

International Human Rights

- Governing Laws – Pertinent and Applicable Laws
- Governing Principles & Concepts – Terminology in Context
- Case Law
 - Tests in Applying the Law
 - The Balancing of Responsibilities & the Balancing of Interests

Governing Laws

1. The U.N. Declaration of Human Rights (UNDHR) (30 Articles) (1948)
 - This document was a response to the great loss of life and excesses of State power demonstrated in WW1 and WW2.
 - The International Court of Justice declared these "fundamental principles" as "legally binding" for the first time in a case in 1980 (U.S. v. Iran, Judgment, ICJ Reports 1980, p. 42, para. 91).
2. The International Covenant on Civil & Political Rights (U.N. ICCPR) (1966-76)
 - a. has 53 Articles
 - b. has 2 "Optional Protocols"
3. The International Covenant on Economic, Social & Cultural Rights (U.N. ICESCR) (1966-1976)
 - a. has 5 Parts
 - b. has 31 Articles
 - These first three documents are the most all-encompassing human rights instruments.
4. The U.N. Convention Against Torture (UNCAT)
5. The Convention on the Rights of the Child (U.N. 1989-1990) (CORC)
 - a. Optional Protocol on sale of children, prostitution, and pornography
6. The International Convention on the Elimination of All Forms of Racial Discrimination (U.N.) (1969)
7. The Convention on the Elimination of All Forms of Discrimination Against Women (U.N.)(1981)
 - a. Optional Protocol on individual complaints
8. The Rome Treaty (International Criminal Law) (1998)
9. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief
10. Basic Principles for the Treatment of Prisoners (U.N.)(1990)
11. Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment (U.N)(1988)
12. (U.N.) Juveniles Deprived of their Liberty (1990)
13. (U.N.) Medical Ethics for Prisoners and Detainees against Torture, etc. (1982)
14. (U.N.) Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)(1990)
15. (U.N.) Declaration on the Right and Responsibility... 'Human Rights Defenders' (1998)
16. (U.N.) Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990)
17. etc:

There are a good handful of additional major human rights treaties and agreements, including the Convention Against Genocide, and continental and regional bodies for the African continent, American continents, and the European Councils on Human Rights. Other regional and international declarations on specific topical points are not mentioned here.

Governing Principles & Concepts – Terminology

Because human rights are fundamental, they rely on the following order of activity for their protection: (1) **protection of human rights** at the national level, plus (2) **rule of law** (the domestic system of laws – democratic law-making and consistent and equal law enforcement, exercised at the national level, as well as the availability of effective remedies) plus (3) **good governance**. With these three in place, justice, peace, social and economic development are encouraged.

What is the rule of law?

This is established by international courts' case law, and U.N General Assembly resolutions. For example, the UNCHR is not 'law,' but provides evidence of "customary law."

Treaties

Treaties *must* be interpreted to **effect human rights** (Meets the objective? Apply **in good faith**.)

Other bases for determining controlling law in international cases

International customary law can be used by judges to decide cases.

The test is two-part:

- (1) is the act a matter of "**settled practice**" of States (the **objective test**)(virtually uniform behavior), and
- (2) the needed practice is rendered obligatory by the existence of a rule of law requiring it (**subjective test**)(a softer standard).

- An example of a declared area of international customary law is the law against genocide (also encased in the Convention on Genocide, ICJ Reports, 1951).
- Certain deprivations of freedom have been found to be customary international law (ICJ Reports 1980, p. 42, para. 91).

International courts can also use:

- **general principles of law** found in national / domestic law systems, and, lastly,
- **subsidiary law**, by looking at other international case holdings, as well as
- **teachings** of 'highly qualified publicists.'

What are a State's obligations under international human rights law?

One would proceed in this manner:

- Has the State made any **reservations**?
- Has the State made any **interpretive comments** at the time of ratification, or accession?
- If none of the above, and the State is a member of the treaty, international law will apply but may permit **reservation (conforming reservations)**(ACHR) , may regard **intent** of the State (UNHRC), or may apply an **object and purpose test** (VCLT, Vienna Convention)

How can fundamental human rights be limited?

Human rights can be limited in two ways, either by **limitation** or by **derogation**.

Limitations. Limitation examples include: ICCPR Articles 12(3), 13, 18(3), 19(3), 21, 22(2), ECHR Articles 8(2)-11(2), and UN Charter Article 30. (See the text of these for details and examples.)

Generally, limitations must be:

- **in the interest of the society** in general, may restrict the exercise of a basic human right,
- provided they **are undertaken in accordance with the law**,
- are **necessary in a democratic society**
- for certain **specific legitimate purpose**.

Limitations are:

- **defined** in the law,
- only permitted for a **specific legitimate purpose**, noted in the law,
- be **necessary** for that/those purpose(s) "in a **democratic society**."

The test involves determining the **proportionality** of the restrictive action **to both the general and the specific individual circumstance**.

- The **proportionality test** is considered within the context of the **democratic society** requirement.
- The limitation must be "**necessary**," not just **desirable or non-harmful** in the functionality of a democratic order.

Derogations. Temporary derogations from international legal obligations are permitted by certain instruments (ICCPR, ACHR, ECHR) and not by others (African CHPR).

-(ICCPR Art. 4, ACHR Art. 27, ECHR Art. 15)

These must be strictly **required by the exigencies of the situation**: the general times and cases involve (1) **national emergencies** or (2) **times of armed conflict**, while (3) certain rights may never be derogated. (See the texts noted above for details and examples.)

- Derogations are permitted only subject to **strict formal and substantive legal requirements**.
- Courts must construe the legality of derogations strictly so human rights are not watered down (**strict construction** required).
- Non-derogable rights exist – these may never be derogated.

