatory.

The host state and the principle of non-refoulement

As mentioned above, states' paramount obligation to refugees concerns the principle of non-refoulement. Accordingly, states may not forcibly return refugees to a territory where their life or freedom would be threatened.

The principle is also embodied in a number of international legal instruments: the 1949 IV Convention (article 45); 1984 UN Convention Against Torture (article 3), and several Regional instruments, such as the 1969 OAU Refugee Convention (article II [3]) and the 1984 Declaration of Cartagena.

States may, nevertheless, expel individual refugees if their presence is proven to be a threat to national security or public order (articles 32 & 33 of the Refugee Convention). The 1969 OAU Convention, however, admits no exception to the principle of non-refoulement.

In any case, decisions to expel a refugee must be reached in accordance with due process of law (Refugee Convention, article 32.2). Furthermore, states must "allow such a refugee a reasonable period within which to seek legal admission into another country" (article 32.3). In cases of mass displacement, state practice has consistently supported the application of the principle non-refoulement to large groups of refugees as well.

More recently, the importance of this principle has been recognised by the Sphere Humanitarian Charter, which includes it as one of its three fundamental principles.

Internally displaced persons (IDPs)



School in Gangdyang Camp for Internally Displaced Persons (Kitgum, Uganda)

ActionAid Uganda

Both refugees and internally displaced persons (IDPs) have been forced to flee their homes. Unlike the former, IDPs remain within the confines of their countries of origin. But despite the magnitude of this category of forced displacement, there is no specific international provisions governing their assistance and protection. That does not mean that they are not entitled to human rights protection. On the contrary, they have a wide range of rights legally recognised.

General human rights and humanitarian law provisions include the following fundamental rights to which IDPs (as all human beings) are entitled:



- Right to request and to receive protection and humanitarian assistance from their national authorities
- Right not to be arbitrarily displaced from their home or place of habitual residence
- Rights to life, dignity, liberty and security
- Freedom of movement and freedom to choose one's own residence
- Right to flee (and seek asylum in another country if necessary) from areas where their lives, security or freedom are threatened
- Right to an adequate standard of living

Based upon existing international instruments, Francis Deng, UN representative for IDPs, produced a list of **Guiding Principles on Internal Displacement** to guide governments as well as international humanitarian and development agencies in providing assistance and protection to IDPs (Foreword to the Guiding Principles).

The reality, however, is that the application of such norms and standards largely depends on the will of governments, which often oppose international involvement arguing considerations of national interest and sovereignty.

The role of humanitarian agencies

According to international law, protecting refugees and internally displaced persons is the primary responsibility of states. In practice, protection and assistance of such groups have become the 'responsibility' of a wide range of humanitarian agencies.

Initially created to deal with refugees only, the United Nations High Commissioner for Refugees (UNHCR) has seen its mandate successively expanded in response to particular situations increasingly affecting internally displaced persons.

UNHCR's mandate is twofold: to ensure that refugees are protected by their country of asylum; and assist that government in the fulfilment of that obligation. To such end, the UN agency plays a role which is supportive, advisory and supervisory with regard to the state concerned. Over the last decades UNHCR has raised its profile as a humanitarian agency, increasingly assuming responsibilities for the provision of assistance to refugees and occasionally to groups of IDPs, as well as the co-ordination of relief efforts involving displaced populations.

Though of a non-binding nature to states, UNHCR's resolutions constitute an authoritative source of guidelines, particularly regarding procedures and criteria for the determination of refugee status.

Nevertheless, the expanding role of UNHCR remains controversial. As some authors point out, the assumption of further responsibilities seems to have occurred to the detriment of its primary role: the protection of refugees (Darcy, 1997:27).

Other UN agencies are closely associated with the plight of refugees and other displaced persons, such as the World Food Programme (WFP), UNICEF, the World Health Organization (WHO), United Nations Development Programme (UNDP) and the UN High Commissioner for Human Rights (UNHCHR).

The International Committee of the Red Cross (ICRC) plays a crucial role as an independent provider of protection and assistance to victims of international and non-international armed conflict and internal



disturbances. Its activities include protection of civilians, medical assistance, food aid, visit to detainees and family tracing.

In cases of forced displacement, humanitarian assistance is also provided by the National Red Cross and Red Crescent Societies and their International Federation (IFRC). In addition, the ICRC, IFRC and their national societies seek to encourage respect for international humanitarian law.

