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Paper : P-8 Human Rights in times of Armed Conflict
Module : U – III M – 1 Judicial recourse to International Humanitarian Law violation

मानव अधिकार विनियमन



Development Team

Principal Investigator: Prof. (Dr.) YSR Murthy, Executive Director, Centre for Human Rights Studies, OP Jindal Global University

Paper Coordinator: Rohini Sen, Assistant Professor and Assistant Dean (International Collaborations), GLS

Content Writer: Rohini Sen, Assistant Professor and Assistant Dean (International Collaborations), GLS

Content Reviewer: Professor (Dr.) Gurjeet Singh, Professor and Dean, Faculty of Law, Guru Nanak Dev University, Punjab

Description of Module	
Subject Name	Human Rights and Duties
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Module Id	1
Pre-requisites	
Objectives	
Keywords	

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Judicial recourse to International Humanitarian Law violations

Learning Outcomes

- To give students an overview of the different judicial recourse mechanisms available to States under International Humanitarian Law at the time of human rights violations.
- By the end of the module, students will have an understanding of the Geneva Conventions and International Tribunals such as the ones established in Former Yugoslavia and Rwanda. Further, they will be able to understand the broad purpose and structure of the International Criminal Court.

I. Introduction

The focus of this module is to understand some of the enforcement mechanisms in the face International Humanitarian Law violations.

Here is a broad classification of the different types of violations under IHL.

- War crimes: This is a serious violation of the laws of armed conflict. This includes willful killing, torture, taking hostages, killing prisoners, inhumane treatment, etc. Further, attacks on undefended towns, civilians or those providing humanitarian assistance are also regarded as war crimes¹.
- Genocide: Genocide is termed as any act committed with the intent to destroy a national, religious, racial or ethnic group. This includes perpetrating any form of violence such as killing or seriously injuring members in any manner from that group.
- Crimes against humanity: Crimes against humanity are perpetrated against a large civilian population. Such crimes may occur during peace or wartime. It includes crimes such as murder, enslavement, rape, etc².

¹<http://www.redcross.org.uk/~media/BritishRedCross/Documents/What%20we%20do/Teaching%20resources/Teaching%20packages/Justice%20and%20fairness/Justice%20and%20Fairness%20module%204%20part%201.pdf>

² ibid.

The enforcement of IHL can be done by two ways: a) Judicial and b) Non-judicial.

- a) Judicial recourse to IHL violations: A wide range of courts and tribunals are involved. These include domestic courts to the International Criminal Court (ICC)
- b) Non-judicial recourse to IHL violations: The governments of involved States offer non-judicial help to help victims and deliver justice. These services are more informal in nature; they do not involve courts or judges. These options are seen as relatively viable, as they are quicker and less expensive. These mechanisms adopted by the States, include truth commissions, apology and forgiveness, compensation in the form of monetary, psychological and medical services. Further support could include memorials, community reconciliation and the return of property³.

II. Law

An armed conflict arises when there is a fight between two States or government authorities. An international armed conflict arises when one State uses armed forces against another State/s. The law applies even when there is no formal declaration of war.

A major part of the international humanitarian law is found in the four Geneva Conventions of 1949. These conventions have been developed further by two agreements; Additional Protocols of 1977 relating to the protection of victims of armed conflicts⁴. These conventions serve as an important cornerstone of contemporary international humanitarian law. They lay down the rules necessary for protecting people who are no longer taking a direct part in the hostilities. These people are wounded and sick, the shipwrecked, the prisoners of war and civilians, including those civilians living under occupation⁵.

³<http://www.redcross.org.uk/~media/BritishRedCross/Documents/What%20we%20do/Teaching%20resources/Teaching%20packages/Justice%20and%20fairness/Justice%20and%20Fairness%20module%204%20part%201.pdf>

⁴https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf

⁵<https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm>

The first Geneva Convention was for the Amelioration of the Wounded and Sick in Armed Forces in the Field and the Second Geneva Convention was for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. These conventions embody a central idea - If a member of the armed forces is wounded or sick, and is in no condition to take an active part in the hostilities, he is no longer a part of the fighting force. He becomes a vulnerable person in need of protection and care.

