

# Human Rights in Higher Education:

Innovative pedagogical approaches  
through service-learning and  
competency-based learning

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**ABDEM**



United Nations  
Educational, Scientific and  
Cultural Organization



UNESCO Chair  
Democratic Citizenship  
and cultural freedom



**UNIVERSIDAD  
DE LA RIOJA**



In an increasingly complex and intolerant world, we need to more effectively communicate and teach basic rights and freedoms, to ensure that people listen and are able to change the way they behave. We also need to empower people so that they are able to claim and defend their human rights. This often means returning to the basics of effective communication and truly meaningful education, making rights understandable and relevant for everyone. In short, this involves putting a human face on the stories that we tell, instead of merely giving facts and figures. But this will only be possible if education for all citizens offers answers to real problems, such as the eradication of poverty and discrimination, post-conflict reconstruction, sustainable development and multicultural understanding, in order to improve society and people's lives.

The United Nations and UNESCO have taken up this important challenge and are according strategic relevance to human rights education. Since 2005, the *World Programme for Human Rights Education* has encouraged concrete measures to integrate human rights education in all sectors and all educational systems. It aims to 'promote a common understanding of the basic principles and methodologies of human rights education'. This programme conceives human rights education as a lifelong process of empowerment that transfers knowledge and skills, develops values, attitudes and behaviours, and promotes the application and defence of human rights in everyday life. In this process, both what is learned and the way in which it is learned are equally important. Both should reflect human rights values, encourage participation and foster a learning environment free from want and fear.

In addition, the 2030 *Agenda for Sustainable Development* (Goal 4.7) and the *Education 2030 Framework for Action* consider the vital importance of reinforcing the role played by education in the full realisation of human rights, peace, and responsible local and global citizenship. To achieve these goals, learning content must be appropriate and include both cognitive and non-cognitive aspects.

This publication has been prepared on the basis of these premises and aims to respond to the challenges outlined. It is not limited to a theoretical reflection on human rights, but instead aims to contribute to the analysis of real-world problems in order to facilitate the necessary changes and foster the creation and consolidation of democratic societies. At its heart, there is a firm commitment to rethinking the universality of human rights and their contextualisation in non-Western cultures. Its main objective is to help students to *learn to know, learn to do, learn to live together and learn to be*.

The content is divided into **three modules** whose sequence reflects a specific pedagogical commitment to ensuring that with learning comes a sense of civic responsibility. The first module focuses on **competence-based learning** (identification, programming and evaluation), where the student is the central agent in their own learning process - a process which needs to be both meaningful and functional. Competences must have meaning. They must have a direct impact on personal development - increasing students' level of knowledge, their understanding of what is happening and their ability to respond - at the same time as contributing to the improvement of real-world situations. This learning, therefore, should not only favour the acquisition of technical competences specific to each academic qualification, but should also reinforce the training of the competences needed to become good professionals, such as critical and reflective thinking, teamwork, intercultural and ethical competences, problem solving, decision making and initiative taking.

The second and longest module focuses on the **human rights-based approach**. This involves analysing the specificity of this approach in comparison to others, the principles and essential characteristics of human rights, the international texts and protection mechanisms, as well as a detailed discussion of each of the rights. This discussion takes an eminently functional perspective, avoiding academic digressions and originality of approaches. In fact, most of the materials used in the preparation of the topics come from official United Nations publications, which are indicated in each case. Its overarching concern is to outline the key aspects of each right and the tools necessary for their implementation in local contexts. For this purpose, documentary and bibliographical references are provided, as well as activities on each topic.

The third module is devoted to the **Service-Learning** methodology considered the most appropriate tool for integrating the human rights-based approach in university activity, since it reinforces the student's role as an active member of a community. This methodology allows students to acquire curriculum content through participation in a voluntary service: investigating and diagnosing problems in a local context, defining objectives, designing projects, implementing them and evaluating them. The teacher's role is to accompany them on this journey and learn with them. The service becomes a workshop on values and knowledge, with the students becoming agents of change, willing to work actively to create a more just world.

In short, these pages offer "*training while transforming*".



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# MODULE 0 |

General introduction



**ABDEM**





# SUBJECT 1:

## CONCEPTUAL FRAMEWORK OF THE HUMAN RIGHTS APPROACH

**Hours:10**

**Subject 01.** Conceptual Framework of the Human Rights Approach

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### SUMMARY OF THE TOPIC

This first lesson discusses several basic concepts governing any continuous education, such as the definition of human rights, education on human rights and attention to issues pertaining to human rights. In addition, it presents elements of this approach that differentiate it from other approaches used, especially in development programmes. Lastly, the added value of this approach is also presented, and its specific contribution to the results-based management approach.

### GENERAL AND SPECIFIC COMPETENCES

For the three modules comprised in the HRBA training programme and pursuant to the governing principles of the action plan for development of the world programme for human rights education approved by the United Nations (General Assembly, 2010, p. 8; 2012 pages 26 and 27), at the end of the course participating teachers should be able to recognise the educational potential of the *general and specific skills* described below to achieve significant awareness on human rights in order to incorporate these skills in the planning of the courses, in an effort to integrate and guide towards the effective application of the knowledge acquired.

Specifically, in **this topic** we will work with the following specific and general skills:

#### GENERAL

- 1 **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- 2 **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.



- 3 **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means..
- 4 **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- 5 **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

## SPECIFIC

- To identify, analyse, discuss and evaluate the critical deficiencies and deficiencies in the capacity and responsibility of the claim-holders and duty-holders that hinder the action or the transformation of a situation where human rights are infringed.
- To investigate, select and analyse information from various sources (legal, social, economic, etc.). Properly plan and document this task.
- To develop analytical, systematic, deliberate, practical and qualified thought.
- To develop oral and written communication
- To promote guidance towards achievement and leadership
- Use of ICT

## REFERENCES AND OTHER OBLIGATORY TEACHING RESOURCES

- 1) Presentation of the lesson
- 2) Office of the United Nations High Commissioner for Human Rights (2006), [Frequently asked questions on a human rights-based approach to development cooperation](#), New York and Geneva (HR/PUB/06/8).
- 3) World Bank (2011). [Learning for All Investing in People's Knowledge and Skills to Promote Development](#), Washington D.C.: World Bank.
- 4) [Plan of Action for the second phase \(2010-2014\) of the World Programme for Human Rights Education](#) (A/HRC/15/28) human rights education for higher education and on human rights training for teachers and educators, civil servants, law enforcement officials and military personnel. [Web](#)

## REFERENCES AND OTHER COMPLEMENTARY RESOURCES

Equitas - International Centre for Human Rights Education and the United Nations Office of the High Commissioner for Human Rights (2011), [Evaluating Human Rights Training Activities: A Handbook for Human Rights Educators](#). Professional Training Series No. 18, Montreal, (HR/P/PT/18)

UNICEF (2003), [The State of the World's Children 2004](#). Girls, education and development, Annex B, New York.

United Nations Children's Fund/ United Nations Educational, Scientific and Cultural Organization (UNESCO), [A Human Rights-Based Approach to education for all](#), New York / Paris, 2007.

United Nations Development Programme - UNDP (2000), [Human Development Report](#), De Boeck & Larcier, Paris. Chapter 1

United Nations Development Programme - UNDP (2004), [Human Development Report 2004. Cultural Liberty in Today's Diverse World](#), Economic, Paris. Chapter 1.

United Nations High Commissioner for Human Rights (1999), Human Rights Training. [A manual on Human Rights Training Methodology](#). Professional Training Series No. 6. New York and Geneva (HR/P/PT6).

United Nations High Commissioner for Human Rights (2004) [Human Rights and Poverty Reduction. A conceptual framework](#), New York and Geneva (HR/PUB/04/1).

United Nations, [Plan of Action for the third phase \(2015-2019\) of the World Programme for Human Rights Education](#) (A/HRC/27/28) promoting human rights training for media professionals and journalists. [Web](#):

Web: [United Nations Development Group \(UNDG\), Working Groups: English Learning Package](#).

## LEARNING OUTCOMES

At the end of the learning, participants will be able to:

- Understand the value of human rights in development and particularly in education.
- Understand the added value of applying the Human Rights-based Approach (HRBA) and (GBR) in the national and United Nations programming processes, and in the social intervention process.
- Apply the key elements of a human rights-based approach and a results-based management approach to reinforce the analytical work of the social, economic and cultural environment of each person's country.

## METHODOLOGY

Methodology	Teaching tools
Explanatory method	Reading of texts
Cooperative learning	Forum
Role play or simulation	
Group discussions	Forum
Work groups	

## SYLLABUS

### 1) INDIVIDUAL ACTIVITY: INDIVIDUAL REFLECTION

Read the following documents for a reference framework:

- a) **Presentation of the lesson.** By reading the declaration of the lesson, students will have a summarised general idea of the main elements of a HRBA. A first reading will enable participants to identify the section of their teaching activity to delve further into the study of human rights and to apply the subject in a practical setting.



- b) **Parts III and IV of the United Nations High Commissioner for Human Rights document (2006)**, [Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation](#), New York and Geneva (HR/PUB/06/8).
- c) **Plan of Action for the second phase (2010-2014)** of the World Programme for Human Rights Education (A/HRC/15/28) on human rights education for higher education and on human rights training for teachers and educators, civil servants, law enforcement officials and military personnel.
- d) World Bank (2011). [Learning for All Investing in People's Knowledge and Skills to Promote Development](#), Washington D.C.: World Bank.

Produce a list of possible arguments in favour of introducing changes to the syllabus that integrates human rights-based approach and competences to convince the education authorities.

## 2) ACTIVITY 2. SMALL-GROUP WORK WITH FOUR PARTICIPANTS FROM EACH UNIVERSITY.

Your group or yourself are invited to give a presentation to the Minister of Education on how the curriculum reform process could be carried out within a national or local context. Using what you have learned, prepare a presentation for the minister, where you will present some preliminary ideas and issues that may be considered during the change in context of the curricular process. When preparing the presentation, bear in mind the following:

- presentation of the objectives and strategies to reach them;
- the possible response from the minister;
- the issues that the minister may identify;
- the problems that the minister may request;
- the information to be considered during the meeting; and
- ways to encourage or persuade the minister.

Participants may prepare the presentation using free online tools, [such as Google docs, Google Drive](#), etc.

## 3) ACTIVITY 3. SMALL-GROUP WORK WITH FOUR PARTICIPANTS FROM EACH UNIVERSITY.

Preparation of the presentation:

- a) The group must agree on:
  - the number of slides;
  - the main subject/idea of each slide; and
  - the order of the ideas/slides.
- b) Each member will be responsible for presenting some of the slides.
- c) Individual work on each slide using a draft.
- d) Development of a presentation containing all the completed slides.

The presentation will be shared with other students in the virtual room.

#### 4) ACTIVITY 4. COMMON DISCUSSION.

Each group's presentation will be discussed in agreement. Identify the common challenges, approaches, solutions and the existing possibilities for cooperation that will enable advancement in rights and competence-based approaches. At the end, each student will evaluate other groups' presentations on a scale from 1 to 10.

**Expected outcome:** arguments to discuss with the Minister of Education.

#### 5) ACTIVITY 5.

Perform a **self-evaluation test**.

### TIMELINE OF ACTIVITIES

Activity Name	Time for the activity
Reading the presentation of the lesson	90'
Reading of parts III and IV of the report by the United Nations Office for Human Rights (2006)	60'
Reading of the Plan of Action for the second phase (2010-2014) of the World Programme for Human Rights Education (A/HRC/15/28) on human rights education for higher education and on human rights training for teachers and educators, civil servants, law enforcement officials and military personnel.	60'
Reading of the World Bank (2011) document. Learning for all. Investing in People's Knowledge and Skills to Promote Development.	60'
Activity 2: Preparation of the presentation	120'
Activity 3: Preparation of the presentation	120'
Activity 4: Plenary discussion	60'
Activity 5: Complete the self-evaluation test.	15'

### SELF-EVALUATION TEST

1) Needs approach, how are individuals considered?

- a) As subjects of development
- b) As citizens
- c) As poor people

- 2) What is the rights-based focus?
  - a) Needs
  - b) Situation
  - c) Structural causes
- 3) Is poverty related to the lack of resources?
  - a) They are actually the same thing
  - b) No, it depends on the quality of life
  - c) No, poverty refers to the lack of capability
- 4) One of these three principles is not compatible with the human rights-based approach:
  - a) Contribute to the realisation of human rights
  - b) Promote international sanctions
  - c) Inspire policies
- 5) State two human rights principles that guide the actions of the United Nations Organisation:
  - a) Indivisibility and non-discrimination
  - b) Protection for minorities and persecution of violations
  - c) Accountability towards the civil society
- 6) How does the human rights-based approach affect the analysis of situations?
  - a) It helps in the analysis of causality
  - b) It monitors the use of indicators
  - c) It encourages reformulating problems
- 7) Which of these ideas cannot be included in the added value of the human rights-based approach?
  - a) To verify the relationships of power
  - b) To force the cooperation agencies to work
  - c) To learn about reality on the ground
- 8) What is a charity approach based on?
  - a) It awakens positive attitudes
  - b) Rights
  - c) On international cooperation
- 9) Can poverty be related to the lack of resources?
  - a) They are actually the same thing
  - b) No, it depends on the quality of life
  - c) No, poverty refers to the lack of capability



## SELF-EVALUATION TEST

Question	Question Key
Question 1	1 a
Question 2	2 c
Question 3	3 c
Question 4	4 b
Question 5	5 a
Question 6	6 a
Question 7	7 b
Question 8	8 a
Question 9	9 c

# SUBJECT 1:

## CONCEPTUAL FRAMEWORK OF THE HUMAN RIGHTS APPROACH

### 1. INTRODUCTION

To reach its objectives, the ABDEM project has adopted a conceptual framework incorporating three instruments on which there is a broad consensus within the international community. The first is the *Human Rights-Based Approach* (HRBA), introduced following the United Nations Programme for Reform launched in 1997, in which the Secretary-General called on all entities of the UN system to mainstream human rights into their various activities and programmes within the framework of their respective mandates. The second is the *World Programme for Human Rights Education* (WPHRE), approved by the General Assembly's Resolution 59/113A of 10 December 2004, to advance the implementation of human rights education programmes in all sectors. Lastly, the third instrument is the guide to *Human Rights Indicators* established by the Office of the United Nations High Commissioner for Human Rights<sup>1</sup>.

The use of these instruments offers advantages both for our teams and for the international community. On the one hand, it facilitates the identification and therefore the understanding of defined, internationally accepted concepts and frameworks. On the other hand, the ABDEM project helps to validate and implement these international instruments in different cultural and geopolitical contexts where until recently they were less familiar to governments and higher education institutions.

### 2. WHAT ARE HUMAN RIGHTS?

Human rights are **universal legal guarantees** protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity.

Human rights are **indivisible**. Whether they relate to **civil, cultural, economic, political or social issues**, human rights are inherent to the dignity of every human person. Consequently, all human rights have equal status, and cannot be positioned in a hierarchical order. They are also **interdependent and interrelated**. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others.

Human rights **protect individuals** and, to some degree, groups. Some rights can only be assured through the recognition and protection of individuals' rights as members of a group. The term 'collective rights' refers to the rights of peoples and groups, including ethnic and religious minorities and indigenous peoples.