Non-Governmental Organizations (NGOs) have a long tradition in assisting and protecting refugees and other displaced persons around the world. Either as direct providers of assistance, implementing agencies or advocates of their rights, NGOs continue playing an essential role on behalf of those affected by forced displacement. Their work includes:

- Provision of aid to refugees and IDPs (e.g. food, clothing, shelter and medical care)
- Raising public awareness of the needs of refugees and IDPs. Their role as information providers is invaluable, particularly with regard to early warning systems.
- Influencing national policies and lobbying governments to secure better respect for the rights of those affected by forced migration
- Monitoring, witnessing and reporting rights abuses
- Legal and social counselling
- Offering education and training programmes to refugees and IDPs
- Monitoring and reporting human rights violations
- Conflict resolution and peace-building

In this respect, UNHCR and several NGOs have recently produced a “Field Guide for NGOs: Protecting Refugees” (1999). In addition, the UN’s Inter-Agency Standing Committee Working Group has published a “Manual on Field Practice in Internal Displacement” (1999)³⁴. These materials constitute a highly useful source of basic legal information concerning international protection for refugees and IDPs, while offering practical guidance in relation to the incorporation of protection measures in NGO field operations.

Enforcing Human Rights

Law, in common parlance, means a rule which (unlike a rule of ethics) is actually capable of enforcement through institutions created for that purpose.³⁵

What is the sense of having a law that cannot be put into practice? Even our imaginary friends of Obwbwo (module one) were aware of the above premise and decided to set up a system of rules and institutions to ensure respect of their laws.

Guidance notes

We have already argued that a commitment for action is necessarily the basis of human rights education. In this regard, the implementation and enforcement of such rights constitutes a key area of our learning voyage. The topic is vast and difficult. Again, the facilitator should place greater emphasis on those mechanisms of more relevance to the context in which the participants operate. In some cases it will be advisable to focus on one or two particular mechanisms. In our learning programme in Sierra Leone, for instance, the participants had the chance to discuss in depth the implications of setting up an *ad hoc* Criminal Tribunal rather than relying on a Truth and Reconciliation Commission.

This section contains a brief description of a range of mechanisms of implementation and enforcement of human rights and humanitarian standards, both at the national and international level. In the absence of a 'global' system of enforcement, this *menu* of heterogeneous and somehow fragmented mechanisms remains a valuable point of reference for those who continue struggling against human injustice.

LEGAL OBLIGATIONS AND ACCOUNTABILITY

It must be said that the declaration, promotion and protection of human rights are primarily the responsibility of the State. As Darcy stresses, "*in legal terms, responsibility for protecting human rights lies with the state first and foremost*".³⁶ Such primary responsibility derives from the very nature of our modern international legal system, based on the principle of national sovereignty, and mainly concerned with the legal relationships between States.

In the field of human rights protection, by ratifying human rights treaties, States assume certain legal obligations, including:

- ❑ to respect and to ensure rights recognised in Covenants and other treaties;
- ❑ to take steps to achieve the full realization of economic, social and cultural rights;
- ❑ to respect and ensure respect for the legal rights and guarantees legally established in international humanitarian law and refugee law;

More specifically, States have the obligation to adopt legislative measures and policies as well as, to ensure the dissemination of knowledge around such laws and principles. They also have the right, and the obligation, to prosecute and punished certain crimes, even if they have been committed outside their national jurisdiction (war crimes, crimes against humanity, genocide, hijacking of aeroplanes, etc.).

Collectively, States also bear important responsibilities. As we saw in previous sections, the UN Charter (articles 55 & 56) requires of its member states that they take joint and separate action to ensure



observance of human rights. The **international community** therefore has a legal commitment to the protection of human rights, especially in those cases in which states are unable, or unwilling, to do so.

Yet any analysis of the history of our international human rights legal system will probably tell us that its main characteristic has been the lack of effective and consistent enforcement.

LACK OF ENFORCEMENT: the drama of international human rights law

Robertson suggests that

"all that happened to human rights law over [...] four decades was a series of academic exercises, honing and refining and putting in place international conventions which were marvels of modern diplomacy: none of the States which signed them intended to work".³⁷

Some definitions of **enforcement** put the emphasis on the use of, or threat to use, *force or some kind of sanctions*.