The sick, wounded and shipwrecked must be cared for adequately. Belligerents must treat members of the enemy force as carefully as they would their own. The dead must be collected quickly. The death must be confirmed by medical examination. Bodies should be identified and must be protected from robbery. Medical equipment must not be tampered with; medical establishments and vehicles must not be attacked, damaged or prevented from operating in these regions, even if they don't have patients.

The third Geneva Convention is about the members of the armed forces who fall into enemy hands. They are in the power of the enemy State, not of the individuals or troops who have captured them. Further, it says that, prisoners of war must be:

- Treated humanely with respect for their persons and their honour.
- They must be able to inform and correspond regularly their family or friends
- They must be supplied with adequate clothing and food. Further, they must be allowed to keep their clothes, utensils and such personal possessions.
- They must be paid for the work they do.
- Their quarters must not be inferior to their captor's troops.

- Their health must be taken care of. They must be given the medical care that their health demands.

The prisoners of war must **NOT** be

- Compelled to give any information other than their name, age, rank and service number.
- Deprived of money or valuables without a receipt. These should be returned at the time of release.
- Given individual privileges other than for reasons of health, sex, age, military rank or professional qualifications.
- Held in close confinement except for breaches of the law, although their liberty can be restricted for security reasons.
- Compelled to do military work, or work that dangerous, unhealthy or degrading.

The fourth Geneva Convention covers all individuals "who do not belong to the armed forces, take no part in the hostilities and find themselves in the hands of the Enemy or an Occupying Power".

Protected civilians must be:

- Treated humanely at all times and protected against acts or threats of violence, insults and public curiosity.
- Entitled to respect for their honour, family rights, religious convictions and practices, and their manners and customs.
- Specially protected. For instance, in safety zones, if wounded, sick, old, children under 15, expectant mothers or mothers of children under 7.
- Enabled to exchange family news of a personal kind. - Helped to secure news of family members dispersed by the conflict

- Allowed to practise their religion with ministers of their own faith. Civilians who are interned have the same rights as prisoners of war. They may also ask to have their children interned with them, and wherever possible families should be housed together and provided with the facilities to continue normal family life. Wounded or sick civilians, civilian hospitals and staff, and hospital transport by land, sea or air must be specially respected and may be placed under protection of the red cross/crescent emblem.

Protected civilians must **NOT** be:

- Discriminated against because of race, religion or political opinion.
- Forced to give information.
- Used to shield military operations or make an area immune from military operations.
- Punished for an offence he or she has not personally committed. - Women must not be indecently assaulted, raped, or forced into prostitution⁶.

III. Basic Principles and guidelines on the Right to Remedy and Reparation of victims⁷

On the 16th December 2005, the United Nations General Assembly adopted the basic principles and guidelines on the right to remedy and reparation for victims of gross violations of International Human Rights Law and serious violations of IHL.

Some of the provisions of the principles are as follows-

- a) There is an obligation to respect and enforce international human rights law and international humanitarian law. This is subject to:
 - * Treaties to which a State is party
 - * Customary International Law

⁶ http://www.ppu.org.uk/learn/texts/doc_geneva_con.html

⁷ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

* The domestic law of each State

b) This obligation includes the duty to

- * Take the appropriate legislative and administrative measures to prevent violations.
- * Investigate violations effectively, promptly, thoroughly and impartially. The action must be taken in accordance with domestic and international law.
- * Provide victims of an IHL violation with equal and effective access to justice.
- * Provide effective remedies to victims, including reparation.

c) Case of gross violations of human rights law and serious violations of international humanitarian law that constitute crimes under international law