The regulatory framework for human rights legislation is provided by treaties, including the nine core international human rights treaties - ICCPR, ICESCR, CERD, CEDAW, CAT, SPT,

#### What are human rights?

- Universal legal guarantees
- Civil, cultural, economic, political and social rights
- Protection of human values (freedom, equality, equity)
- Inherent to individuals and, to some degree, to groups
- Based on international standards and models
- Legally binding for States

1. See Office of the United Nations High Commissioner for HR), [Human Rights Indicators: A Guide to Measurement and Implementation](#), New York and Geneva, 2012 (UN Doc. HR/PUB/12/5)

CRC, CMW, CRPD and CPED. Human rights treaties are legally binding on member states, who are obliged to report to the respective competent review bodies on the progress made in their implementation.

In general, the State is the primary duty-bearer responsible for respecting human rights and ensuring guarantees under international law. Nevertheless, by virtue of international human rights instruments, it is becoming ever clearer that non-State actors, such as international organisations and corporations, can also be duty-bearers to varying degrees.

### 3. WHAT IS HUMAN RIGHTS EDUCATION?<sup>2</sup>

#### What is human rights education?

'Human rights education can be defined as education, training and information aimed at building a universal culture of human rights. Effective human rights education not only provides knowledge about human rights and the mechanisms that protect them, but also develops the skills needed to promote, defend and apply human rights in daily life. Human rights education also fosters the attitudes and behaviours needed to uphold human rights for all members of society.'

World Programme for Human Rights Education.  
Second Phase, Plan of Action, p. 2.

As human rights educators, having a clear understanding of human rights education (HRE) and its goals enables us to articulate clearly to others the nature of the work we do and why it is important. The task of evaluating the effectiveness of HRE work is directly linked to a common understanding of what HRE involves and what it aims to achieve.

Simply stated, human rights education (HRE) is all learning that builds human rights knowledge, skills, attitudes and behaviours. It is a process of empowerment that begins with the individual and branches out to encompass the community at large.

The United Nations plan of action for the second phase (2010-2014) of the World Programme for Human Rights Education provides a more extensive definition of HRE that includes the different elements and provisions on HRE agreed upon by the international community.

Human rights education is defined as learning, education, training and information efforts aimed at building a universal culture of human rights. It involves

not only learning about human rights and the mechanisms that protect them, but also the acquisition or reinforcement of skills needed to apply human rights in a practical way in daily life, the development of values, attitudes and behaviour which uphold human rights as well as taking action to defend and promote human rights.

Human rights education aims towards developing an understanding of everyone's common responsibility to make human rights a reality in each community and in the society at large. In this sense, it contributes to the long-term prevention of human rights abuses and violent conflicts, the promotion of equality and sustainable development, and the enhancement of participation in decision-making processes within a democratic system.

Human rights education aims to develop the capacity of government officials and institutions to meet their obligation to respect, protect and fulfil the human rights of those under their jurisdiction. Human rights education also aims to empower individuals, i.e., women and men, girls and boys, and their communities to critically analyse their human rights problems and seek out solutions that are consistent with human rights values and standards. Through HRE, therefore, government institutions and individuals are able to become actors of social change aimed towards the effective realization of human rights.

The change envisioned would involve, among other things, changes in social structures, attitudes, beliefs, views, values, freedoms and rights, the quality of education, and effective

2. This section is taken from Equitas - International Centre for Human Rights Education and the Office of the United Nations High Commissioner for Human Rights, *Evaluating Human Rights Training Activities: A Handbook for Human Rights Educators*. Professional Training Series No. 18, Montreal, 2011 (HR/P/PT/18), pp. 10-11.

governance. Equality between women and men or gender equality is also a critical component of social change that HRE must strive to achieve.

Human rights education is a lifelong process that builds knowledge and skills, as well as values, attitudes and behaviours, to promote and uphold human rights in everyday life. In this process, the learning itself is as important as what is learned. These two realities should respect human rights values, encourage participation and foster a learning environment free from want and fear.

The concept of human rights education is now firmly established. The *World Programme for Human Rights Education* (WPHRE) and the *United Nations Declaration on Human Rights Education and Training* (2011) are guiding documents that set out standards for human rights education to encompass principles of peace, non-discrimination, equality, justice, tolerance, and respect for human dignity.

As the United Nations Special Rapporteur has highlighted<sup>3</sup>, the right to education in the post-2015 development agenda also implies human rights education and learning as an objective of education. The future development agenda should seek to create a generation that values education as a 'common good'. States and other relevant stakeholders should intensify action at the national level, pursuant to the *United Nations Declaration on Human Rights Education and Training* (2011) as a means 'to give full effect to the right to education worldwide'. Universally recognised human rights values and democratic principles should be embedded in any education system.

This context enables us to understand the strategic importance currently ascribed to human rights education by the United Nations and UNESCO, realised through various actions, such as the World Programme for Human Rights Education. This programme is a global initiative of the United Nations which, since 2005, has encouraged concrete measures to integrate human rights education in all sectors. It 'seeks to promote a common understanding of the basic principles and methodologies of human rights education, to provide a concrete framework for action, and to strengthen partnerships and cooperation from the international level down to the grass roots'<sup>4</sup>.

The World Programme is open-ended and structured around an ongoing series of phases. The emphasis of the World Programme's first phase (2005–2009) was on the school system. Building on the achievements of those five years, the second phase (2010–2014) focuses on those who further mentor tomorrow's citizens and leaders, such as higher education institutions<sup>5</sup>. In its resolution 24/15, the Council requested the Office of the United Nations High Commissioner for Human Rights to prepare the present plan of action for the third phase (2015–2019) of the World Programme, devoted to strengthening the implementation

'Higher education institutions, through their core functions (research, teaching and service to the community), not only have the social responsibility to educate ethical citizens committed to the construction of peace, the defence of human rights and the values of democracy, but also to generate global knowledge to meet current human rights challenges, such as eradication of poverty and discrimination, post-conflict rebuilding, sustainable development and multicultural understanding.'

World Programme for Human Rights Education. Second Phase, Plan of Action, p. 19, para. 21

3. See Report of the Special Rapporteur special on the right to the education, Kishore Singh (UN Doc. A/68/294, para. 89).

4. See World Programme for Human Rights Education. Second Phase, Plan of Action, p. 3.

5. The Plan of Action (UN Doc. A/HRC/15/28) was adopted through resolution 15/11 by the Human Rights Council on 30 September 2010. See Office of the United Nations High Commissioner for Human Rights (OHCHR) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), *World Programme for Human Rights Education. Second Phase, Plan of Action*, New York and Geneva, 2012 (UN Doc. HR/PUB/12/3). According to the Plan of Action, 'higher education is all education taking place at the post-secondary level in universities or other establishments approved by the State authorities, including institutions for the training and certification of professionals such as teachers, social workers, medical and legal personnel (ibid., p. 4).

of the first two phases and promoting human rights training for media professionals and journalists<sup>6</sup>.

The Plan of Action provides Governments and other stakeholders with practical guidance on how to act in terms of planning the process and contents.

The Plan of Action<sup>7</sup> requires that higher education promotes a holistic, rights-based approach to education that includes both “human rights through education,” ensuring that all the components and processes of education – including curricula, materials, methods and training – are conducive to the learning of human rights, and “human rights in education,” ensuring that the human rights of all members of the education community are respected.

The Action Plan indicates that effective integration of this approach in higher education requires action in at least the following five areas:

- (a) Policies and related implementation measures.** Higher educational policies – legislation, plans of action, curricula, training policies and so on – should explicitly promote human rights education and infuse human rights throughout the higher education system. Policies are to be developed in a participatory manner in cooperation with all stakeholders and fulfil a country’s international obligations to provide and promote the right to quality education. To be effective, policies need a consistent implementation strategy, including the allocation of adequate resources and the setting-up of coordination mechanisms to ensure coherence, monitoring and accountability.
- (b) Teaching and learning processes and tools.** Introducing or improving human rights education requires a holistic approach to teaching and learning that reflects human rights values. Human rights are infused as a cross-cutting issue into all disciplines, and specific human rights courses and programmes – in particular, multidisciplinary and interdisciplinary human rights programmes – are introduced. Practices and methodologies are democratic and participatory. Materials and textbooks promote human rights values. Relevant support and resources are in place.
- (c) Research.** Higher education institutions develop new knowledge and advance critical reflection in the area of human rights, which in turn inform policies and practices in human rights and in human rights education. Through an assessment of existing experiences and comparative studies, research can support the identification and dissemination of good practices as well as the development of innovative methodologies and tools based on those practices; research can also guide lesson-learning and evaluation exercises. Research can be furthered through exchanges, scholarships and fellowships.
- (d) The learning environment.** Academic freedom informs the environment of higher education institutions, where human rights education promotes the daily practice of human rights by fostering mutual understanding, respect and responsibility. Explicit and shared policy statements protect the human rights of all actors. Teaching personnel have a mandate to pursue human rights education, and students can express their views freely, participate in academic life and have extensive opportunities for interacting with the wider community.
- (e) Education and professional development of higher education teaching personnel.** For higher education institutions to serve as a model of human rights learning and practice, all teaching personnel and other staff need

6. See UN Doc. A/HRC/27/28.

7. See *World Programme for Human Rights Education. Second Phase, Plan of Action*, op. cit. pp. 4-5.



to be able to both transmit and model human rights values. Education and professional development must foster educators' knowledge about, commitment to and motivation for human rights. Furthermore, as rights-holders themselves, teaching personnel need to work and learn in a context of respect for their dignity and rights.

These five areas were analysed during Phase 1 of the ABDEM project with the aim of establishing a diagnosis of the challenges posed by HRBA in the national education policies and in the higher education institutions of each European and Maghrebi partner.

## 4. RESULTS OF HUMAN RIGHTS EDUCATION<sup>8</sup>

The goal of social change is very broad and complex. For us to be able to capture the results of our HRE work, this goal needs to be defined more precisely. An effective way to do this is to identify the changes we expect to see at different social levels connected with our HRE work. Box 3 provides a description of this process.

As human rights educators, identifying the changes that we would like to see on these three levels will enable us to better plan our evaluation processes. HRE evaluation, if planned and implemented well, will help us to look for and capture evidence of change at the levels of the individual, organization/group and broader community/society. It will also enable us to demonstrate how our HRE work is contributing to social change in line with human rights.

Levels of change	
<b>Individual</b>	Changes you want to see in the individual learner. What knowledge, skills, attitudes and behaviours can an individual acquire, reinforce or modify? <i>Example of individual-centred change: Learners become familiar with the participatory approach in HRE and are confident to begin to use it in their HRE work.</i>
<b>Organization/ group</b>	Changes you expect when the learners transfer their learning experiences to their organization or to a group they work with (such as members of a community). What effects might their new knowledge, skills, attitudes and behaviours have on the organization or group? <i>Example of group-centred change: Learners' organizations or groups incorporate the participatory approach in their human rights training sessions.</i>
<b>Broader community/society</b>	Changes you anticipate when an organization transfers its learning to the broader community/society. What effects might be observed? <i>Example of community/society-centred change: The participatory approach is incorporated into the HRE work of other groups as well as into their other work and into other aspects of life in the broader community.</i>

Source: Equitas and the Office of the United Nations High Commissioner for Human Rights (2011), *Evaluating Human Rights Training Activities*, op. cit. p.11.

8. This section is taken from Equitas and the Office of the United Nations High Commissioner for Human Rights, *Evaluating Human Rights Training Activities*, op. cit. pp. 10-11.

## 5. A PARTICIPATORY APPROACH TO HUMAN RIGHTS EDUCATION<sup>9</sup>

Our understanding of HRE and what it should achieve must be reflected in the way we carry out our work. Fundamental to the effective practice of HRE, therefore, is a participatory approach.

A participatory approach in HRE promotes and values the sharing of personal knowledge and experience of human rights, and encourages critical reflection on individual beliefs and values. It is founded on principles of mutual respect and reciprocal learning and seeks out and includes the voice of the learners in the learning process. It enables people with different backgrounds, cultures, values and beliefs to learn effectively together and learn from each other.

A participatory approach encourages social analysis aimed towards empowering adult learners to develop concrete actions for social change that are in accordance with human rights values and standards.

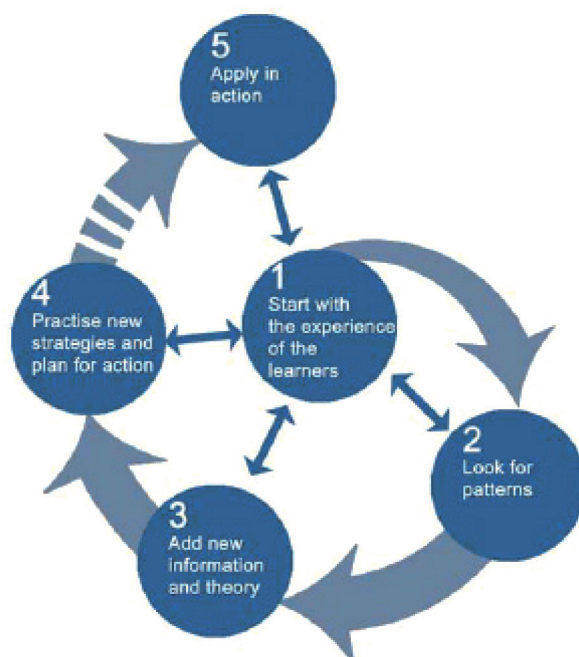
A participatory approach is particularly appropriate for HRE because:

- Human rights are part of our life experience and therefore we should look at them from our own realities, share different perspectives and develop analytical skills to understand, exercise and promote human rights;
- Human rights are based on values and norms that are evolving;
- HRE is rooted in social justice and each person involved in human rights work is an agent of social change;
- HRE should spark critical reflection about the possibilities for social change.

As human rights educators working with adult learners, we need tools that can help us to put the concepts of a participatory approach into practice. One such tool, the learning spiral (see box 7), illustrates how a participatory approach can work.

9. This section is taken from Equitas and the Office of the United Nations High Commissioner for Human Rights, *Evaluating Human Rights Training Activities*, op.cit., pp. 11-13.

## Box 7: The learning spiral



1. Learning begins with the experience of the learners (i.e., their knowledge, skills, values and lived experience of human rights).
2. After the learners have shared their experience, they analyse that experience and look for patterns (i.e., what are the commonalities? what are the patterns?).
3. To complement the experience of the learners, new information and theory from experts are added or new ideas are created collectively.
4. Learners need to practise what they have learned, practise new skills and strategies, and plan for action.
5. Afterwards (usually when they are back in their organizations and daily work) learners apply in action what they have learned.

Source: Rick Arnold et al., *Educating for a Change* (Toronto, Canada, Between the Lines, 1991). Adapted with permission from the Doris Marshall Institute for Education and Action.

## 6. WHAT IS A HUMAN RIGHTS-BASED APPROACH (HRBA)?

A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress<sup>10</sup>.

