

## UNDERSTANDING STATE'S APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW

### **Abstract**

*The emergence of the State is a crucial development in the evolution of human rights precisely because so many rights, if not most of them, are State-centered. The State is a bearer of duties in respect of individual persons, who depend on it for the protection of their rights and are entitled to claim against it for violations of those rights. The application of these human rights is the crux of this work.*

**Keyword:** *Human Rights, State's Application, International Law, Human Beings*

### **1. Introduction**

Human rights are those rights that every human being possesses and is entitled to enjoy by virtue of being human. Human rights are the birthrights of all human beings. The protection of human rights is the first responsibility of Government. Human rights are based on the fundamental principle that all persons possess inherent human dignity. People are entitled to enjoy rights regardless of national origin, colours, language, race, sex and class or religious or political belief. The former Chief Justice of India<sup>1</sup> stated thus:

Human Rights are as old as human society itself, for they derive from every person's need to realize his (or her) essential humanity. They are not ephemeral, not alterable with time and place and circumstances. They are not the products of philosophical whim or political fashion. They have their origin in the fact of the human condition; and because of this origin they are fundamental and inalienable. Human rights were born not of humans but with humans.

### **2. Background of Study**

Human rights in the modern era can be traced back to the American Revolution and the French Revolution. The idea of freedom, which was introduced in these two revolutions, emphasized the importance of the individual before the community or society. Human rights that emerged in the 18<sup>th</sup> century emphasized the natural rights of man; its form in the 20<sup>th</sup> century has become more global advocating a standard form of human rights in cultures, societies and races. It has also emphasized the moral claims of individuals as superior to that of Government. The body of human rights law includes any law that can be used to promote or protect human rights and these can be found in either of the following:

- i. State Constitutions;
- ii. Legislations;
- iii. Treaties or Conventions; and
- iv. International Customary Laws both written and unwritten.

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<sup>1</sup>Justice P N Bhagwati, *Creating a Judicial Culture to Promote the Enforcement of Women's Human Rights* (Hongkong, May 1996) p. 21

The United Nations Human Rights Conventions (UNHRCs) are part of the international laws that set out the human rights values and how they are to be protected and enforced. They address civil, political, economic, social, cultural, gender and other special rights for children and the disadvantaged<sup>2</sup>.

Some of the significant United Nations Conventions on Human Rights are:

- a. Universal Declaration on Human Rights (UDHR);
- b. International Convention on Civil and Political Rights (ICCPR);
- c. Optional Protocol to the Covenant on Civil and Political Rights (OPCCPR);
- d. International Covenant on Economic, Social and Cultural Rights (ICESCR);
- e. Convention Against Torture (CAT);
- f. Convention Against Genocide (CAG);
- g. The Geneva Convention on the Conditions of the Wounded and Sick in Armed Forces (1), The First Geneva Convention;
- h. Convention on the Rights of the Child (CRC); and
- i. Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)<sup>3</sup>.

### **3. International Human Rights and States Application**

International human rights law is the body of international law designed to promote human rights on social, regional, and domestic levels. As a form of international law, international human rights law is primarily made up of treaties, agreements between sovereign States sintered to have binding legal effect between the parties that have agreed to them; and customary international law, rules of law derived from consistent conduct of States acting out of the belief that the law required them to act that way. Other international human rights instruments while not legally binding contribute to the implementation, understanding and development of international human rights law and have been recognized as a source of political obligation<sup>4</sup> International human rights law seeks to guarantee human rights to all human beings without discrimination. Under International human rights law, States are not only to refrain from interfering with the exercise and enjoyment of human rights (so-called negative obligations but) also to take steps to promote, protect and fulfill their enjoyment (so-called positive obligations). Positive obligations require States to take steps to ensure that non-state actors do not impede the enjoyment of human rights. While International humanitarian law applies to both State and non-State actors, it remains contested whether and under what circumstances, non-State actors have human rights obligations. Human rights law applies at all times, including during times of armed conflict. States may derogate from their human rights treaty obligations during a state of emergency, including during times of armed conflict<sup>5</sup>.

International human rights treaties usually provide for a monitoring system to scrutinize compliance and assist States parties in the implementation of their obligations. To a varying degree, treaties create procedures where individuals can bring complaints against States for alleged human rights violations. Victims of human rights violations during times of armed conflict may use their procedures to the extent that they are available.

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<sup>2</sup> [www.hrb.org/legal/undocs.html](http://www.hrb.org/legal/undocs.html). Accessed 21/02/2018.

<sup>3</sup> *Journal of South Pacific Law* (2009) Vol. 13

<sup>4</sup> Wikipedia cc BY-SA 3.0

<sup>5</sup> [www.rulac.org/Legal-frame work](http://www.rulac.org/Legal-frame%20work). Accessed 21/02/2018.

#### 4. What are Derogations?

International human rights law continues to apply in times of armed conflicts yet some human rights treaties envisage a system of derogations.<sup>6</sup> Derogations allow States parties to adjust some of their obligations under the treaty in exceptional situations. The existence of a situation amounting to a public emergency is a fundamental requirement for triggering the derogation clause. Non-international armed conflicts or acts of terrorism are frequently asserted as justifying the declaration of a State of emergency. Yet, an armed conflict does not automatically qualify a state of emergency to exist – there must be an actual and imminent threat to the organized life of the community<sup>7</sup>. The meaning of State of emergency in the sense of international human rights treaties does not necessarily correspond to the definition of state of emergency within domestic law. States must officially proclaim a State of emergency, and notify the relevant international supervision body of the proclamation, the reasons for derogation and the measures taken.