- * In such cases, the duty to investigate is upon States. If the States find sufficient evidence, they have the duty to submit the alleged person to the prosecution.
- * Further, States should cooperate with each other and assist international judicial organs in the investigation and prosecution of these violations.
- * States shall incorporate and implement appropriate provisions for universal jurisdiction in their domestic law.
- * Further, States should facilitate extradition or surrender offenders to other States and appropriate International judicial bodies.
- * States should also provide judicial assistance and other forms of cooperation in the pursuit of international justice. This includes, assistance to, and protection of, victims and witnesses. The assistance and protection has to be consistent with international human rights legal standards. In addition to this, it has to be subject to international legal requirements such as prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment.

d) Statutes of limitations

- * If provided for in an applicable treaty or other international legal obligations, statutes of limitation shall not apply to the gross violations of international human rights law and serious violations of IHL, which constitute crimes under international law.
- * Domestic statutes of limitations for other violations that do not constitute crimes under international law should not be unduly restrictive.

e) Who is a “victim”?

Who is a “victim” of gross violations of International Human Rights?

- A victim is a person who suffers any harm and substantial impairment of their fundamental rights through acts or omissions that constitute gross violations of international human rights law.
- The term includes immediate family, dependents of the direct victim, persons who have suffered harm while assisting victims or preventing victimization.
- Further, a person will be considered as a victim regardless of the familial relationship between the perpetrator and the victim.

f) Treatment of victims

- * Victims should be treated with dignity and human rights. Appropriate measures should be taken ensure their safety, well-being; both physical and psychological and privacy, of their families and theirs.
- * The State should ensure that its domestic laws provide for a victim, who has suffered violence or trauma. The victim should benefit from special consideration and care to avoid re-traumatization in the course of legal and administrative procedures.

g) Victim's right to remedies

- * The remedies for gross violations include the victim's right to equal and effective access to justice, adequate, effective and prompt reparation for harm suffered and access to relevant information concerning violations and reparation mechanisms.

h) Access to justice

- * A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy.
- * Other remedies available to the victim include access to administrative as well other bodies, mechanisms, modalities and proceedings conducted in accordance with domestic law.
- * Obligations arising under international law to secure the right to access justice and fair impartial proceedings shall be reflected in the domestic laws.

i) Reparation of the harm suffered

- The reparation should be in proportion to the violations of the harm suffered.
- It should be accordance with the domestic and international laws and legal obligations.
- If a person or any other entity is liable, such party should provide reparation to the victim or compensate the State, if the State has already provided reparation to the victim.
- Compensation should be provided for any economically assessable damage. This hinges on the circumstances and gravity of the violation of each case.

IV. International judicial organs

International War Crimes Tribunals are courts of law established to try individuals who are accused of perpetrating war crimes and crimes against humanity. These courts are based on the idea of fair trial – that is, to give the accused a fair chance of defending himself⁸.

The War Crimes Tribunals of Nuremberg and Tokyo were established to punish the high ranked officers of the German and Japanese military after the World War II. These tribunals are still considered to be extremely successful. These two tribunals are often cited as evidence to prove the effectiveness of war crimes tribunals in helping a society that has perpetrated war crimes⁹.

The Nuremberg Trials were a series of 13 trials between 1945 and 1949. They were held to prosecute several high-ranking Nazi military officers along with the German upper class on charges of perpetrating crimes against peace and humanity¹⁰. These trials were a milestone in recognizing and establishing a permanent international court. This help set an important precedent for later cases of genocide and other crimes against humanity¹¹.



⁸ <http://www.beyondintractability.org/essay/int-war-crime-tribunals>

⁹ *ibid*

¹⁰ <http://www.history.com/topics/world-war-ii/nuremberg-trials>

¹¹ *ibid*

Nuremberg Trials – Source: https://prezi.com/a8rykn_pmoow/the-nuremberg-trials/

The Nuremberg Principles were a result of the Nuremberg Trials. They are a set of seven guidelines established to determine what constitutes a war crime. Through these principles, the UN attempted to codify the fundamental rules in the Charter of the Nuremberg Tribunal¹².