A broader definition *includes all legitimate measures intended to ensure respect for human rights*.

In module one we learnt that, traditionally, States have been considered as the only actors capable of possessing rights and obligations of international nature. The processes of law-making, implementation and enforcement of international law have been largely in their hands.

This is perhaps one the main contradictions affecting the modern international legal system: the fact that, while the United Nations system champions the idea of *universal* human rights, at the same time proclaims the *sovereign equality* of all its members. In consequence, the processes of implementation and enforcement of those rights remain, to a large extent, under the exclusive control of individual states. As a matter of fact, since the birth of human rights law, numerous states have used the argument of the 'sanctity' of their sovereignty to justify, and often mask, gross violations of fundamental rights.

National interests usually prevail. As a result, most proposals put forward to establish effective mechanisms of monitoring and enforcement fail to become a reality. Such a legal vacuum, which affects all branches of international law, means that the effectiveness of a whole legal system largely depends on the will of the states and, more recently, on the will of a number of powerful global institutions (e.g. World Bank, IMF).

Last decade, however, has witnessed a number of event and developments that have led some authors to venture that perhaps we are entering a new historical period: **the age of enforcement of human rights** (Robertson, 2000). The 1990s have seen the establishment of two *ad hoc* criminal tribunals, the arrest of Pinochet and Milosevic, armed interventions in the name of humanitarianism, and some interesting developments at the regional level (in particular, in relation to the role and efficacy of the European Court of Human Rights).

*Are we witnessing the final assault on the fortress of sovereignty?
Are justice and human rights finally emerging as the prevailing principles guiding international relations?
Are we really entering an age of enforcement of human rights?*

Implementation and enforcement mechanisms of Human Rights Law and Humanitarian Law

The legal vacuum which affects the system of implementation and enforcement of International Law has normally been filled by a wide variety of fragmented, often *ad hoc*, mechanisms. The following 'menu' outlines some of the main instruments used for the promotion and protection of human rights and humanitarian standards.

Menu of Implementation & Enforcement Mechanisms of Human Rights Law and Humanitarian Law

Starters

Diplomatic pressure

Public denunciation

Fact-finding Commissions

UN Mechanisms (monitoring and reporting)

Main courses

Economic sanctions

Armed intervention

National courts

Universal jurisdiction (e.g. torture)

Ad hoc Criminal Tribunals (Rwanda, Former Yugoslavia)

International Criminal Court

Desserts

Truth and Reconciliation Commissions

Aid conditionality

Diplomatic pressure and negotiations Public denunciation.

Systematic abuses and violations of human rights by state and non-state actors are often documented and made public by specialised bodies. It can be argued that such a negative publicity (what some authors call “*mobilisation of shame*”³⁸) may influence the behaviour of those human rights offenders (particularly governments) who still care about their international reputation and credibility. The real efficacy of these strategies is difficult to evaluate. Yet they have sometimes proved to be relatively effective in the protection of human rights, when accompanied by other perhaps more controversial measures, such as trade restrictions or aid conditionality.

Fact Finding Commissions

Legally speaking, *fact-finding* describes the function of human rights monitors whose role is “*to ascertain what is going on in a given situation and to report thereon in relation to international human rights standards*”.³⁹ Fact-finding activities have been carried out within the UN system, but also by regional organs and NGOs.

In the ambit of Humanitarian Law, article 90 of Additional Protocol I provided for the establishment of the **International Humanitarian Fact-Finding Commission** (IHFFC). The role of this independent and permanent body includes inquiring into alleged serious violations of IHL and facilitating the restoration of respect for IHL. Any intervention by the IHFFC must be consented by the parties involved in the conflict. To date, fact-finding commission remains largely unused.

UN reporting mechanisms

All major human rights treaties provide for mechanisms to supervise and monitor states compliance with their legal obligations. States are required to submit periodic reports to specific committees (see box 3.?) containing information about the extent to which they are implementing their obligations under the particular human rights treaty.