10. Office of the United Nations High Commissioner for Human Rights, *Frequently asked questions on a human rights-based approach to development cooperation*, New York and Geneva, 2006, p. 15 (UN Doc. HR/PUB/06/8). <http://www.ohchr.org/Documents/Publications/FAQen.pdf>. For an analysis of the different concepts of HRBA, see: P. GREADY & J. ENSOR, *Introduction*, in P. GREADY & J. ENSOR (eds.), *Reinventing Development? – Translating rights-based approaches from theory into practice*,

### What is a human rights-based approach?

- A conceptual framework for the process of development:
- normatively based on international HR standards and principles
- operationally directed to promoting and protecting human rights
- recognizes human beings as rights-holders and establishes obligations for duty-bearers
- focuses on discriminated and marginalized groups
- aims for the progressive achievement of all human rights
- gives equal importance to the outcome and process of development

A HRBA focuses explicitly on discrimination and marginalisation in the development process.

HRBA penetrates all development practice to the point that the boundaries of human rights and development disappear as both become conceptually and operationally inseparable parts of the same processes of social change. HRBA is applied to development in such a manner that it alters the way that programmes are designed, implemented, monitored and evaluated, beginning with the assessment and analysis of the situation, which is ideally the point of departure.

The level of commitment is higher in the application of HRBA and requires addressing the challenges in a more comprehensive way. This means confronting persistent patterns of inequality and discrimination and formulating responses that take into account the structural causes that enable a political and societal environment to foster exclusion and marginalization and ultimately, the denial of human rights

*Focus is both on outcome and process.*

In a HRBA, attention must be paid to results since the desired outcome and impact of any programme activity is that it contributes to further the realization of human rights. At the same time, attention must

be paid to ensure that the development process does not deepen inequality, discrimination and ultimately conflict. Human rights principles and standards provide objective criteria for acceptable development processes, thus being participatory, inclusive and accountable processes which prioritize the most marginalized and excluded groups. For example, human rights principles should inform the process of formulating, implementing and monitoring a poverty reduction strategy.

## 7. WHAT IS THE DIFFERENCE BETWEEN A RIGHTS-BASED APPROACH AND A NEEDS-BASED APPROACH?

As stated by the Office of the United Nations High Commissioner for Human Rights, 'Development is not a simple matter of charity, but a right. The distinction is an important one. When something (like development) is defined as a right, it means that someone holds a *claim*, or legal entitlement, and someone else holds a corresponding *duty* or legal obligation. This means that Governments, and their agents, are *accountable* to people for fulfilling such obligations. The duties held (by individual States vis-à-vis their own people, and collectively by the international community of States) are in some cases *positive duties* (to do or provide something) and, in others, *negative duties* (to refrain from doing something). With a rights-based approach, effective action for development moves from the optional realm of charity into the mandatory realm of law, with identifiable rights, obligations, claim-holders and duty-holders. What is more, adopting a rights-based approach opens the door for the use of a rich and growing pool of *information*, *analysis* and *jurisprudence* developed in recent years by treaty bodies and other human rights specialists on the requirements of adequate housing, health, food, childhood development, the rule of law, and virtually all other elements of sustainable human development'<sup>11</sup>.

London, New York, 2005, Zed Books Ltd., pp. 1-40; B. MEYER-BISCH, [Les approches basées sur les droits humains en développement](#), Zürich, Nadel, 2008.

11. Office of the United Nations High Commissioner for Human Rights (2000), [Human Rights Training: A Manual on Human Rights Training Methodology](#), Professional Training Series No. 6, New York and Geneva (HR/P/PT6), p. 11.

### Needs-based approach vs. rights-based approach in the field of nutrition

‘The essence of this difference is that in the former, “beneficiaries” have no active claim to ensure that their needs will be met, and there is no binding obligation or duty for anybody to meet these needs. In contrast, a rights-based approach recognizes beneficiaries as active subjects or “claim-holders” and establishes duties or obligations for those against whom a claim can be held.’

Urban Jonsson

Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. Here lies the fundamental difference between this and a **needs-based approach**. HRBA goes beyond the traditional ‘needs-based’ approach in terms of both public policies and teaching. As Meyer-Bisch underlines, ‘a human rights-based approach is clearly different from a needs-based approach. For the sake of efficiency, needs-based approaches tend to favour sector-based technical assistance and therefore fail to recognise social complexity, sustainability and the interdependence of rights. Needs-based approaches that do, however, recognise social complexity can be justified to meet a vital necessity for a limited time, but they should still be subject to a HRBA; the aim is to increase individuals’ capacities and freedoms, not to reduce needs. A HRBA concerns all policies, regardless of sector, country and level of governance’<sup>12</sup>.

Other approaches	
Needs-based	Human rights-based
<ul style="list-style-type: none"> <li>• Action is voluntary/optional</li> <li>• ‘Needs’ are contextual and open-ended</li> <li>• Deserve help</li> <li>• Passive beneficiaries - can be invited to participate</li> <li>• Pragmatic ways to work with structures</li> <li>• Development is technocratic - for the experts</li> <li>• Hierarchy of needs</li> </ul>	<ul style="list-style-type: none"> <li>• Action is mandatory</li> <li>• Universal and legally established claims and entitlements</li> <li>• Entitled to enforceable rights</li> <li>• Active participants by right</li> <li>• Power structures must be effectively changed</li> <li>• Development transforms behaviours, institutions and empowers rights holders</li> <li>• Rights are indivisible and interdependent though in any situation practical prioritisation may be required</li> </ul>

Source: United Nations Development Group (UNDG), Working Groups, Human Rights Working Group, English Learning Package.

12. See P. Meyer-Bisch, [L’approche basée sur les droits de l’homme en développement. Un renouveau grâce à la prise en compte des droits culturels?](#), Documents de synthèse, DS 19, 16/02/2012, p. 2, Institut Interdisciplinaire d’éthique et des droits de l’homme, Université de Fribourg. See also [Principes d’éthique de la coopération internationale évaluée selon l’effectivité des droits de l’homme](#) (Document de Bergamo), DS12, a joint [programme of the Unesco chairs of Bergamo, Mexico and Cotonou](#).



## 8. WHY ADOPT A HRBA TO DEVELOPMENT?

### Why adopt a HRBA to development?

- 1) Normative value
  - universal legal standards for a life with dignity
- 2) Instrumental value
  - contributes to more sustainable development outcomes
  - ensures a higher quality of the process
  - clarifies the purpose of capacity development
- 3) Institutional reasons (UN comparative advantage)
  - impartiality to deal with sensitive issues
  - holistic analysis and integral responses to problems

A human rights-based approach adds force and legitimacy to the development agenda and offers a solid foundation for measures taken at national level since is based on legal rather than political obligations. This approach seeks to create greater awareness among governments and other relevant institutions of their obligations to empower individuals and communities to understand, exercise and claim their rights. In the shift from theory to practice, there has been considerable debate regarding its meaning, the added value to development and particularly on how to apply a HRBA to development programming so that it can have greater impact. There are three main rationales for a HRBA: (a) intrinsic; (b) instrumental; (c) and institutional.

### (a) Intrinsic rationale

Acknowledging that a HRBA is the right thing to do, morally and legally: The HRBA is based on universal values (freedom, equality, solidarity, etc.) reflected in human rights principles and standards that provide a common standard of achievement for all men women and children and all nations. The

HRBA moves development action from the optional realm of benevolence (or charity) into the mandatory realm of law. The HRBA establishes duties and obligations and corresponding claims, and underscores the importance of establishing accountability mechanisms at all levels for duty-bearers to meet their obligations. The HRBA changes the concept from regarding people as passive beneficiaries of State policies to active participants in their own development and further recognizes them as rights-holders, thereby placing them at the centre of the development process.

## (b) Instrumental rationale

Recognizing that a HRBA leads to better and more sustainable human development outcomes, the HRBA:

### Under a human rights-based approach, it is essential that:

1. People are recognized as key actors in their own development, rather than passive recipients of commodities and services.
2. Participation is both a means and a goal.
3. Strategies are empowering.
4. Both outcomes and processes are monitored and evaluated.
5. Analysis includes all stakeholders.
6. Programmes focus on marginalized, disadvantaged, and excluded groups.
7. The development process is locally owned.
8. Programmes aim to reduce disparity.
9. Both top-down and bottom-up approaches are used in synergy.
10. Situation analysis is used to identify immediate, underlying, and basic causes of development problems.
11. Measurable goals and targets are important in programming.
12. Strategic partnerships are developed and sustained.
13. Programmes support accountability to all stakeholders.

UNICEF (2003), The State of the World's Children 2004, p. 93.

- Focuses on analyzing the inequalities, discriminatory practices, and unjust power relations which are the root causes of the human rights and development challenges and processes that exacerbate conflict.
- Has a special focus on groups subjected to discrimination and suffering from disadvantage and exclusion, including children, minorities and women. The twin principles of non-discrimination and equality call for a focus on gender equality and engaging with women's human rights in all development programmes.
- Emphasizes participation, particularly of discriminated and excluded groups at every stage of the programming process.
- Counts on the accountability of the State and its institutions with regard to respecting, protecting and fulfilling all the human rights of all people within their jurisdiction (although in some instances the duty of the State may extend beyond their jurisdiction, e.g. prisoners of war).
- Gives equal importance to the processes and outcomes of development, as the quality of the process affects the achievement and sustainability of outcomes.

## (c) Institutional value

The UN has a comparative advantage in its core mandate on Peace, Security, Human Rights and Development and the values of the UN Charter. In that regard, neutrality and respect for self-reliance make the UN a privileged partner to deal with sensitive issues in a holistic manner, which means that: Development challenges are examined from a holistic lens guided by the human rights

principles and taking into account the civil, political, economic, social and cultural aspects of a problem (e.g. poverty reduction strategy is guided by rights to education and health as well as freedom of expression and assembly and right to information etc.). A HRBA lifts sectoral "blinkers" and facilitates an integrated response to multifaceted development problems, including addressing the social, political, legal and policy frameworks that determine the relationship and capacity gaps of rights-holders and duty-bearers. A HRBA requires using the recommendations of international human rights mechanisms in the analysis and strategic response to development problems. A HRBA can also shape relations with partners since partnerships should be participatory, inclusive and based on mutual respect in accordance with human rights principles.

In this sense, a HRBA brings essential added value to the design of any public policy since it: (a) justifies the demands of the fight against poverty; (b) is focused on the application of the rights of the most vulnerable; (c) comprehensively considers the context and takes into account all stakeholders, fostering participatory consensus; (d) helps to convert these international objectives and standards into nationally applicable rights within a defined timeframe; (e) contributes to greater transparency and public responsibility, not only from

an economic angle, but also from the point of view of the commitment to joint responsibility. The level of commitment is higher in the application of HRBA and requires addressing the challenges in a more comprehensive way. This is because firstly it gives equal importance to the outcomes and the processes of development, which must be participatory, transparent and inclusive, and secondly it means formulating responses that take into account the structural causes that enable a political and societal environment to foster exclusion and marginalization and ultimately, the denial of human rights.

## 9. IMPLICATIONS OF A HUMAN RIGHTS-BASED APPROACH<sup>13</sup>

The application of good programming practices does not by itself constitute a human rights-based approach, which requires additional elements. The following elements are necessary, specific and unique to a human rights-based approach:

- a) Assessment and analysis identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers, as well as the immediate, underlying, and structural causes when rights are not realized.
- b) Programmes assess the capacity of rights-holders to claim their rights, and of duty-bearers to fulfil their obligations. They then develop strategies to build these capacities.
- c) Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles.
- d) Programming is informed by the recommendations of international human rights bodies and mechanisms.

## 10. FOUR CRITICAL QUESTIONS FOR A HRBA

A human rights-based approach analysis raises four critical questions:

### (a) Who has been left behind and why?

#### Four critical questions

- Who has been left behind and why?
- What are they entitled to?
- Who has to do something about it?
- What do they need, to take action?

Process and outcome are equally important

Human rights standards are a minimum in practice and a standard of achievement (as per Universal Declaration) which are necessary to expand the freedoms and opportunities inherent to human development.

The “why” links with the causal analysis and will help us visualize how human rights principles can help identify persistent patterns of discrimination, exclusion, impunity and powerlessness. Causality analysis should lead to the identifications of immediate, underlying and root causes.

### (b) What are they entitled to?

The question on the entitlements is essential to visualize and understand that HR standards embodied in the treaties are not just words on the page - but applicable standards.

### (c) Who has to do something about it?

It is important to identify, specifically, who are the duty-bearers and rights-holders - those with obligations to act.

13. UNICEF (2003), *The State of the World's Children 2004: Girls, education and development*, Annex B, New York, p. 92.

#### (d) What do they need, to take action?

The “they” in the final question refers to both rights-holders and duty-bearers and helps identify critical capacity gaps that prevent action.

At the underlying and root levels, these capacity gaps will nearly always involve gaps in legal, institutional, policy, and financial (budget) frameworks. Action in the political and economic environment may be critical for empowering rights-holders and developing the capacities of duty-bearers.

Rights-based causality analysis should be used to strengthen ongoing or planned country analysis and to bring some influence to the preparation or review of national development plans, including PRSPs. Reports from international, regional and national human rights mechanisms are key sources of information that should be used during the analysis. We will discuss this issue in Course 2.

## 11. THE RESULTS-BASED MANAGEMENT APPROACH (RBM)<sup>14</sup>

### What is RBM?

It helps us connect what we do with what we want to achieve and RBM helps us understand whether we have achieved it

RBM is a management philosophy and approach that integrates strategy, people, resources, processes and measurements to improve decision-making, transparency and accountability. Applied to development projects, RBM emphasizes development results in planning, implementation, learning and reporting. RBM helps to clarify, early on, the purpose of a project or programme and thus the expected results.

Using RBM, we begin with the results that we are trying to achieve and work our way back to the activities and resources we need to achieve those results. Results at each level aggregate to produce the results at the next, higher level. Within an RBM approach, results are viewed as consequences of actions taken to meet certain purposes and are defined as describable or measurable changes derived from cause and effect relationships.

RBM also helps to manage more effectively for results by modifying as required project activities or approaches to better meet expected results rather than managing solely on the basis of activities.

The human rights-based approach provides RBM with a conceptual framework for understanding the causes of (non-) fulfilment of human rights. In this way, it is possible to identify the underlying issues that hinder progress. The approach is based on international human rights standards and principles and it develops the capacities of rights-holders to claim their rights and duty-bearers to fulfil their obligations. Apart from its normative value as a set of universally agreed values, standards and principles, the HRBA leads to better and more sustainable outcomes by analyzing and addressing the inequalities, discriminatory practices and unjust power relations which are often at the heart of development problems and which pose a serious threat to progress when left unchallenged. The following paragraph underlines the role of the HRBA within the context of RBM.

### What does a HRBA add to RBM?

A HRBA ensures the strengthening and justification of a RBM practice by showing us

- the right questions to ask
- the types of change to pursue
- how to measure the change and how to talk about it with stakeholders.

While RBM is a management tool to help reach a desired result, HRBA is a framework that helps define the results and the process by which they are achieved.

14. Source: Equitas and the Office of the United Nations High Commissioner for Human Rights (2011), p. 56.

The HRBA specifies who should be the subject of programming results: rights-holders and duty-bearers:

- Outcomes should reflect the improvement in the performance or the strengthened responsibility of the right-holder and duty-bearer resulting from institutional or behavioural change.
- Outputs should close the capacity gaps:
  - Monitoring how programmes have been guided by human rights principles (non-discrimination, participation, accountability) in the process of reaching results.
  - Specifying what should be the programming results: the realization of human rights as laid down in international instruments.