The Nuremberg Trials also paved way for the creation of several **ad hoc tribunals**. They are set up to prosecute the war crimes that happen in these specific locations. The International Criminal Tribunal for the former Yugoslavia and its sister court for Rwanda are examples of this.

This has also paved way for the creation of special courts. These courts have been set up to prosecute domestic and international crimes. Examples: Kosovo Cambodia, East Timor, Sierra Leone and Lebanon¹³.

Let us take a closer look at what happened in Yugoslavia and Rwanda.

Yugoslavia

The conflict

The Socialist Federal Republic of Yugoslavia was a well-developed and diverse country in the Balkans. It comprised Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Serbia and Slovenia.

The communist model failed here in the 1990's. This collapse led to the worst economic and political crisis in Yugoslavia. The government failed to contain the situation and this gave rise to militant

¹² http://www.hrea.org/index.php?base_id=131

¹³ <https://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/ad-hoc-tribunals/overview-ad-hoc-tribunals.htm>

nationalism¹⁴. Further, the political leaders used the fear and mistrust to pit one ethnic group against the other. The tension escalated and culminated in one of the worst genocides in history.

The single worst ethnic clash occurred in a Bosnian town called Srebrenica. This was a UN-declared safe area. Bosnian Serb commander Ratko Mladić and his forces attacked it. Serb forces in an act of genocide executed more than 8,000 Bosnian Muslim men and boys. The women and children were driven out¹⁵.



Bosniak (Bosnia Muslim) civilians inside the Manjaca concentration camp in 1993

The Tribunal

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was the first war crimes court created by the UN. Further, it was also the first international war crimes tribunal since the Nuremberg and Tokyo tribunals.

It was established to adjudicate alleged war crimes committed during the conflict in the Balkans during the 1990's.

¹⁴ <http://www.icty.org/sid/322>

¹⁵ <http://www.icty.org/sid/322>

The three main branches of the ICTY are:

- The Chambers
- The Registry
- Office of the Prosecutor.

The legal proceedings pass through three stages:

- Investigation and indictment phase
- Pre-trial and appeal phase
- Enforcement of sentences.

ICTY is a successful model for other ad hoc international criminal tribunals. Its rulings have produced a broad and deep set of legal precedents on international humanitarian law¹⁶. It has laid the norms for conflict resolution and post-conflict development around the world.

Further, the Tribunal has been instrumental in ensuring that crimes across the region cannot be denied. For instance, it has been proven beyond reasonable count that the mass murder at Srebrenica was genocide. It was also head that rape was used by one ethnic group on other as an instrument of terror.

Rwanda

The Conflict

Rwanda's population comprised Hutu (85%), Tutsi (14%) and Twa (1%). The country was riddled with social, economic and political pressure. In the early 1990's, the Hutu extremists within Rwanda's political elite blamed the Tutsi minority population for this. These accusations and politics increased the division between Hutu and Tutsi by the end of 1992.

¹⁶<http://www.redcross.org/rulesofwar/international-law-courts>

In 1994 a plane carrying the President of Rwanda, a Hutu, was shot down. Violence escalated after that. Hutu extremists wanted to destroy the entire Tutsi civilian population. The Tutsi population was brutally killed and the women were raped. It is estimated that 8,00,000 people perished in the Rwandan genocide¹⁷.



The Tribunal

The UN Security Council created the International Criminal Tribunal for Rwanda (ICTR) in 1994. The purpose of this is to facilitate peace building and reconciliation in Rwanda.

The ICTR consists of three organs:

- The Chambers and the Appeals Chamber
- The office of the prosecutor in charge of investigations and prosecutions
- The Registry

¹⁷ http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm

They are responsible for providing overall judicial and administrative support to the Chambers and to the Prosecutor.