Once examined, such committees have the capacity to produce *General Comments* or *Recommendations* to state parties. Such reports often embarrass governments, putting pressure on them both in the domestic and international arena

Box 3.3 – Some UN treaty-monitoring bodies

Human Rights Committee (ICCPR)

Committee on Economic, Social and Cultural Rights

Committee against Torture

Committee on the Elimination of Racial
Discrimination

Committee on the Elimination of Discrimination
against Women

Committee on the Rights of the Child



Unlike the Committee on Economic, Social and Cultural Rights, the **Human Rights Committee** (set up under the Covenant on Civil and Political Rights) has a procedure to deal with complaints formulated by individuals or groups victims of human rights violations against their states (if these have ratified the Optional Protocol to the Convention).

The effectiveness of such committees has been seriously questioned. Their members are nominated by governments, and their monitoring functions are usually constrained by lack of funds. These mechanisms, however, may offer NGOs valuable opportunities to contribute to the reporting processes through their own monitoring and advocacy activities, while focusing public attention on specific issues.

National Courts

In recent years we have seen the implementation of a number of international aid programmes aimed at rebuilding or strengthening essential institutions of governance (e.g. the judiciary), particularly in countries affected by armed conflict. Such programmes have included training for judges, lawyers, prosecutors, police officers, etc. (e.g. Office of the High Commissioner for Human Rights).

The idea is to provide such countries with an adequate institutional framework and human rights culture to promote and protect the rights of the citizens effectively.

In this regard, national courts should play a key role in the translation of human rights standards into effective laws. The Pinochet case, for instance, offers us an example of how national courts (in Spain, the UK and Chile) may act effectively even in relation to violations of human rights committed in a different country (torture, terrorism and complicity in murder). Some multi-lateral treaties (e.g. Convention against Torture) have established the principle of universal jurisdiction (see below).

In addition, some national legal systems allow domestic courts to try residents in their territory, whatever their nationality, for crimes allegedly committed abroad. A Belgian court, for example, recently set an important precedent by imposing life sentences on four Rwandans convicted of complicity in the 1994 Rwandan genocide that killed up to 800,000 Tutsis and moderate Hutus. These trials held in national courts are an essential complement to the work of International Tribunals.

In some countries, like India, the High and Supreme Courts may admit 'public interest' litigation. This type of procedures allows anyone to initiate a judicial action on behalf of a large number of people suffering some legal wrong or injury, when they are unable to access the judicial system on their own.⁴⁰

Aid conditionality and economic sanctions

The imposition of certain conditions in the provision of international aid is a common practice. The provision of humanitarian aid may, for instance, be withheld by the donor until certain conditions are fulfilled (e.g. respect of humanitarian standards or human rights). Such practice, however, raise strong controversies. As Leader argues, on the one hand, the so-called 'humanitarian conditionality' has so far had limited efficacy in terms of ensuring that warring actors respect human rights and humanitarian standards. On the other hand, the use of conditionality may clash with the principles of humanitarian action (particularly, the humanitarian imperative and impartiality).⁴¹



Similarly, economic sanctions are used in international relations as a means of putting pressure on governments to comply with internationally legally recognised standards (e.g. in Burundi, Iraq, Former Yugoslavia). The main problem is that such *“penalties tend to hit the poorest hardest and may have little impact on government policy”* (Darcy, 1997:12). The use of economic sanctions has been widely criticised for their inconsistent application. It is also argued that economic penalties are often accompanied by other measures (e.g. imposition of economic reforms) which may seriously undermine human rights (e.g. structural adjustment programmes often mean a drastic reduction of public spending on education, health, etc.).

Universal Jurisdiction

By virtue of the principle of universal jurisdiction, national Courts may arrest and prosecute individuals who are suspected of having committed serious criminal offences according to international law (e.g. torture), even if the criminal activity in question was committed in the territory of a different country.

Usually the courts of the place in which the criminal action took place have exclusive power to try the offenders (*territorial jurisdiction*). Some legal systems grant their courts the power to try their nationals when they have committed certain crimes abroad (*jurisdiction based on nationality*). In international law, the principle of universal jurisdiction permits states, in some extraordinary circumstances, to exercise criminal jurisdiction beyond their territorial and national boundaries. These cases concern the prosecution the most serious crimes under international law (e.g. violations of the laws of war, crimes against humanity, genocide, etc.). A recent example of this mechanism is the arrest in 1998 of General Pinochet. It was enforced through the British authorities at the request of a Spanish prosecutor.