Within an RBM approach a **logic model** (also known as a “results chain”, log frame or logical framework) is a means for communicating the vision of a project, planning for it and articulating what it will accomplish over time. It is a valuable tool for the monitoring, evaluation and management of projects. A logic model is typically a graphical illustration or table that aims to present information about the key components of a project in a clear, concise, logical and systematic way.

A logic model summarizes, in a standard format:

- What the project is going to achieve;
- The activities that will be carried out to achieve the purpose and expected results of the project;
- The resources (inputs) that are required;
- The potential problems which could affect the success of the project;
- How the progress and ultimate success of the project will be measured and verified.

The logic model summarizes a project and its context in a logical manner so that the connections or logical relationships between inputs, activities and expected results (generally described as immediate outcomes, intermediate outcomes and impacts) can be visualized.

In planning HRE projects, a logic model can be a useful tool in helping us to articulate the results or changes in line with human rights values and principles that we envision connected to our human rights training activities. It is important to underline that the terminology of RBM is not consistent across organizations and also that the terminology is evolving. This being said, the underlying notion of viewing results at different levels (i.e., individual, organization/group, broader community/society) and over time (i.e., short, medium and longer term) remains the same.



Logic model (results chain)					
These address the HOW of an investment in an initiative			These are the actual CHANGES that take place, i.e., results		
Inputs	Activities	Outputs	Immediate outcomes (changes in learners)	Intermediate outcomes (changes in learners' organizations/ immediate environment)	Impacts (sustained changes in the broader community/ society)
The financial, human, material and information resources used to produce outputs through activities and accomplish outcomes.	Actions taken or work performed through which inputs are used to produce outputs (e.g., planning, designing the training session).	Direct products or services stemming from the activities (e.g., the actual training session delivered, the training materials produced).	Changes that are directly attributable to the outputs. They are usually short-term and represent a <b>change in skills, awareness, access or ability</b> among beneficiaries (e.g., initial outcomes among the learners that participated in the training session - Kirkpatrick's level 1 - reactions and level 2 - learning).	Changes that are expected to logically occur once one or more immediate outcomes have been achieved. These are usually medium-term but can also be short-term. They constitute a <b>change in behaviour or practice</b> among the beneficiaries (e.g., outcomes for learners' organizations/ immediate environment - Kirkpatrick's level 3 - transfer/behaviour).	The highest level of changes that can be reasonably connected to an initiative and are the consequence of one or more intermediate outcomes. These take the form of <b>sustained change of state or condition</b> of beneficiaries and their broader community/ society (e.g., Kirkpatrick's level 4 - impacts).

Source: Equitas and the Office of the United Nations High Commissioner for Human Rights (2011), p. 58. Adapted from CIDA, 'Results-based management tools at CIDA: how-to-guide'.

The logic model provides a practical summary to inform project staff, donors, beneficiaries and other stakeholders which can be referred to throughout the life cycle of the project. As the project circumstances change, the logic model will probably need to reflect these changes and all stakeholders will have to be kept informed. See Part 4, section 6.8 for an example of developing a log frame diagram.

Within each of the three levels of changes of increasing scope (i.e., individual, organization/ group and broader community/society) discussed in Part 1, section 1.2, the types of short-term, medium-term and longer-term changes or results we are aiming towards with our human rights training activities can be identified. Examples of the types of changes HRE aims to achieve are listed in box 24. The changes we identify in connection with our human rights training activities will help us define what we are hoping to evaluate.

Box 24: Types of results linked to HRE activities	
Level	Types of changes or results linked to HRE activities
<b>Individual</b>	Changes in: • Awareness • Willingness or motivation • Knowledge • Skills • Attitudes, behaviour
<b>Organization/ group</b>	Changes in: • Access to information • Access to services and resources • Power relations (interest and influence) • Level of participation • Family relations • Respect for and fulfilment of specific rights: non-discrimination, liberty, security, education, health, housing, etc. • Reported number of human rights violations
<b>Broader community/society</b>	Changes in: • Laws, policies and procedures to reflect principles of human rights • Government services • Reported number of human rights violations • Citizen and civil society participation and collaboration with Government • Socio-economic conditions for the better • Cultural norms and practices that impact positively on human rights (for example, changing gender roles)

Source: Equitas and the Office of the United Nations High Commissioner for Human Rights (2011), p. 59.

It should be noted that changes at the individual level may be evident in the short term, medium and longer terms. For example, a change in an individual's attitude is not likely to occur unless the person has an awareness of the human rights issue or problem and a desire to change it. This awareness and motivation to change does not necessarily happen immediately. Similarly, a change at the community level is not only medium-term. There are changes at the community level which may be more immediate and short-term, or longer-term.

Although there are many aspects to the RBM approach, the focus on determining desired results is what is most important for consideration by human rights educators. The benefits of thinking ahead about how our work can contribute to social change cannot be overstated.

## 12. A HUMAN RIGHTS-BASED APPROACH TO EDUCATION

The importance of this approach in educational policies is undisputed, since there is a unanimous consensus that the right to education deserves foremost consideration in the post-2015 development agenda<sup>15</sup>. Education is a fundamental building block for human development and is invaluable for individual and social transformation. All development goals have educational dimensions and the right to education provides indispensable leverage for development. The right to education, essential for the exercise of all other human rights, is of paramount importance in national and international development agendas and in public policies and global partnerships<sup>16</sup>.

As established in numerous international legal human rights instruments, education shall be directed to the full development of the human personality, to the strengthening of respect for

15. UNICEF, *L'éducation dans le programme de développement pour l'après-2015 : projet de rapport de synthèse de la Consultation thématique globale sur l'éducation*, New York, 2013.

16. Regarding the mainstreaming of human rights into the post-2015 development agenda, highlighting the right to education, see the Report of the Special Rapporteur on the right to education, Kishore Singh, submitted to the General Assembly of the United Nations (sixty-eighth session) in accordance with Human Rights Council resolutions 8/4 and 17/3 (UN Doc. A/68/294, paras. 28-43).

human rights and fundamental freedoms, and enable all persons to participate effectively in a free society and promote understanding, tolerance and friendship.

The adoption of a human rights approach involves, among other things, a thorough review of the national legal instruments framing countries' education systems and policies and linking governments' policy commitments with international obligations deriving from human rights law. Once States ratify international human rights instruments, they commit themselves, through whichever government is in power, to compliance with the rights embodied in those instruments. States hold the primary responsibilities and are accountable to the holders of those rights for their implementation. To ensure the realization of the right to education for all, States have three levels of obligations<sup>17</sup>:

- a) **To fulfil the right to education** by ensuring that education is available for all students and that positive measures are taken to enable students to benefit from it.
- b) **To respect the right to education** by avoiding any action that would serve to prevent students accessing education, for example, legislation that categorizes certain groups of students with disabilities as uneducable.
- c) **To protect the right to education** by taking the necessary measures to remove the barriers to education posed by individuals or communities, for example, cultural barriers to education or violence and abuse in the school environment.

The development of a human rights-based approach to education requires a framework that addresses the right of access to education, the right to quality education and respect for human rights in education. These dimensions are interdependent and interlinked, and a rights-based education necessitates the realization of all three.<sup>18</sup>

To ensure quality education in line with the aims of education elaborated by the Human Rights Committee, attention must be paid to the relevance of academic programmes, the role of teaching staff, and the nature and ethos of the learning environment. A rights-based approach necessitates a commitment to recognizing and respecting the human rights of students while they are in university - including respect for their identity, agency and integrity. This will contribute to increased retention rates and also makes the process of education empowering, participatory, transparent and accountable.

This conceptual framework highlights the need for a holistic approach to education, reflecting the universality and indivisibility of all human rights, as well as coherence between the different aspects of human rights education, including training programmes, content, work experience, and teaching and learning strategies. The following sections set out the central elements that therefore need to be addressed in each of the three dimensions mentioned above.<sup>19</sup>

17. See Committee on Economic, Social and Cultural Rights, General Comment No. 13, The right to education [article 13], E/C.12/1999/10, of 8 December 1999, paras. 43, 44, 50.

18. United Nations Children's Fund (UNICEF)/United Nations Educational, Scientific and Cultural Organization (UNESCO), *A Human Rights-Based Approach to Education for All*, New York, 2007, p. 27, <http://unesdoc.unesco.org/images/0015/001548/154861E.pdf>

19. Ibid., pp. 28-37.

**(a) The right of access to education<sup>20</sup>:**

- *Education throughout all stages of childhood and beyond*: make different forms of education available and accessible to all, and take appropriate measures such as the introduction of free education and financial assistance in case of need.
- *Availability and accessibility of education*: make higher education accessible to all on the basis of capacity by every appropriate means; make educational and vocational information and guidance available and accessible; recognize the right of every student to a standard of living adequate for their physical, mental, spiritual, moral and social development.
- *Equality of opportunity*: recognize the right to education without discrimination of any kind; ensure support measures and reasonable accommodation for students with disabilities so that they have effective access to education in a manner conducive to their achieving the fullest possible social integration.

**(b) The right to quality education<sup>21</sup>:**

- *A broad, relevant and inclusive curriculum*: foster the development of the student's personality, talents and mental and physical abilities to their fullest potential.
- *Rights-based learning and assessment*: set out learning objectives that encompass knowledge, skills, attitudes and behaviour related to human rights and human rights education, and that prepare the student for responsible life in the spirit of understanding, peace, tolerance, equality and friendship and develop respect for their own cultural identity, language and values and those of others; set out a learner-centred model for teaching human rights that is participatory, involving learning through experience and practical activities, and that takes into account cultural considerations; set out regular and reflective formal and non-formal student evaluation which will help motivate them.
- *Friendly, safe and healthy environments*: encourage the student to respect the natural environment; ensure that the student has access to information and material from a diversity of sources; encourage respect for the development of capabilities of the members of the university community in the exercise of their rights; incorporate educators with an understanding of human relations and a spirit of initiative in line with the principles of democracy and human rights.

**(c) The right to respect in the learning environment<sup>22</sup>:**

- *Respect for identity*: respect the development of the capabilities of the student and of all members of the university community without discrimination of any kind; encourage respect for human rights and fundamental freedoms, diversity and responsible life in a free society, in the spirit of understanding, peace, tolerance, equality and friendship.

20. Sources: Article 26, Universal Declaration of Human Rights, 1948; Articles 2, 22, 23, 27, 28 and 32, Convention on the Rights of the Child, 1990; Article 13, International Covenant on Economic, Social and Cultural Rights, 1966; Article 10, Convention on the Elimination of All Forms of Discrimination against Women, 1989; Articles 4 and 5, Convention against Discrimination in Education, 1960; Article 24, Convention on the Rights of Persons with Disabilities, 2007.

21. Sources: Article 26, Universal Declaration of Human Rights, 1948; Articles 3, 5, 6, 12, 17, 29 and 31, Convention on the Rights of the Child, 1990; Articles 13 and 14, International Covenant on Economic, Social and Cultural Rights, 1966; Article 24, Convention on the Rights of Persons with Disabilities, 2007.

22. Sources: Articles 2, 3, 5, 12, 13, 14, 15, 16, 19, 28 and 29, Convention on the Rights of the Child, 1990; Articles 1 and 2, Universal Declaration of Human Rights, 1948; Articles 18, 19 and 27, International Covenant on Economic, Social and Cultural Rights, 1966

- **Respect for participation rights:** respect the right of all members of the university community to express their views on any matter of concern to them, their views being given due weight; respect the right to freedom of thought, conscience and religion, and to freedom of peaceful assembly.
- **Respect for integrity:** respect the privacy of students; take all appropriate measures to ensure that discipline is administered in a manner consistent with the student's human dignity and in conformity with the rights enshrined in international human rights conventions; protect students from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

According to UNESCO/UNICEF, 'Education does not exist in a vacuum'. Ensuring that every person has access to quality and respectful learning environments throughout their lifetime necessitates action far beyond ministries of education. 'The right to education can only be realized in a political and economic environment that acknowledges the importance of transparent, participatory and accountable processes, as well as broad-based collaboration both across government and in the wider society. It needs a long-term strategic commitment to the provision of adequate resources, development of cross-departmental structures, engagement with the energies and capacities of parents and local communities, and partnership with non-governmental organizations'<sup>23</sup>. Effective communication strategies occupy an important place within this perspective, encouraging the active participation of educational environments in order to achieve the educational goals of the post-2015 development agenda.

For all the reasons discussed, the ABDEM project aims to assign joint responsibility to both government authorities and, more importantly, the university communities of Consortium members with regard to processes aimed at comprehensively improving the quality of higher education.

23. UNICEF/UNESCO, A Human Rights-Based Approach to Education for All, op. cit., p. 41.

# SUBJECT 2:

## COMPETENCY-BASED LEARNING

**Hours:5**

**Subject 02.** Competency-based learning

**Lecturer:**

Fermín Navaridas Nalda.

University of La Rioja Professor of Educational Sciences.

### SUMMARY OF THE TOPIC

This lesson focuses on competency-based learning as a key strategy to promote human rights education within Higher Education.

### GENERAL AND SPECIFIC COMPETENCES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations [General Assembly, 2010, p. 8; 2012, pp. 26 and 27], upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives:

#### GENERAL

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.



## SPECIFIC

- Approach the knowledge of competency-based learning as a key strategy to promote human rights education within Higher Education.

## REFERENCES AND OTHER OBLIGATORY TEACHING RESOURCES

Jonnaert, Ph. (2002). *Compétences et socioconstructivisme. Un cadre théorique*. Brussels: De Boeck & Larcier.

Jonnaert, Ph., Barrette, J., Masciotra, D. & Yaya, M. (2006). *Review of competency as organiser of training programmes: towards a competent performance*. Geneva: BIE/UNESCO.

## REFERENCES AND OTHER COMPLEMENTARY RESOURCES

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Villa, A. & Villa, O. (2007). El aprendizaje basado en competencias y el desarrollo de la dimensión social de las universidades. *Educación*, 40, pp. 15-48.

## METHODOLOGY

### 1. Reading:

- Text of the lesson drawn up by the lecturer in charge.
- Documents listed in the section on “References and other mandatory teaching resources”.

### 2. Notes in the forum:

- Add a brief reflection in the forum (maximum 100 words) on the convenience of approaching human rights education from a competence-based learning approach.

### 3. Individual report:

- Draft a brief individual report (maximum 100 words) on the conditions necessary for a true evaluation of competence-based learning.

## TIMELINE OF ACTIVITIES

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Activity Name	Estimated work time
Activity 1	3 hours
Activity 2	1 hour
Activity 3	1 hour

# SUBJECT 2:

## COMPETENCY-BASED LEARNING

### 1. COMPETENCY-BASED EDUCATION: A TYPE OF SITUATED LEARNING

Higher Education is currently immersed in an important change process entailing a new educational model focused on students' learning. In this case, rather than focusing on the disciplinary content of the syllabus or on the number of correct answers obtained after the final evaluation on a subject taught by the lecturer, the personal processes and resources that the students activate to successfully approach a task they are given within the framework of a defined context is especially relevant.

From this new educational perspective, the students' role is much more *active* (intentional, based on their prior knowledge) and *strategic* (self-regulated, reflective, marked by the circumstances and conditions of the situation at hand), and it becomes centre stage in the training process (insofar as they *build their own knowledge* with the help and guidance from the lecturer).

These activities carried out by students during the process to build their own knowledge favour the acquisition of basic competences, necessary for the global development of a person, which is the ultimate goal of the university.