Case Study: The Trial of Jean-Paul Akayesu¹⁸

Jean-Paul Akayesu is a Rwandan national born in 1953. He was a teacher and then became an inspector of schools. He entered politics in 1991. He was one of the founding members of Mouvement Démocratique Républicain (MDR). He was the head of the Taba commune. During the Rwandan Genocide, Tutsis were brutally killed and raped in his commune. Akayesu not only refrained from stopping the violence, but actively supervised the murder of the Tutsis.

He stood trial for 15 counts of genocide and crimes against humanity during the Rwandan Genocide. He was also accused of gross violations of the Geneva Convention. The defense argued that he was being made a scapegoat for the ethnic clashes in his commune. Despite this, the ICTR found him guilty on 9 counts of genocide and crimes against humanity. However, he was not found guilty under the Geneva Conventions.

This is landmark case for several reasons. Some of them are as follows:

1. This is the first time that the Convention on the Prevention and Punishment of the Crime of Genocide was enforced¹⁹.
2. It demarkated the mental element that constitutes the crime 'genocide' from the mental element that constitutes a breach of Geneva Conventions²⁰.

¹⁸ <http://www.uniurb.it/scipol/pretelli/9%20Akayesu.pdf>

¹⁹ <http://www.unicttr.org/sites/unicttr.org/files/case-documents/ictr-96-4/appeals-chamber-judgements/en/010601.pdf>

²⁰ *ibid.*

3. The court clarified that genocide is a specific crime. This takes the accused outside of the scope of armed conflict²¹.

Permanent Courts

International Criminal Court

The Rome Statute established the International Criminal Court (ICC) in 2002. It is the world's first permanent court with jurisdiction to prosecute individuals for crimes against humanity, war crimes and genocide.

It is important to remember that all of the world's nations are not signatories to the Rome Statute of the ICC. The court came into existence because a sufficient number of nations have ratified the Rome Statute.

The ICC is treaty based and has jurisdiction only when crimes listed in the statute are committed either by a national of a State Party or on the territory of a State party. One of the main features of the ICC is that it is **NOT** retrospective in nature. That is, its jurisdiction only extends to war crimes committed after the establishment of the ICC²².

The ICC seeks to complement national tribunals by providing them with an arena if the case is too complicated or extensive for a national tribunal²³.

However, the ICC has a fair set of limitations. Some of them are:

²¹ ibid.

²² <http://www.beyondintractability.org/essay/int-war-crime-tribunals>

²³ <http://www.beyondintractability.org/essay/int-war-crime-tribunals>

- Lack of international support: Not all countries are signatories to the Rome Statute of the ICC. Therefore, they are not members of the ICC. This poses as a major impediment for victims of war crimes from non-member countries to get justice.
- International Politics: There might not always be international cooperation among the different members states of the ICC due to international politics. Some of the major concerns include dilution of leadership, accusations of favoritism, etc²⁴.

Owing to these limitations, it is important to empower other judicial mechanisms.

More recently, the UN Security Council established the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. The Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the period of Democratic Kampuchea were established pursuant to an agreement between the UN and the Sierra Leone and Cambodia respectively.

The Statutes of the International Criminal Court, of the International Criminal Tribunal for Rwanda, of the Special Court for Sierra Leone and of the Extraordinary Chambers for Cambodia expressly include within their jurisdiction war crimes committed during non-international armed conflicts²⁵. Following the Cold War and with the advent of the atrocities that occurred in the former Yugoslavia, Sierra Leone and Rwanda, special international courts were set up. These were also known as ad hoc tribunals. They were set up in the 1990's to prosecute the war crimes that had occurred in these locations.

²⁴ <https://www.prbuzz.com/politics-a-public-affairs/66277-international-criminal-court-icc.html>

²⁵ <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>