International human rights treaties provide for series of substantive limits to derogations. First, derogation measures must be strictly required by the exigencies of the situation<sup>8</sup>. Hence States must limit the severity, duration and geographical scope of derogation measures to the extent strictly required. In other words, derogation measures must be limited to what is really needed to address the situation of crisis. Consequently, the entire rights cannot be eliminated or suspended during a state of emergency. States, however, must put in place the necessary safeguards to prevent abuse.

Second, derogation measures should be consistent with other obligations of the derogating State under international law, including international humanitarian law and international refugee law. Third, derogation measures must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. The inclusion of the criteria of national origin in non-discrimination clause was rejected on the ground that different treatment of alien nationals would be necessary during war time. However, derogation measures that distinguish between nationals and non-nationals are only permissible if the exigencies of the situation require such a distinction. In the case of *A and Others v The United Kingdom*<sup>9</sup>, the Grand Chamber of the European Court held that the British derogation measure which limited preventative detention to non-nationals was disproportionate and discriminated unjustifiably between nationals and non-nationals. Nationals and non-nationals that could not leave the country for fear of torture abroad were in a substantially similar situation and they both posed a potential terrorist threat.

Finally, States cannot derogate from certain rights. All derogation clauses provide for a list of such rights. The list varies; yet common to all treaties are the right to life, the prohibition of slavery, the prohibition of torture and cruel, inhuman or degrading treatment or punishment, and prohibition of retroactive penal measures. Other rights that are not expressly listed are also considered non-derogable, in particular rights or aspects thereof that reflect other obligations under International law, such as the principle of humane treatment of all persons deprived of liberty<sup>10</sup>.

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<sup>6</sup> Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the European Convention on Human Rights, Article 27 of the American Convention on Human Rights

<sup>7</sup> *A and Others v. The United Kingdom*, Grand Chamber, Judgment, App no 3455/05, 19 February 2009, pp 179-180

<sup>8</sup> Article 4 of the International Covenant on Civil and Political Rights, Article 15 of the European Convention on Human Rights, Article 27 of the American Convention on Human Rights

<sup>9</sup> E c t H R Grand Chamber, Judgment App no 3455/05, 19 February 2009, p 182- 190

<sup>10</sup> HRCtee, General Comment No 29: Derogations During a State of Emergency (Article 4), UN doc CCPR/C/21/Rev.1/Add.11, 31 August 2001, s 7

## 5. Do Human Rights Treaties Apply Abroad?

Most human rights treaties, albeit with slightly different wordings, specify that they apply where the State concerned exercise jurisdiction. Jurisdiction always includes a State's territory. This remains true in instances where the State has lost control of part of its own territory, for example when another State or separatist regime effectively controls part of the territory. However, such circumstances limit the scope of State's obligations<sup>11</sup>. Armed conflicts often involve operations outside a State's territorial boundaries, which raises the question whether individuals fall within the jurisdiction of the State in such Circumstances. From international jurisprudence, two models to establish the extraterritorial application of human right treaties emerge. First, under the so called spatial or territorial mode, jurisdiction for the purpose of human rights treaties exists when a State exercises effective control over an area, including as a consequence of military occupation. For instance, in the case of *AL-Skeini and others v The United Kingdom*<sup>12</sup>, the case originated in an Application No. 55721/07 against the United Kingdom of Great Britain and Northern Island lodged with the Court under *Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms*, by six Iraqi nationals, Mr. Mazin Jum'aa Gatteh Al-Skeini, Ms Fattema Zabun Dahesh, Mr. Hameed Abdul Rida Awal Kareem, Mr. Fadul Fayay Muzban, Mr. Jabbar Kareem Ali and Colonel Daoud Mousa (the applicants), on 11 December 2007. The applicants alleged that their relatives fell within United Kingdom's jurisdiction when killed and that there had been no effective investigation into their deaths, in breach of *Article 2 of the Convention*. The Court unanimously rejected the Government's preliminary objection regarding attribution and non-exhaustion of domestic remedies, joined to the merits the questions whether the applicants fell within the jurisdiction of the respondent State and whether the fifth and six applicants retained victim status, declared the application admissible and held that the applicants' deceased relatives fell within the jurisdiction of the respondent State and dismissed the Government's preliminary objections as regards jurisdiction.

Second, under the personal model, jurisdiction for the purpose of human rights treaties exist when State agents operating outside State territory exercise authority and control over individuals such as for example when arresting an individual<sup>13</sup>.

## 6. Conclusion

Enforcement of International human rights law can occur on a domestic, a regional or an international level. States that ratify human rights treaties commit themselves to respecting those rights and ensuring that their domestic laws are compatible with international legislations. When domestic law fails to provide a remedy for human rights abuses, parties may be able to resort to regional or international mechanisms. To better guarantee the exercise and enjoyment of human rights of all human beings without discrimination, States are to take steps to promote, protect and fulfill their enjoyment. To achieve this, State parties should ensure effective compliance with the International human rights treaties, and an unalloyed application and implementation of their obligations, as well as ensure that the entire rights are not eliminated or suspended during a state of emergency, but should instead put in place necessary safeguards to prevent abuse.

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<sup>11</sup> ECtHR, *Ilascu and Others v. Moldova and Russia*, Grand Chamber Judgment, App no 48787/99, 8 July 2004

<sup>12</sup> Grand Chamber Judgment, App no.55721/07/ 7 July 2011, 135

<sup>13</sup> *Armado v. Alejandre; Jr et al v. Cuba*, Case No. 11.589. Rep no 86/99, 29 September, 1999,25