### 2. COMPETENCY-BASED EDUCATIONAL PLANNING: BASIC GUIDELINES TO PROMOTE LEARNING ON HUMAN RIGHTS

Learning understood as *personal building of meaning* for the acquisition of basic competences in the students' global development does not entail a reduction or loss of value of the lecturers' teaching functions. On the contrary, in this new perspective of competency-based learning, teachers acquire even more importance, responsibility and centre role during the training process. Their role is now that of a mediator between the structure of knowledge and the student's cognitive structure.

Therefore, teachers must strategically plan all of the intervening elements that are necessary for a successful learning process for the student. For example, in order to provide significant and integrated learning on human rights within higher education, teachers must take into account these key elements:

1. **The competencies** that students will acquire on their own and listed in the general competencies framework defined in the Human Rights Education Programme in question.
2. The academic and/or professional **situations** where teachers want to develop the learning process (relevant scenarios within the framework of a defined context). Actual professional situations (for example, a school or high school in a city) provide the highest training potential. However, sometimes the difficulties in accessing these situations may advise choosing *virtual* professional scenarios (e.g. recording a school meeting at the centre).
3. **The content** to be developed to help achieve these objectives.
4. **Teaching strategies**: the methods, techniques and resources most relevant to the expected learning results.

5. **Timing:** the work process that students must follow to acquire the defined competencies. It is important to specify the stages involved in the student's total work sequence, for example, a) Presentation at the centre; b) Analysis of the educational reality; c) Design of a teaching unit; d) Report on the work carried out), as well as the work to be performed by the student and by the teacher during each of the specific phases.
6. **The evaluation system** that the teacher deems valid and reliable to verify the students' degree of acquisition of competencies. This entails contemplating several types and moments for evaluation.

### 3. EVALUATION OF COMPETENCY-BASED LEARNING

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Guaranteeing the quality of human rights education from a competencies approach requires including an evaluation system in the training process that will accurately verify the degree of achievement of the results expected from the educational planning.

In order to efficiently achieve this objective, it is important to clarify the concept of *evaluation*, recognising its differences with other related concepts (measurement, grading). If not, teachers' confusion on these concepts may negatively affect the entire training process or lead to erroneous conclusions when taking decisions.

Aware of the complexity and difficulty of evaluating competency-based *integrated learning* of human rights, we must analyse several procedures and instruments to obtain relevant data from students that will prove valid and reliable when identifying the concepts acquired.

## SUBJECT 3:

# INTRODUCTION TO THE METHODOLOGY OF LEARNING/ SERVICE AS AN ACTIVE METHODOLOGY

**Hours:**5

**Subject 03.** Introduction to the methodology of learning/service as an active methodology

**Lecturer:**

Esther Raya Diez.

Social Work and Social Services Lecturer. University of La Rioja

E-mail: [esther.raya@unirioja.es](mailto:esther.raya@unirioja.es)

## SUMMARY OF THE TOPIC

What is the purpose of Higher Education: to improve competency and the personal curriculum or to promote solidarity to change the world? We start out with this question to identify service learning as a methodology that connects the university with society and integrates the methodology principles set forth in the second phase of the Plan of Action of the World Programme for Human Rights in Higher Education

Based on Ken Robinson's video we can reflect on the changes in the education paradigm and on the need to adapt the learning processes towards an active role by the student and commitment to the problems in society.

Several definitions of the service learning concept are given, highlighting that it is the positive sum of learning through experience and service to the community, based on the theoretical and conceptual frameworks of the subjects involved in the community service project.

Service learning is one of the possible ways in which the university can relate to society. In this lesson service learning is differentiated from other experiences such as field work in a subject; one-time socially responsible initiatives or institutional community service. The ingredient added to all of them by service learning is based on connection of the practical experience with the academic curriculum in an integrated action.

Experts point out that when implementing service learning experiences five elements or requirements must be approached: learning (curriculum), service (community action); project (initiative for action); participation of the actors involved; and reflection on the experience (what good did I do? What have we learned?). These five elements are what give meaning to the project and connect with the Pillars of Education in the 21st century: learn to know; learn to do; learn to be and learn to co-exist.

The educational foundations on which service learning is based are constructivism and experiential learning. We learn what we do "the higher the students level of appropriation of the project, the higher its educational impact" (Aramburuzabala, 2014). Service Learning is based on an understanding of citizenship based on active participation and contribution to the improvement of society's quality of life. It is based on the consideration of learning as social responsibility, exploration, action and reflection, and on understanding education in values that is based on life, experience and on building habits.

Service learning is not new; it is more of a discovery that many teachers apply naturally, not even knowing that they are actually applying this methodology. Internationally there are numerous networks focused on the development and dissemination of Service Learning. There are also various levels of institutionalisation. In some cases, the state education regulations expressly include it, in others it is an organised university service. However, in many areas of the world service learning is an emerging methodology.

## GENERAL AND SPECIFIC COMPETENCES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Particularly, **in this topic** we will work on the following general and specific competences:

### GENERAL:

- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

### SPECIFIC:

Understand the processes involved in intervening in social reality linked to the field of knowledge of the certification, by developing a service learning project.

## REFERENCES AND OTHER OBLIGATORY TEACHING RESOURCES

Cameron, Silver Donald (2010) Getting Wisdom: [The Transformative Power of Community Service-Learning](#) edited by The foundation of the J.W. McConnell family, Quebec, Canada (ISBN 978-0-9867125-1-7); pages 6-15.

## REFERENCES AND OTHER COMPLEMENTARY RESOURCES

Aramburuzabala, Pilar (2014) El ABC del APS. Teacher training course, University of La Rioja, VII Meeting of the Spanish Service Learning Network.

Bandy, Joe. [What is Service Learning or Community Engagement?](#)

Battle, Roser (2012) [“60 Buenas Prácticas de Aprendizaje Servicio”](#) Bilbao, edited by Zerbikas, available (in Spanish).

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Cameron, Silver Donald (2010) Getting Wisdom: [The Transformative Power of Community Service-Learning](#) edited by The foundation of the J.W. McConnell family, Quebec, Canada (ISBN 978-0-9867125-1-7); pages 6-15.

Delors, J. (1996.): “The four pillars of education” in *Learning, the treasure within. Report to UNESCO of the International Commission on Education for the Twenty-first Century*, Madrid, Spain: Santillana/UNESCO. pp. 91-103.



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Furco, A. (2004). *The educational impact of service-learning*. [Lecture in the VII International Seminar on supportive learning and service](#). Buenos Aires, 6-7 October 2004 (Ministry of Education, Science and Technology, Argentina (in Spanish))

Furco, A. and Shelley H. Billig, SH. éd., *Service-Learning: The Essence of the Pedagogy*, Greenwich (CT), Information Age Publishing Inc., 2002.

League of Nations (1924) [Geneva Declaration](#).

Martínez, Miquel (2010) *Aprendizaje Servicio y construcción de ciudadanía activa en la universidad: la dimensión social*, Miquel Martínez in, Martínez, Miquel (coord.) *Aprendizaje Servicio y Responsabilidad Social de las Universidades*, ed. Octaedro, Barcelona

Maynes, N., Cantalini-Williams, M., Tedesco, S. (2014). [Alternative Service Learning Placements for Teacher Candidates](#). Toronto: Higher Education Quality Council of Ontario.

Puig, J. M.; Batlle, R.; Bosch, C. And Palos, J. (2007). *Aprendizaje servicio: educar para la ciudadanía*. Barcelona: Octaedro.

Tapia, M. N. (2000b). *La Solidaridad como Pedagogía*. Buenos Aires: Ciudad Nueva.

Tapia, N. (2010a), "Calidad académica y responsabilidad social: el aprendizaje servicio como puente entre dos culturas universitarias, en MARTÍNEZ, Miquel, (editor) *Aprendizaje Servicio y Responsabilidad Social de las Universidades*, ed. Octaedro, Universitat de Barcelona, pg. 27-56

UNESCO (2009) [World Conference on Higher Education](#).

United Nations (2010) [World Programme for Human Rights. Second phase. Plan of Action](#) (A/HRC/15/28).

United Nations (2012) *World Programme for Human Rights Education, Second phase. Plan of Action* (HR/PUB/12/3) Geneva, New York.

## WEBOGRAPHY

[http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-4/4\\_project-examples.htm](http://www1.umn.edu/humanrts/edumat/hreduseries/hereandnow/Part-4/4_project-examples.htm)

[http://www.theadvocatesforhumanrights.org/uploads/service-learning\\_handout\\_2.pdf](http://www.theadvocatesforhumanrights.org/uploads/service-learning_handout_2.pdf)

<http://www.theewc.org/uploads/content/archive/AIUSA-HREA-ServiceLearning.pdf>

<http://roserbatlle.net/aprendizaje-servicio/guias-practicas/#> (in Spanish)

## METHODOLOGY

Methodology	Teaching tools
Explanatory method	Reading of texts and/or viewing of audiovisual material
Cooperative learning	Forum

The methodology is explanatory and participative. On the one hand, there are plans for viewing two videos and reading texts. The purpose of this is to give the course participant a general idea of the Service Learning concept. After this first work section (presentation) they must participate in the forum with two interventions, where they will present the main

ideas taken from the documents and give their point of view relating to those of their fellow students.

## SYLLABUS

Detailed description of the activities to be performed by the student, individually or in groups, specifying the results expected and, if applicable, the evaluation criteria.

- Attached is a list of activities, from which they can choose.

## ACTIVITIES

### 1) WATCH KEN ROBINSON'S DOCUMENTARY (LENGTH: 11'06'')

Conference by Ken Robinson on [changing education paradigms](#), available at the following link (length 11'06''):

Students should note the ideas brought up by Ken Robinson and the consequences that the ideas given in the video have on our education system.

### 2) READ THE LESSON'S POWER POINT PRESENTATION

The text of the lesson presents the main ideas that will be worked on. It would be good to acquire an idea of the concept of CSL and of the differences regarding other forms of practice-based learning.

### 3) WATCH THE CSL VIDEO (LENGTH: 2'26'') AND EXPLORE THE WEBSITE

[L'apprentissage par le service communautaire](#) (ASC) (length 2'26'')

The video offers a summarised presentation of CSL. Its purpose is to complement the ideas given in the power point.

### 4) EXPLORE THE [MCCONNELL FOUNDATION WEBSITE](#)

This website offers the experience of the foundation having applied CSL.

### 5) READ THE TEXTS OF THE LESSON

Cameron, Silver Donald (2010) *Getting Wisdom: The Transformative Power of Community Service-Learning* edited by The foundation of the J.W. McConnell family, Quebec, Canada (ISBN 978-0-9867125-1-7); pages 6-15.

Extract the main ideas from the text, in order to acquire a general idea on CSL and the implications of applying it in higher education.

### 6) PARTICIPATE IN THE FORUM, WITH AT LEAST TWO INTERVENTIONS:

First: give a personal opinion as a summary of the readings and videos

Second: make a comment related to the participation by fellow students

## TIMELINE OF ACTIVITIES

Activity Name	Estimated work time	Evaluation criteria
Activity 1: Reading of the sheet on lesson 1	30 minutes	---
Activity 2: Ken Robinson video	15 minutes	Self-test
Activity 3: Reading of the text for lesson 1	60 minutes	Self-test
Activity 4: CSL video and website	15 minutes	Self-test
Activity 5: Read "Getting Wisdom"	60 minutes	Self-test
Activity 6.1: First comment on the Forum	30 minutes	Forum
Activity 6.2: Read Forum comments	60 minutes	
Activity 6.3: Second comment on the Forum	30 minutes	

## EVALUATION SELF-TEST

- 1: According to Nieves Tapia, the University as a temple of knowledge
  - a) integrates the functions of teaching, research and extension
  - b) connects with the problems of society.
  - c) is closed in on itself.
  - d) has a commercial orientation
  
- 2: According to the Final Communiqué of the 2009 World Conference on Higher Education, universities should
  - a) train the future executives depending on the needs of the labour market
  - b) promote active citizen participation
  - c) generate critical opinion leaders
  - d) direct training towards priority interests
  
- 3: The second phase of the World Programme for Higher Education advocates (identify the wrong answer)
  - a) adopting a teaching style that is coherent with human rights
  - b) adopting methods that stimulate interactive participation
  - c) using experimental learning methodologies
  - d) using intrapersonal knowledge-based learning

- 4: Service learning is defined as
- a) learning helping oneself in resolving problems
  - b) providing a basic service to a community
  - c) learning through providing a community service
  - d) learning from the university community
- 5: The pedagogic basics of service learning are:
- a) constructivism and experiential learning
  - b) evidence-based learning
  - c) functionalism
  - d) the pedagogy of adult learning

## EVALUATION SELF-TEST

Question	Question key
Question 1	C
Question 2	B
Question 3	D
Question 4	D
Question 5	A

# SUBJECT 3:

## INTRODUCTION TO THE METHODOLOGY OF LEARNING/SERVICE AS AN ACTIVE METHODOLOGY

### 1. INTRODUCTION

One of the first issues when questioning teaching duties leads us to ask about the ultimate purpose of Higher Education: To improve competencies and personal curriculum? Or, to promote solidarity to change the world? We can answer this question not with a disjunctive clause, rather with a copulative clause. We could say that it is about improving personal competencies and curriculum and also to promote solidarity to change the world, which is where we connect with the human rights-based approach. At this point is where the Service Learning methodology becomes particularly interesting.

Nieves Tapia, one of the main international reference figures on Service Learning, points out that this methodology builds a bridge between two university models. On the one hand, the traditional university, or Temple of Knowledge, closed in on itself and removed from society. In this model teaching, research and university extension would appear as air-tight compartments, acting separately and independently. On the other hand, the second model, linked to the market, aims to respond to the demands that the economic environment places on the university, through the University-Company relationship. This promotes contact with companies, seeking joint research projects, fund-raising, with a commercial focus. The author states that it is possible to connect the university to society, where the university is part of society, as an active subject, playing a key role in the development and social transformation processes, based on its triple mission (teaching, research and extension). As the author states *"service-learning programmes in higher education are expressions of a new paradigm, which may seem faraway and unrealistic, but they are already being practised in many countries around the world"* (Tapia, 2010a, 33).

This new education paradigm is doubtless responding to one of the principles established in the 1923 Geneva Declaration, when it states that *"The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men"* (art.5). Therefore, there is a social responsibility to guide education towards helping each other.

Along these lines, we must also point out the aspects set forth in the Final Communiqué of the 2009 World Conference on Higher Education. It establishes the obligation of Higher Education to lead *"society in generating global knowledge to address global challenges, inter alia food security, climate change, water management, intercultural dialogue, renewable energy and public health"*. And it expressly states in section 3 that:

*"Higher education institutions, through their core functions (research, teaching and service to the community) carried out in the context of institutional autonomy and academic freedom, should increase their interdisciplinary focus and promote critical thinking and active citizenship. This would contribute to sustainable development, peace, wellbeing and the realization of human rights, including gender equity"*.

We highlight from above the institutional autonomy and academic freedom. Sometimes we expect to have a mandate from above, telling us that we have to do things in a certain way. We have the framework, even when it is not institutional, at least from the specifics of academic freedom, where each lecturer works on the subjects in which we are involved.