Forgiveness & Truth and Reconciliation Commissions

Over the last two decades, Truth and Reconciliation Commissions have been established in a number of countries which were emerging from periods of gross and widespread violation of human rights. They tend to appear in periods of transition from situations of authoritarian rule or armed conflict to more democratic forms of government (e.g. Argentina, El Salvador, South Africa).

Faced with a central dilemma:

shall we arrest, try and punish all violators of human rights in the name of justice?

or

shall we pardon them in the name of reconciliation?

these *ad hoc* governmental bodies basically intend to establish a record of the tragic facts affecting a particular country, identifying and naming the perpetrators. For some, such commissions may play a key role in the processes of reconciling political divisions and promote forgiveness. In some cases (e.g. South Africa), the Commission is given authority and power to grant amnesty to specific individual perpetrators. Their reports are made public.

Others, like Robertson (2000), argue that certain crimes (e.g. crimes against humanity) are by nature unforgivable. In some cases, the use of Truth and Reconciliation Commissions and blanket amnesties may favour the perpetuation of injustice, corruption and gross violations of human rights.

International Criminal Tribunals: *ad hoc* and permanent.

The horrific nature and magnitude of the violations of human rights and humanitarian standards both in the former Yugoslavia and Rwanda during the 1990s led the United Nations to set up two *ad hoc* criminal tribunals to prosecute and punish those responsible for such crimes. Based on chapter VII of the UN Charter, the Security Council established such courts, giving them jurisdiction to deal with grave breaches of the Geneva Convention of 1949, article 3, violations of the laws and customs of war, genocide and crimes against humanity.

Both courts (in The Hague and Arusha) are facing important problems (e.g. bureaucratic infighting) that are seriously undermining its effectiveness. The recent arrest of the Serbian ex-President Milosevic, however, seem to have revitalised the role of such international mechanisms.

The creation of a permanent International Criminal Court

On 17 July in Rome, over 100 nations agreed to adopt a statute creating a permanent International Criminal Court. The treaty has not come into effect yet (it requires its ratification by at least sixty states).

The Court is established as a permanent mechanism with power to try persons accused of the most serious crimes of international concern, such as genocide, crimes against humanity, war crimes, and the crime of aggression.

Genocide

As we highlighted earlier in this module, genocide, whether committed in time of peace or war, is a crime under international law (see definition in page 17).

Crimes against humanity:

The 1945 Nuremberg Charter lists a number of crimes against humanity: murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime.

The list has been further expanded, including rape and torture, enforced disappearance of persons and apartheid.

War crimes are the violations of the laws of war – IHL – from which derive individual criminal responsibility.

Crime of aggression: (or crime against peace). According to the 1945 Nuremberg Charter the crime of aggression implies the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy to do so.

The success of the court, however, may be severely curtailed by several factors, including the opposition of the United States, the power of the Security Council and the still solid principle of state sovereignty.

Armed Intervention

Chapter VII of the UN Charter enables the UN Security Council to determine the imposition of sanctions, including armed intervention, when there is a threat to world peace and security. In practice, the use of this measure is highly controversial, especially when is undertaken based on 'humanitarian' or 'human rights' reasons (e.g. Kosovo). In certain cases armed intervention may be a legitimate measure under international law (e.g. prevention of genocide or other gross abuses of human rights). Yet, in reality, this kind of humanitarian intervention remains a very imprecise and contested matter. Who decides when there is a threat to international peace and security? What is the role of public opinion, international activists, CNN and the political class?²

* * * * *

It is said that the current human rights system is toothless. It lacks effective instruments of implementation and enforcement. Instead we find a highly heterogeneous collection of mechanisms whose application has so far been irregular and inconsistent. Yet they may offer some valuable opportunities for the realisation of human rights. As Cassese suggested in a conference held in London not long ago, *let's try to use what we have*.

In this regard the role of human rights and humanitarian agencies may be crucial in the process of strengthening and further developing such mechanisms. In module five we will come across different examples of effective promotion and protection of human rights through emergency work.

Closing Remarks

Module three is usually the less popular among facilitators and participants. It is vast, complex and full of technical expressions. Furthermore, it may generate, among the participants, certain degree of disengagement from the learning programme. As we have repeatedly argued, the gap between what the law says and what the reality shows us is unfortunately too wide.