State Responsibility

States are responsible for compliance. This can involve an **act or omission**: The two approaches are phrased such: (1) responsibility for **not taking reasonable action**, for example, to stop private persons or groups from carrying out violations of human rights, and (2) responsibility for not providing sufficient preventative **protection for human rights** under the law(s) of the country.

- A lack of compliance would trigger responsibility to correct.
- **Responsibility** has certain **third party effects**, in reality, for example:
 - control and oversight of public servants,
 - sufficient and reasonable police presence,
 - regulation of schools and protection of children in public and private schools,
 - preventing child abuse, spousal abuse.
- In the private life arena, this includes both abstaining from interference ('freedom-from' rights) and positive obligations to correct violations of human rights (to **effect rights**, the 'right-to' rights)
- States only incur **international responsibility** if they fail to give an **adequate and effective** domestic remedy.
- The State's **legal duty** implies they must (1) **prevent**, (2) **investigate** and (3) **punish** human rights violations, in addition to (4) **restoring rights**, if possible, and/ or **providing compensation**.
- The current state of the law raises questions whether a State can incur responsibility for violations committed by **private individuals and businesses**. Now, they would have the duty to offer adequate remedies for those whose rights were violated, through their own domestic law. There is a growing ethical responsibility to respect all human rights.
- **Judges, prosecutors and lawyers** are on the forefront of this area of law, and must always uphold it and encourage its recognition in all related national and international contexts.
- **Monist versus dualist theories**:
 - **Monist theory**: If a State has ratified a treaty, it automatically makes that law applicable as the State's domestic law.
 - **Dualist theory**: A State's legislature must adopt law based on the treaty law, and make it applicable to the local courts before the local judge can cite it in their own cases. (This is a common way to update one's laws to reflect new human rights obligations. Ex: Norway)

International Procedures

International Procedures include:

- The State would regularly **report** to the related oversight body.
- NGOs are beginning to make contributions to the discussions at the oversight level.
- Once all domestic attempts fail, a **complaint may be filed** with the oversight body.
 - an individual, or, in some cases, only by a group and/or a State (ex: a neighboring State can file a complaint about the violation(s) occurring near its border)
 - the oversight body's staff conduct an **investigation**,
 - a **recommendation** may be made to the State as to desired action to take, and/or requested to **attend hearings or meetings** to discuss actions or lack of actions.
- *Remember*: States are **sovereign bodies**: no other State may legally interfere in the accomplishment of human rights corrections within another State. This position is currently being hotly debated at the highest levels.

Example using the ICCPR:

International Covenant on Civil and Political Rights

- First Optional Protocol: Permits individual complaints.
- Second Optional Protocol: Abolishes the death penalty.

- As of 2002, 148 countries were State parties to the ICCPR.
- As of 2002, 101 States were party to the First Optional Protocol.
- As of 2002, 46 States had entered into the Second Optional Protocol.
- As of 2001, 47 States made declarations regarding inter-State communications.

Potential **limitation** areas:

- right to freedom of movement –Art. 12(3)
- right to manifest one's religion or beliefs –Art. 18(3)
- right to exercise rights to freedom of expression –Art. 19(3)
- right to peacefully assemble –Art. 21
- right to freedom of association –Art. 22(2)

Specific purposes under which these rights can be limited:

- national security
- public order
- public health and morals
- respect for the fundamental rights of others

Areas of permissible **derogations**:

- This condition exists: a **public emergency that threatens the life of the nation**
 - excludes both minor and serious disturbances that do *not* 'rock' the State's institutions or the people's lives generally to the core of the democracy
 - requires an **official proclamation** - of a 'public emergency which threatens the life of the nation'

- **Rights that can never be derogated:**
 - right to life
 - freedom from torture, cruel inhuman or degrading treatment or punishment
 - right to freedom from slavery
 - right to not be imprisoned on grounds of inability to fulfill a contractual obligation
 - no ex post facto laws
 - right to a legal personality
 - right to freedom of thought, conscience and religion
 - 'other non-derogable rights considered 'inherent' to the ICCPR (ex: right to judicial remedies re: arrest and detentions –Art. 9(3) and (4))
 - other rights added by international case law (ex: right to be tried by an independent and impartial tribunal is an absolute right . . . with no exception, per *M.Gonzalez del Rio v. Peru*, 46th Sessions, GAOR, A/48/40 (1992).

- Derogations require **strict necessity**
 - This is **narrowly construed** in interpreting the facts.

- Any measures taken must be taken on the basis of legislation that is also **strictly proportionate**.
- Derogations must be **consistent** with other international law obligations (a developing area)
- Actions taken based on derogations **may never discriminate** on any of the listed bases. - Art. 4(1)
- A **notice** of derogation to other State parties is a pre-requisite before actions can be taken that derogate human rights.

Case of Choice

- Study the case of your choice, as provided, and discuss the following points, orally.
 - Make notes as you discuss the case, following the questions given here.
 - Prepare a written summary of your case analysis points, with any supporting comments and statements.
1. Does the State have a legal obligation? How would you determine that?
 2. What human rights appear to have been violated?
 3. If legal rights have been violated, how would you characterize the State's obligation regarding the human rights involved?
 4. How would you advise the State to proceed? What possible procedure would then take place?
 5. What is your assessment of the State's acts or omissions regarding the events in this circumstance? What is your prediction, if any?
 6. How would the State use limitations in this context? Would it be possible? If so, how?
 7. How would the State use derogations in this context? Would it be possible? If so, how?
 8. Can present human rights law mechanisms assist in this situation? If you find weaknesses in their application, why? What could be done to correct/address problems?
 9. Has the ultimate balancing of interests been - or can it still be - handled legally? How?