Within the autonomy of each university, and also within the academic freedom of the faculty involved in each of the subjects taught at the university, resides the ability to choose an education focused on the transmission of knowledge, or as said by Miquel Martínez *“in addition to a good space for learning to know and for learning to do, an excellent place to learn to be and to live together in plural and diverse societies”* (Martínez, 2010:19).

In short, we can say that we have the framework, the whys regarding the mission and vision of Higher Education on these elements. Now we have to find the how, and one of them, albeit not the only one, is Service Learning.

The second phase of the Plan of Action of the World Programme for Human Rights in Higher Education, section 28 c), advocates:

- i) *Adopt a teaching style that is coherent with human rights, i.e. which respects human rights, the dignity and self-esteem of each learner, taking also into account cultural considerations.*
- ii) *Adopt learner-centred methods and approaches that empower students, encourage their interactive participation, and activities that encourage the exploration of alternative perspectives and critical reflection.*
- iii) *Employ experiential learning methodologies that enable learners to understand and apply human rights concepts to their lives and experiences, including community research and/or service.*

It is precisely in the latter where service learning is being referenced. In this lesson we will explain what Service Learning consists of as methodology to develop civic-social competencies in university students. We also present several models to develop service learning internationally. Lastly, we will situate this module within the context of the ABDEM project training programme.

## 2. SERVICE LEARNING IN HIGHER EDUCATION

### 2.1. DEFINITION

Focusing on the Service Learning methodology, we begin with the definition. The term comprises two words: Learning and Service. It connects learning with community service action. In layman's terms, below are some of the definitions obtained from various training sessions:

*To learn while helping others*

*To learn through providing a community service*

*To do something socially useful and to learn through this experience*

The Canadian Alliance for Community Service-Learning (ACASC<sup>24</sup>) defines it as *an educational approach that integrates service in the community with intentional learning activities. Within effective CSL efforts, members of both educational institutions and community organizations work together toward outcomes that are mutually beneficial.*

Known by a variety of terms (e.g., service-learning, community-based learning), CSL programs are most effective when they include key elements drawn from experiential education theory, especially developing critical thinking and intentionally facilitating reflection. Carefully designed and implemented CSL programs and courses assist students to make meaning from their community experiences, to connect experience outside of the classroom to more theoretical study, and to develop as individuals in relation to their values, their sense of social responsibility, and their leadership skills

24. [http://www.communityservicelearning.ca/fr/welcome\\_what\\_is.htm](http://www.communityservicelearning.ca/fr/welcome_what_is.htm)



The Spanish Network of Service Learning<sup>25</sup> and the Centre Promotor d'Aprenentatge Servei<sup>26</sup> de Catalunya define it similarly: *An educational proposal that combines learning and community service processes in a single well-articulated project where the participants learn to work with real needs of their environment with the purpose of improving it.*

A summarised definition would be that given by Josep Puig, Roser Battle et al: it is a complex activity that combines learning and service into a single well-articulated pedagogic proposal.” (Puig; Battle, et al. 2007:16). Linking learning to service affords higher significance and provides students with experiences to reflect on their activity from a practical perspective. Likewise developing service in coordination with the learning process brings new perspectives for their approach, connecting theory and practise.

The Centro Latinoamericano para el Aprendizaje Servicio Solidario<sup>27</sup> (CLAYSS) offers several definitions on its website, grouped under the slogan Learning to Serve, Serving to Learn.

The Service Learning tandem produces a positive sum of learning through experience and service to the community, based on the theoretical and conceptual frameworks of the subjects involved in the community service project. In this sum, positive from the learning standpoint, this methodology enables us to make sense of the contents of the subjects involved, to solve the problems presented. How often do students and teachers do not really know the purpose of the contents of many subjects included in their syllabus? Developing the project directly or indirectly brings into play a series of skills necessary for action. When we make sense of what we are to study, we pay more attention to learning, to the challenges being proposed.

Community service provides many reasons to understand why it is necessary to know the concepts and how to apply them. Community service may also entail the development of actions that are an improvement for their surroundings. This is especially interesting when working with vulnerable groups or with high social value problems. Therefore, integration of both components is sought: community service action and learning through experience. This way both components are transformed, learning improves, the society where it takes place improves; value is added to each of them and it creates new educational qualities differentiated from what each of them would be individually.

In addition, as highlighted by CLAYSS, Higher Education institutions that add service-learning practises also generate socially relevant technological innovations and research, and train professionals who have a higher capacity for response to the challenges of reality.

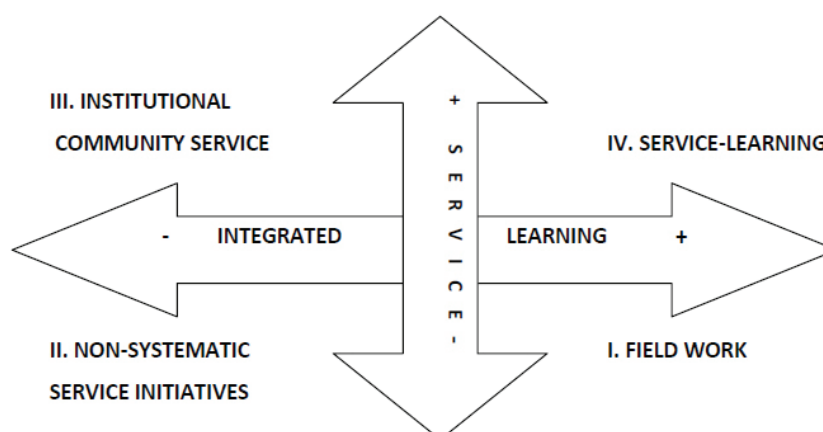
## 2.2. SERVICE LEARNING QUADRANT AND OTHER WAYS OF RELATING TO SOCIETY

It is not always easy to differentiate the service-learning practises in the strictest sense from other community intervention practises performed in educational settings. A useful tool for telling them apart is the graph “Service Learning quadrants”:

25. <http://aprendizajeservicio.net/que-es-el-aps/>

26. <http://www.aprenentatgeservei.org/index.php?cm=02>

27. <http://www.clayss.org.ar/aprendizajeservicio.htm>

**Table 1: Service Learning quadrant**

Source: Tapia, 2000b

The quadrant shows the various scenarios linking educational centres, in our case, university, and society. This is a classic schematic for placing CSL.

The vertical axis of the graph refers to the higher or lower quality of the supportive service provided to the community, and the horizontal axis shows the higher or lower degree of integration of systematic or curricular learning with the service being performed. This produces four quarters, showing four types of educational experiences.

We may find a lower service and lower learning situation, leading to sporadic volunteer actions. For example, we could cite certain campaigns, such as collecting toys for Christmas to donate to social entities, as an initiative from the University Social Responsibility unit. This is a way for the university to connect with society, but which has scarce impact on learning and on service.

There are also situations of much service but little learning, such as university volunteering. In this case, students participate in society's problems, providing it with a service, and they acquire learning that is not necessarily linked to the academic curriculum of the syllabus and programmes.

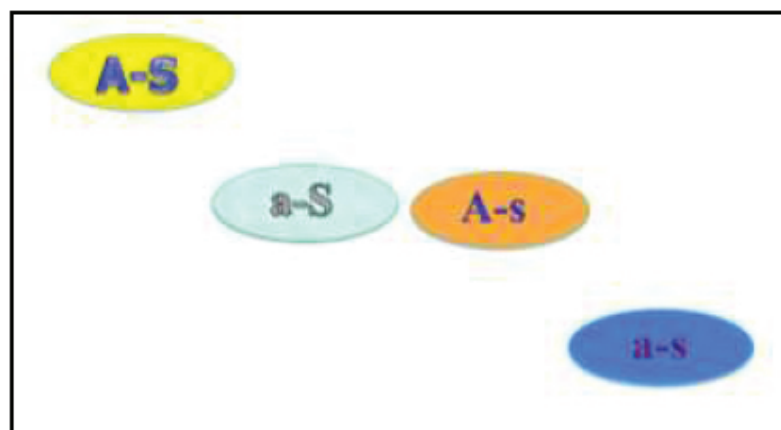
The third situation, which is quite common in relations between the university and society, is derived from field work and external internships. In this case, the order between learning and service is inverted. Much learning is obtained from society, but without offering hardly any service value. For students the opportunity to work while coming into contact with reality is very enriching. In fact, there are skills, competencies and knowledge that can hardly be acquired without this direct contact with reality. However, that learning remains with the student and in the classroom, but does not transcend into society. There are countless occasions when entities are asked for information on various matters that are being worked on in the classroom.

Lastly, we have the situation with a positive sum on both ends, more learning and more service, that happens when the learning programme is connected to objectives and results in society and also within the framework of one or several subjects from the syllabus. This is CSL.

In short, we can say that CSL is not a well-articulated volunteer project, or a poorly-structured volunteer project or fieldwork for a subject. It is a combination of learning through experience and community-service action. Even when learning and service integration are sought, the result may be variable, depending on the combination of ingredients, leading to various combinations:

Graph 1: Combination of results

## Different objectives

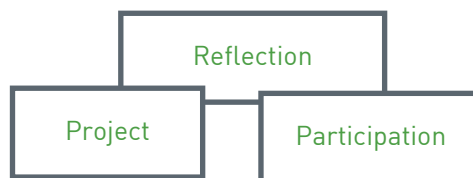


...are all CSL

A-S is the ideal situation, when both the learning and the service provided are vast. Sometimes one of the elements obtains more benefit than the other, there is more learning or more service. In some modest experiences, both learning and service were low profile. Even in these situations the combination is positive, and it could be the way to advance in future experiences, to become more satisfactory in both aspects.

## 2.3 CSL REQUIREMENTS

Five basic requirements must be met in order for a CSL experience to be excellent and successful, as shown in the pyramid.



As stated above, they must be based on an educational programme that is connected with the curricular goals of the training. There must be a service, in other words, it must be connected with the actual needs of the surroundings. It must also be implemented through a project in which the actors involved participate actively, mainly the students as main characters of the process, teachers and society, depending on the partnering required for the project. Lastly, it is essential to have reflection activities, or else the experience may reproduce certain types of paternalism, philanthropy, without there ever being a true sense of what the intervention process was about. This reflection must raise awareness of what the problems are and why they happen, what consequences they have from a standpoint of human rights.

## 2.4. SERVICE LEARNING AND PILLARS OF EDUCATION IN THE 21ST CENTURY

Several authors have highlighted the relationship between service learning and the pillars of higher education established by the UNESCO and set forth in the Report produced by Delors (1996): learning to know, learning to do, learning to be and learning to live together.

**Learning to know** the social challenges and problems; the associations and people committed to society, or the elements related to the subject in question. In short, learning to know having a more realistic and understanding vision of the world in which we live. In Higher Education we are training the future elite, those who are going to make decisions on the social problems and needs, on the challenges that society currently has and will face in the

future. It is about learning to know and learning to know from within, being part of what we are doing.

**Learning to do** involves *rolling up one's sleeves*, setting to work along with others; this activates several skills, for planning, management, communication, evaluation, etc. We must go beyond the classroom walls to implement them, providing students with the opportunity to observe themselves and to participate in the situation. Becoming aware of what they are capable of doing and of what they need to improve. They may train beforehand, but only when they carry it out first-hand can we say that they have acquired these competencies. To this end contact with reality is essential.

**Learning to be** entails the development of personal autonomy, with effort, constancy, self-criticism, as well as tolerance of frustration and self-esteem. After actively participating in a project and succeeding in completing it, students become aware of their ability to face other situations in the future, even if it entails a high degree of uncertainty. During this process they also internalise a set of values such as responsibility, solidarity, justice, commitment and critical awareness, among others.

**Learning to live together** is the capacity for teamwork, where they must dialogue, negotiate, compromise, demand, explain, understand, respect, etc.

In our experience implementing the CSL methodology in external internships, we are seeing how students develop these competencies, because it is not the same to design a social intervention project on paper (they say that paper withstands everything,) than to explain and defend before those in charge of a certain programme or service the interest in carrying out a certain action, perform it and evaluate it.

CSL is tradition and novelty, it is based on several psychological-pedagogical schools of thought, such as social constructivism; experiential learning; collaborative learning; while at the same time combining various methodologies: work by projects; case studies or problem-based learning.

## 2.5. PEDAGOGICAL FOUNDATIONS

It is commonly said that CSL is tradition and novelty, it is based on several psychological-pedagogical schools of thought, such as social constructivism; experiential learning; collaborative learning; while at the same time combining various methodologies: work by projects; case studies or problem-based learning.

As main references we have John Dewey's theories on "Learning by doing", Paulo Freire's critical pedagogy and the processes of emancipation and transformation.

Authors such as Nieves Tapia in Argentina, Andrew Furco in the United States and Josep Puig in Spain have published several works on this subject. Scientific research on this matter has also proven that "there is evidence that the more challenging and significant the caring service, the more significant the learning will be; The more the students make the project their own, the higher its educational impact; The duration and intensity of the experience significantly affects its educational impact (Aramburuzabala, 2014).

In short, we could say that Service Learning is based on an understanding of citizenship based on active participation and contribution to the improvement of society's quality of life. It is based on the consideration of learning as social responsibility, exploration, action and reflection, and on understanding education in values that is based on life, experience and on building habits.

## 2.6. SERVICE LEARNING INTERNATIONALLY

As seen throughout these pages, there are systematised experiences implemented in several countries. It is a practise that is common in many areas of the world, with varying degrees of institutionalisation. In some cases regulated by a national legislative framework with the obligation to perform a period of community service, such as the case of Argentina; in others it is offered as an opportunity for personal development for teachers and students (USA

and Canada); in other countries the initiatives originate from the actors involved, with a low degree of institutionalisation regarding legislation (Spain).

In this article we have referred to some of the websites. Below is a sample list of websites specialising in service learning. Further information may be found on all of them, by means of tools, examples, publications, etc.

### Argentina

[Centro Latinoamericano de Aprendizaje Servicio Solidario](#)

### Canada

[l'Alliance canadienne pour l'apprentissage par le service communautaire](#)

### United States

[American Association of Community Colleges](#)

### Switzerland

[Centre suisse de Service-Learning \(in French\)](#)

### Spain (all links are in Spanish)

- [Red Española de Aprendizaje Servicio](#)
- [Red Universitaria Española de Aprendizaje Servicio \(ApS-U\)](#)
- [Blog by Roser Batlle, promoter of CSL in Spain](#)

## 2.7. PRACTICAL EXAMPLES

As a method for intervention in social reality, service learning can be applied to all professional branches and fields of knowledge. It is also a very efficient tool for focusing on knowledge from a practical human rights-based approach. This methodology is in alignment with the Plan of Action of the World Programme for Human Rights in Higher Education, when it establishes the need to Develop strategies for infusing human rights as a cross-cutting issue into all higher-education disciplines - not only law, social studies or history (art.28, a,i).

Below are four projects from the book by Roser Battle “*60 Good Practises of Service Learning*” that illustrate examples of activities that can be carried out with students of Law, Education, Social Work and Communications. These are only examples that have been put into practise, which may be used as a first contact with the subject.

## LAW STUDIES

The Right to Law	
Service	Learning
Law students and teachers provide legal services to underprivileged people and groups, collaborating with public, social and professional entities.	Law students and teachers provide legal services to underprivileged people and groups, collaborating with public, social and professional entities.