Yet my recent experience running similar sessions also tells me that eventually most of the participants realise of the practical importance that acquiring such a basic knowledge and understanding has. This process of "coming-to-terms-with" legal issues usually becomes visible in later stages of the programme, especially during the field-based exercise. It is often at that point that we begin to see the practical implications of having (or not having) a legal system in place.

In my opinion, both the exercise of rights-based advocacy (Appendix M3) and the field-based analysis (module five) are a key part of the learning programme. Not only because they unveil the most practical dimension of the law, but also because they frequently help us identify the key challenges and opportunities which lay behind the situations we face in our work.

By using a pair of rights-based glasses (see module five), we begin to think with a legal mind. This is the first step to become active actors in the processes of definition and application of law, especially of human rights law.

APPENDIX M3

Legal instruments as a tool for rights-based advocacy

This exercise is partly based on Section I of OCHA's document: *An Easy Reference to Humanitarian Law and Human Rights Law*.

The participants will be given some examples of situations and issues of internal armed conflict in which human rights are being violated. They will be also provided with a number of relevant legal instruments relevant to their case. Broken into groups, they will assume the role of legal human rights advocates. They will have to discuss the case, identify a number of human rights provisions applicable and prepare a brief presentation to the plenary advocating for the protection of those human rights using the legal provisions as supporting tools for advocacy.

Suggested issues

ISSUE GROUP A

Material assistance is blocked or diverted, and/or humanitarian personnel are not allowed, or only allowed restricted, access to the vulnerable population.

ISSUE GROUP B

A certain ethnic, religious, political group and/or minority of the population is forced by violence to leave their homes.

ISSUE GROUP C

Civilians are executed or killed without final judgement rendered by a competent court; civilians are arbitrarily executed in their villages.

ISSUE GROUP D

The population is subjected to inhuman and degrading treatment: women and children are subject to rape and mutilation.

GROUP C, for instance, would analyse the following legal instruments:

A. International Humanitarian Law

- *Common article 3, Geneva Conventions of 1949*

"In the case of armed conflict, not of an international character, occurring in the territory of one of the Contracting (States), each party to the conflict shall be bound to apply, as a minimum, the following provisions:

- (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion, or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:



- a) Violence to life and person, in particular murders of all kinds, mutilation, cruel treatment and torture;
- b) Taking of hostages;
- c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples”.

- *Article 4, Additional Protocol II,*

1. “All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without adverse distinction [...]
2. [...] the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time in any place whatsoever:
 - a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment
[...]
 - e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault [...]

B. Human Rights Law

- *Article 3 of Universal Declaration of Human Rights*

“Everyone has the right to life, liberty and security of person”

- *Article II of the Convention on the Prevention and Punishment of the Crime of Genocide*

[...] genocide, whether committed in time of peace or in time of war, is a crime under international law [...]

(article 1 of convention on the prevention and punishment of the crime of genocide)

[...] genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- a) killing members of the group;
- b) causing serious bodily or mental harm to members of the group;
- c) [...]

- *Article IV of the Convention on the Prevention and Punishment of the Crime of Genocide*

“Persons committing genocide [...] shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.



- *Article 5, Universal Declaration of Human Rights*

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”

- *Other legal instruments prohibiting torture and inhuman and/or degrading treatment, including sexual violence*

Covenant on Civil and Political Rights, article 7; Convention on the Rights of the Child, articles 19, 34, 37 & 38; Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment)

C. National Human Rights Law

For instance,

- *Article 15, Constitution of [...]*

“[...] every person in [...] is entitled to the fundamental human rights and freedoms of the individual, that is to say, has the right, whatever his race, tribe, place of origin, political opinion, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following:

- a) Life, liberty, security of person [...] and the protection of law [...]

- *Article 16 (1), Constitution of [...]*,

“No person shall be deprived of his life intentionally except in execution of the sentence of a court in respect of a criminal offence under the laws of [...], of which he has been convicted”.

- *Article 20 (1), Constitution of [...]*

“No person shall be subject to any form of torture or any punishment or other treatment which is inhuman or degrading.”

Guidance notes

We are not looking for a detailed and exhaustive legal analysis. It is just a matter of identifying which specific human rights are being violated in each scenario and what legal instruments protect such rights. In addition, the participants will have an opportunity to get familiar with the legal language and style of such norms.

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