## COMMUNICATIONS STUDIES

Without raising a hand	
Service	Learning
Audio-visual Communication students produce a television program on the city's social and volunteering entities.	Reinforcement of the contents and procedures learned in class; knowledge of the social entities and the causes they stand for; communication and collaboration skills, etc.

## EDUCATION STUDIES

Sponsoring a reader	
Service	Learning
In Language class students become sponsors or tutors of kindergarten children, telling them stories that they have worked on previously.	Improved reading, gestures and oral expression; as well as relationships with younger children, exercising patience and responsibility.

## SOCIAL WORK STUDIES

Coffee and words	
Service	Learning
Social work graduate students organise gatherings for immigrant women from several countries, including dynamics, watching documentaries or reading texts on different subjects of interest: friendship, solidarity, cultural diversity... Participants express themselves freely, while enjoying a cup of coffee and delicious typical sweets.	Development of social and personal skills, such as expression, empathy and active listening; creation and strengthening of social ties; reinforcement of values (friendship, respect or justice) extension of knowledge thanks to contact with cultural diversity and hearing different points of view.



These examples are just a sample of the possibilities of the methodology. Everyone can consider which project to develop within their own specific context. We must also point out that there may be service learning experiences that the actors have been performing naturally, not even aware that they were using this methodology. Thus, many experts say that service learning is not an invention, rather a discovery. When one recognises some of the ingredients of service learning in certain practises, the experience should be analysed and the above five requirements should be reviewed, in order to improve it both from the standpoint of learning and of service.

Throughout the course we will work on practice with the service learning methodology, with the aim to design, implement and evaluate work projects on human rights in the various areas of knowledge comprised in the Abdem project.



# MODULE 1 |

Competecy-based  
learning



**ABDEM**



# SUBJECT 1:

## INTRODUCTION TO THE CONCEPT OF COMPETENCE AS A KEY ELEMENT OF THE ORGANIZATION OF TRAINING PROCESSES

**Hours:5**

**Subject 01.** Introduction to the concept of competence as a key element of the organization of training processes

**Lecturer:**

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University of La Rioja.

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### SUMMARY OF THE TOPIC

The aim of this topic is to provide university instructors with a new model of teaching based on student learning processes, adopting a competence-based approach to human rights that guides their whole training (University's mission).

To address this aim effectively, we consider it important to dedicate a section to clarifying what competence is, along with other related terms that may give rise to confusion among teachers who use such terms (e.g., capabilities, abilities, skills, attitudes).

After explaining the meaning and value of competence-based learning for the whole development of the student, the last section of this topic points out the essential aspects that need to be taken into account in the planning and evaluation processes using this new competence-based approach: situations, processes and contents.

### GENERAL AND SPECIFIC COMPETENCES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

#### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.

#### SPECIFIC:

Specifically for this first topic in Module 1, the participating teachers will learn to respond effectively to the following propositions:

- To make efficient use of the conceptual and terminological field regarding competence-based learning in a specific university teaching situation, including developing one's own informed view on the basis of that construct.
- To explain and distinguish the essential aspects of competence-based learning using a specific example for subsequent development and evaluation in university settings.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

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Smith, SR., Dollase RH & Boss JA. (2003). Assessing student's performances in a competence-based curriculum. Acad Med, 78, pp. 97-107.

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Villa, A. & Villa, O. (2007). El aprendizaje basado en competencias y el desarrollo de la dimensión social de las universidades. Educar, 40, pp. 15-48.

Yániz, C. & Villardón, L. (2006). Planificar desde competencias para promover el aprendizaje. El reto de la sociedad del conocimiento para el profesorado universitario. Bilbao: Universidad de Deusto.

Zabala, A. & Arnau, L. (2014). Métodos para la enseñanza de competencias.

## LEARNING PROCESS

Participants will be able to:

- Understand the value of human rights in development and particularly in education.
- Understand the added value of applying the Human Rights-based Approach (HRBA) and (GBR) in the national and United Nations programming processes, and in the social intervention process.
- Apply the key elements of a human rights-based approach and a results-based management approach to reinforce the analytical work of the social, economic and cultural environment of each person's country.

## METHODOLOGY

### READINGS:

- Text for Topic 1 prepared by the teacher.



- Documents listed in the section “Reference and other obligatory educational resources”

### INDIVIDUAL WORK:

- Based on the readings, construct a personal, informed definition of the term ‘competence’ (maximum 60 words)

### NOTES IN THE FORUM:

- Give a brief reflection in the forum (maximum 60 words) on essential knowledge required from student for a competent performance from the human rights-based education approach.

### GROUP WORK:

In small groups (3 people), using wikis as a space to work and reflect together, describe a typical situation in which students will find real opportunities to effectively apply the knowledge acquired on the subject of human rights.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Activity name	Estimated work time
Activity 1	2 hours
Activity 2	15 minutes
Activity 3	15 minutes
Activity 4	2 hours and 15 minutes

## DESCRIPTION OF THE LEARNING ACTIVITIES

### ACTIVITY 2:

As we noted earlier, the knowledge of concepts, procedures and attitudes are key components to developing competence-based learning. Given the type of exit degree where you teach, and taking a typical situation in which students will apply their acquired knowledge effectively, try to identify which elements are essential for competent performance from a human rights-based approach to education:

**a) Basic theoretical and conceptual knowledge:**

**b) Procedural knowledge:**

**c) Attitudinal knowledge:**

### ACTIVITY 4:

As per what is noted in the topic, any given competence is always contextualised in a specific situation. To enable planning from a HR-based approach, we ask you to describe at least one typical and relevant situation in which the student will find real chances to effectively apply the knowledge acquired.

# SUBJECT 1:

## INTRODUCTION TO THE CONCEPT OF COMPETENCE AS A KEY ELEMENT OF THE ORGANIZATION OF TRAINING PROCESSES

### 1. INTRODUCTION

Education systems in general are currently undergoing significant reworking involving a competence-based approach to learning. Interest is renewed in it because it favours the personal development of the students and their free, committed and responsible contribution to a society that is increasingly fairer, more inclusive, more democratic, and more driven by knowledge. This model has been shown to be the most suited for modernising and improving the quality of higher education (Assembly, 2014; Commission of the European Communities, 2005; European Commission/EACEA/Eurydice, 2014; UNESCO, 1998). Putting it into practice requires a substantial change in the concept of teaching, as well as in the functions traditionally attributed to teachers and students during the educational processes.

Rethinking teaching from this new competence-based approach involves redefining the mission of universities, transforming *syllabus design* and articulating a significantly different orientation for the *teaching activity* and the *role of students* during the educational process. For example, it means transforming curricula into *educational projects* (Yániz & Villardón, 2006, p. 17) that clearly define the expected academic results in students graduating from each centre or faculty (*exit profile as individuals, as citizens and as professionals* who will carry out a job for which they have been prepared). This must always be done in an *integrative way* (i.e., learning cannot be considered separately from the personal dimension of the learner, attitudes and values as priorities in the life of the person) and oriented to *applying the acquired knowledge* (a useful learning to address and intervene *effectively* in the various problems or questions that may arise in *different situations* in society today). From the teaching perspective, it means a major shift in how to *plan and evaluate learning*. In this case, rather than focussing on the disciplinary contents of the syllabys or on the number of correct answers, particular importance is given to the structure and quality of the *processes* by which students can deal with typical or emerging situations in a given context. Thus, the role of students is much more *active* (intentional, based on prior knowledge) and *strategic* (self-regulating, reflexive, marked by the circumstances and conditions of the situation at hand), taking a leading role in their educational process (by *constructing their own knowledge* with the help and guidance of the teacher).

Consequently, we are convinced that none of the above can be possible without the serious commitment and pedagogical training of the teachers in this context. Teachers are the true agents of change; they are responsible for putting into practice the new pedagogical theories and ideas for improving the quality of education from a human rights-based approach (Assembly, 2010, p. 7; Assembly, 2014, p. 8). Therefore, in the following section we will take a look at the essence of the concept of competence, from its fundamental components to the principles and demands needed so that learning about human rights becomes truly meaningful and worthwhile in the students' holistic development (empowering students to apply their knowledge in a practical way in their daily life).

## 2. CLARIFYING THE TERMINOLOGY: THE CONCEPT OF COMPETENCE AND RELATED CONCEPTS

As the literature in this field of knowledge from recent years clearly shows (Jonnaert, 2002; Jonnaert, Barrette, Masciotra, & Yaya, 2006; Villa & Poblete, 2007; Rychen & Salganik, 2000; Rychen & Salganik, 2000; Smith, Dollase & Boss, 2003; Zabala & Arnau, 2014), including the broad framework of norms and recommendations generated on the quality of university education systems (ENQA, 2010; ESU, 2012; European Commission, 2013), 'competences' are considered to be a key element in the design, development and evaluation of teaching and learning processes at educational institutions.

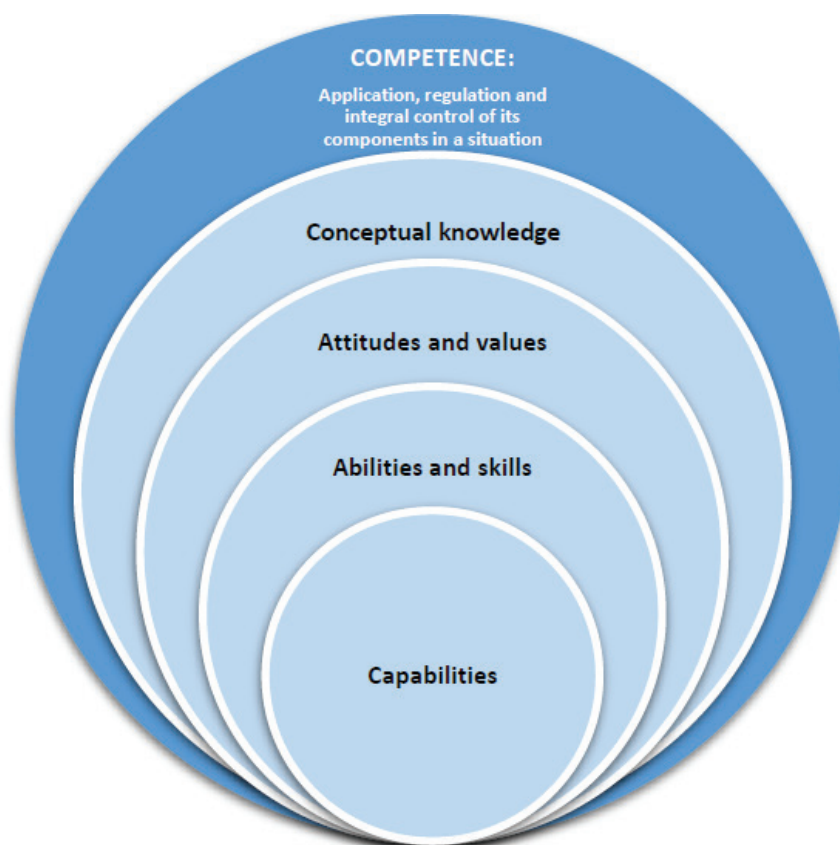
Even so, the notion of competence as it is commonly used is very heterogeneous, and has a multitude of nuances and meanings depending on the discipline and field of study and the stage or level of the education system. This diversity of meanings runs the risk of creating conceptual ambiguity among the teaching staff and of disorienting teachers and subsequently losing their interest in regard to this concept considered key to improving the quality of learning. For this reason, and without any intention of formulating an absolute truth about the term, we turn to the theoretical framework to draw out some of the common denominators that can be deemed the basis for the design and development of educational action from this competence-based approach.

By synthesising relevant contributions to the subject (Rychen & Salganik, 2000; Smith, Dollase & Boss, 2003; Perrenoud, 2004; OCDE, 2005; Jonnaert, Barrette, Masciotra & Yaya, 2006; Villa & Poblete, 2007), we can sum up the concept of competence as a *knowing how to do something efficiently in a particular situation*. This practical summarised conception assumes the students have the *ability to self-regulate and control* their own *knowledge* built on the basis of *theoretical knowledge* (for example, relevant concepts and assertions regarding human rights), *procedural knowledge* (e.g., abilities and skills to apply to protect human rights in different situations) and *attitudinal knowledge* (e.g. ethical principles, values, norms, customs linked to respecting, promoting and defending human rights). In this case, special note should be made of the attitudinal dimension of competence, given that a 'competent' individual not only performs well, but also shows their attitude and values in a consistent manner (Villa and Villa, 2007, p. 19). A satisfactory, harmonious and integral development of all the domains of an individual (conceptual, procedural and attitudinal) constitutes the ideal scaffolding for teaching competences aimed at the effective application of human rights (Fig. 1).

Let us bear in mind that Phase Two (2010-2014) of the Action Plan of the World Programme for Human Rights Education encompasses the following:

- a) Knowledge and techniques: learn about human rights and the mechanisms for protecting them, as well as acquiring the ability to apply them practically in daily life;
- b) Values, attitudes and behaviours: promote values and consolidate attitudes and behaviours that are respectful of human rights.
- c) Adopting measures: encouraging the adoption of measures to defend and promote human rights.

Fig. 1. Main components of a competence



Source: Navaridas, 2013, p. 175]

As per this competence-based approach, the effectiveness of an individual's actions and the resources they rely on at the moment of performing a task (cognitive, affective, social) will depend to a large extent on the conditions and circumstances of the *situation* surrounding it. As Jonnaert (2002) points out, the context and situations are the wrappings within which learners can give meaning to the knowledge they construct. The effective treatment of the situation thus constitutes the main criterion for evaluating contextualised competence. In this way, we also need to note that both the actions and the resources used differ from one person or group to another. It all depends on the perception or interpretation of what the situation at hand calls for.

As regards the types of competences, we prefer the ones established by the Tuning Project (González y Wagenaar, 2003), which classifies them into two large groups: generic and specific. Considering that specific competences are absolutely necessary in forming knowledge and developing abilities specific to each area, Tuning also highlights the relevance of generic competences and transferable skills, especially for preparing students for their future role as professionals and citizens. He distinguishes the following generic competences: instrumental, which includes cognitive, methodological, technological and linguistic abilities; interpersonal, referring to personal abilities regarding social skills; and systemic, such as abilities and skills regarding overall systems, in a combination of understanding, sensibility and knowledge. The importance of these competences derives from the nature of their own characteristics, i.e., they are multifunctional, transversal, referential to a higher order of mental complexity and are multidimensional (Rychen and Salganik, 2001).

### 3. GENERAL GUIDELINES FOR THE DESIGN, DEVELOPMENT AND EVALUATION OF COMPETENCE-BASED LEARNING

In accordance with the conceptual framework sketched out in the section above, the planning stage of the teaching and learning processes from a competence-based approach must take into account the following essential aspects:

- a) *Describe situations that are relevant and familiar* to the students' lives (for example, one related to their professional goals and interests, the personal dimension or the immediate social setting where the educational activity takes place) so as to *contextualise the learning process*. The aim is to offer real-work chances to put their new knowledge into practice, thereby endowing it with meaningfulness and value in their personal development. Their selection and design requires answering questions such as "What situations will our students have to face?. What typical problems will a citizen encounter and have to solve? To what situations in their social, work or personal life can they apply the knowledge acquired in the programme?
- b) *Define the processes of action deemed suitable for effectively handling the situations* described above. For each type of situation, the instructor or group of instructors must clearly and precisely state what the students must be able to do in very specific conditions to show that they have acquired the competences (categories of actions that can be posed in situations). Some teaching questions that need to be cleared up at this time in the syllabus are the following: to act with competence in a priorly determined situation, what actions should students perform and with what resources? What actions do students have to carry out to show a competent endeavour in a particular situation? Under what conditions is an action considered to be competent?
- c) *Determine the contents deemed essential for development of competences in the teaching/learning situation*. A student's competent action or undertaking involves consciously and intentionally activating and mobilising a set of knowledge (regarding curricular contents of the conceptual, procedural or attitudinal kind), because it is on the basis of this prior knowledge that the student processes and interprets the different variables, conditions and nuances found in the situation posed. These contents may become operational in many different ways by the students, mainly by using the objectives previously defined by the instructor or the learning outcomes arising as task demands. Among other questions, at the time of selecting and organising the contents, the question should be asked: What do the students need to know or know how to do to successfully address the demands posed in the given situation? What prior knowledge does competence require work on?

# SUBJECT 2:

## DESIGN AND DEVELOPMENT OF COMPETENCY-BASED TEACHING-LEARNING PROCESSES

**Hours: 10**

**Subject 02.** Design and development of competency-based teaching-learning processes

**Lecturer:**

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### SUMMARY OF THE TOPIC

For any higher education institution or school wishing to implement educational projects in human rights and generally integrate them within the curriculum, the educational processes planned out using a student-centred competence-based approach constitute an effective work methodology for these aims to become real in each community as well as in society at large.

In all surety of its importance, in this topic we try to give a brief account of all the phases that make up this specific process of student-centred lesson planning as well as the basic tasks to be done to put the phases into practice.

However, before we can give a model on how to plan learning and teaching processes, we first need to reflect on the concept of planning from a competence-based approach so as to share a common understanding among the teaching faculty for putting it into practice, as well as understanding its functions and recognising the characteristics it must meet to face the challenge of guaranteeing the quality of teaching human rights at university.

The following pages explain and describe each main point noted about and offer graphics and examples to help make them easier to understand.

### GENERAL AND SPECIFIC COMPETENCES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific*

*competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives:

#### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- In the particular framework of your teaching activity, justify the *planning process using competences* as a *key strategy* in promoting the meaningful learning of human rights.
- Explain the basic characteristics and functions of lesson planning as part of an *integrated educational project* from a competence-based approach.
- Choose a specific situation in a university setting and plan the educational activity from a competence-based approach centred on learning about human rights.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

Navaridas, F. (Coord.) (2013): La gestión de los procesos de enseñanza y aprendizaje en los centros educativos. In Navaridas, F. Procesos y contextos educativos. Pamplona: Genuveve Ediciones.

Yániz, C. & Villardón, L. (2006): Planificar desde competencias para promover el aprendizaje. Bilbao: Universidad de Deusto.

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

Anderson, L. W. and Krathwohl, D. R., et al (Eds..) (2001). *A Taxonomy for Learning, Teaching, and Assessing: A Revision of Bloom's Taxonomy of Educational Objectives*. New York: Longmans, Green.

Bloom, B. S. (ed.) (1956). *Taxonomy of Educational Objectives, the classification of educational goals. Handbook I: Cognitive Domain*. New York: McKay

Churches, A. (2009): [Taxonomía de Bloom para la Era Digital](#).

Krathwohl and Anderson, et al. (2013) : [Understanding the New Version of Bloom's Taxonomy](#). A succinct discussion of the revisions of Bloom's classic cognitive taxonomy.



Navaridas, F. (2014). La programación didáctica a partir de competencias y la evaluación de los resultados de aprendizaje. En González, L. & Navaridas, F. (Coords.) Acción pedagógica en los centros. Enfoque teórico y práctico. Logroño: Fundación Universidad de La Rioja.

Zabalza, M.A. (2003): *Competencias docentes del profesor universitario*. Madrid: Narcea.

## WEBS

<http://thesecondprinciple.com/wp-content/uploads/2014/01/Understanding-revisions-to->

## LEARNING PROCESS

Participants will be able to:

- Understand the value of human rights in development and particularly in education.
- Understand the added value of applying the Human Rights-based Approach (HRBA) and (GBR) in the national and United Nations programming processes, and in the social intervention process.
- Apply the key elements of a human rights-based approach and a results-based management approach to reinforce the analytical work of the social, economic and cultural environment of each person's country.

## DESCRIPTION OF THE LEARNING ACTIVITIES

### 1. READINGS:

- Text for Topic 2 prepared by the teacher.
- Pages 157 to 192 of the book cited in the section 'Reference and other obligatory educational resources'.

### 2. INDIVIDUAL WORK:

- Based on the readings, explain the role of competences in the processes of lesson planning from an approach based on the meaningful learning of human rights (maximum 100 words).

### 3. NOTES IN THE FORUM:

- Write a brief reflection in the forum (maximum 60 words) that justifies the strategic nature of the planning process using competences as a key strategy.

### 4. GROUP WORK:

In small groups (3 people), use *wikis* as a collaborative workplace and the model featured in the topic to create a sample lesson plan from a competence-based approach centred on learning about human rights.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Activity name	Estimated work time
Activity 1	1.5 hours
Activity 2	1/2 hour
Activity 3	1/2 hour
Activity 4	7.5 hours

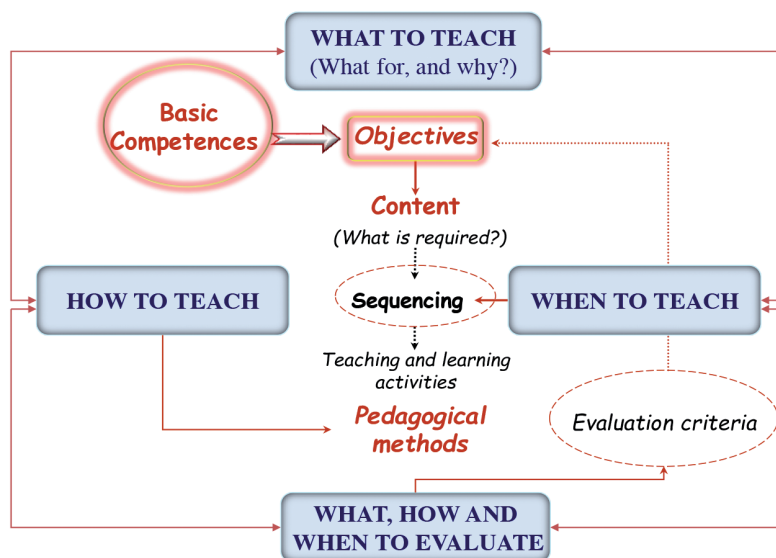
## SUBJECT 2:

# DESIGN AND DEVELOPMENT OF COMPETENCY-BASED TEACHING-LEARNING PROCESSES

## 1. LESSON PLANNING: CONCEPT, STRUCTURE AND MAIN COMPONENTS

As with any other human endeavour involving a degree of complexity, teaching at schools must be planned out ahead of time if it is to be sufficiently efficient, and the plan must take into consideration whatever results are expected within its contextual framework. (Yániz & Villardón, 2006). In the specific case of university teaching from a human-rights approach, this planning requires an initial process of reflection on the essential aspects or general competences whose presence is desired in the exit profile from all universities and all degree programmes (i.e., why do this training programme and what for? What model of individual, professional and citizen do we wish to achieve at the university?). This initial reflection process on the characteristics sought in an individual receiving a degree from our university (what do we wish to achieve with this training?) allows the teacher to suit the teaching decisions to fit the needs and demands of the social and professional reality in the immediate context, as well as taking strategic decisions that are consistent and grounded on the different elements that make up the curriculum of that plan (Fig. 1).

Figure 1: Main components of lesson planning (Source: Navaridas, 2013, p. 176).



In this case, we understand planning as a *teaching activity that orders and organises the set of decisions and guidelines that every teacher or teaching team deems necessary for learning to be successful during the educational practice*. The plan must be drawn up following the pedagogical

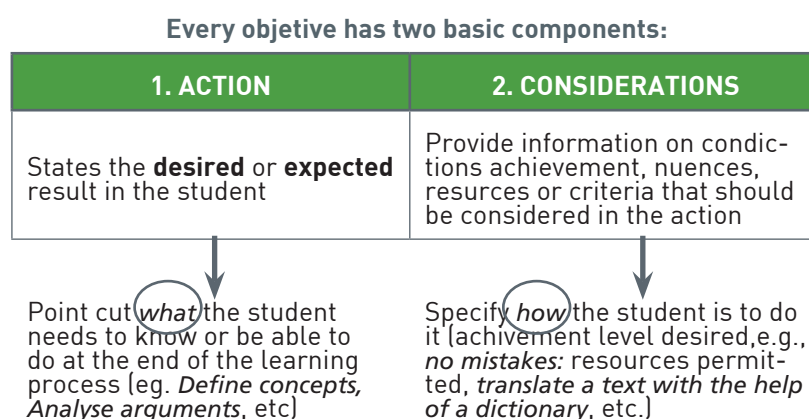
criteria and guidelines previously agreed on by the teaching areas or departments in the context of each university's mission or project.

From this point of view, the essence of a successful planning process is in the prior needs analysis, driven and grounded on a scientific understanding of the dynamics of teaching and learning, *what to do it for, how to do it, when to do it and how to determine how well it is achieved and how efficient were the decisions taken* (Fig. 1). As Zabalza rightly states (2003:73), programming teaching means taking into consideration the legal determinations, the minimum teaching of our discipline, the curricular framework in which it is set, our own vision of the discipline and its didactics, the characteristics of our students and the resources available in our teaching-learning context.

As per all of the above, *the objectives are the elements of planning in charge of turning the perceived or detected educational needs in terms of competences into final learning achievements in the corresponding educational project*. More simply stated, the objectives are relevant results from learning that each student is expected to achieve by the end of a course or training period, and these results may occasionally require assessment to ensure their efficacy. This way, their formulation reveals two basic components (Fig. 2):

1. **The action:** state the future result desired, using the student as the subject of this action.
2. **Considerations:** provide information on conditions, achievement level, variations, resources or any other criteria that should be taken into consideration in the action.

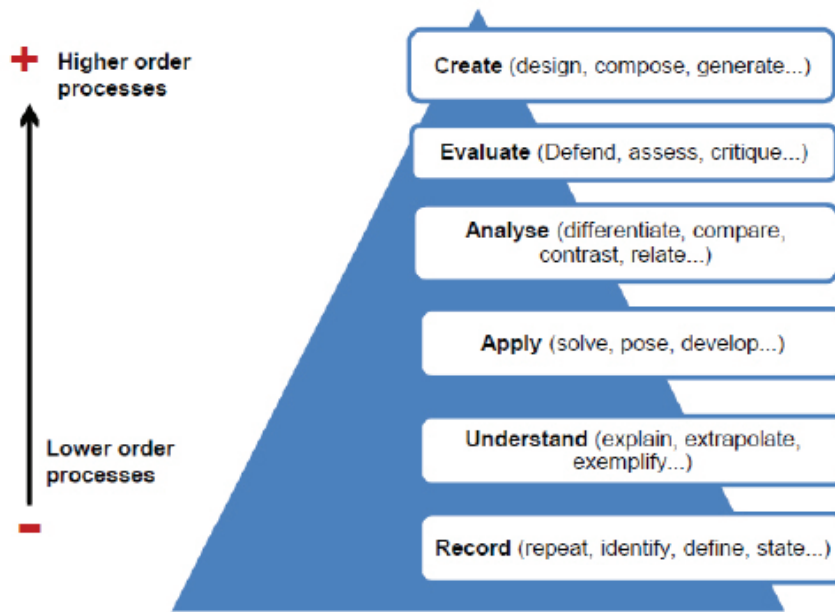
**Figure 2: Learning objectives in the teaching plan. (Source: Navaridas, 2014, p. 3)**



In accordance with all the above, we can safely state that the learning objectives are a key element to teaching plans and form the basis for everything else (contents, methodology, timing and assessment system). Their formulation conveys a demand regarding the teachers' didactic activity. The core of this demand is that *all didactic decisions and activities scheduled by the teacher must focus on the learning process and build upon the commitment of the individual in that situation*.

Starting off with the characteristics and conditions of a particular situation, the learning objectives can only be formulated by clearly and precisely defining what cognitive, affective, social *processes need to be activated by the learners* (while making use of appropriate contents and resources) *for the successful completion of a task* (i.e., performing competently). Thus, classifications and taxonomies of objectives make it easier for teachers to reflect on how to sequence actions differently to achieve different results in learning. One of the most well-known taxonomies is Bloom's *taxonomy of educational objectives* (Bloom, 1956), in which he classifies them into domains, especially the cognitive and affect domains. More recently, this taxonomy has been revised and updated by other authors (Anderson and Krathwohl, 2001), thereby making it easier to take decisions during the teaching plan process (Fig. 3).

Figure 3: Bloom's taxonomy, revised and adapted. (Source: Adaptation, Anderson and Krathwohl, 2001).



## 2. MAIN CHARACTERISTICS AND FUNCTIONS OF TEACHING PLANS

As noted above, the teaching plan process is a unique opportunity for teachers to *reflect critically* on their own practice, the educational reality of their setting, *the learning needs and interests of their students regarding human rights*, and thus to take strategic decisions consistent with the principles and aims of the educational model at their university (i.e., the educational mission).

Along these lines, rather than experiencing teaching plans as bureaucratic chores that all university teachers must do, they should be conceived as a wonderful opportunity for change, for educational improvement and for the teachers' professional development. From this point of view, the reflection teachers make of their own teaching becomes an exercise in consistency that must *engage all the teachers and stakeholders involved in the educational process to work together toward the same educational aims and purposes*. Of course, the students must be told what results are expected of them during the educational process, how they are to go about it and what resources they will need, as well as what system will be used to evaluate their achievement. Making the students more aware of this teaching commitment will no doubt facilitate and guide their study activities and will improve their motivation to learn about human rights (Fig. 4).

Similarly, when teachers reflect on their teaching as they plan out their learning activity, a clear and precise description of what students must do to show their achievement of the competences or aims defined in the educational model of the university (i.e., the formulation of the expected learning results from the educational process) plays a *key role in taking decisions on designing* the curriculum, the selection of didactic strategies suited to developing them, and the valid assessment system for checking the degree to which students achieve those educational aims or goals.

Lastly, to the extent that planning means a professional teaching commitment to be approved by the corresponding governing body at each university, it *facilitates the teacher's own self-assessment in terms of ongoing innovation and improvement of the educational practice and the accountability to the people or institutions that have contracted obligations and responsibilities*.

**Figure 4: Functions of teaching plans from a competence-based approach (Source: Navaridas, 2014, p.73)**

#### COMMUNICATION:

- With other teachers (coordination, collaboration, teamwork)
- With students (guidance, motivation, self-evaluation)
- With other agents from the university community (administration and services)

#### DIDACTIC CRITERION IN DECISION-TAKING:

- Selecting and structuring the content.
- Selecting the didactic strategies (methods, techniques, resources)
- Designing the assessment system and selecting the measuring instruments.

#### SELF-EVALUATION ON PERFORMANCE AND CONTINUAL IMPROVEMENT:

- Self-assessment of teachers
- Of the teacher versus the teaching team
- Of the University to society

In relation to the **characteristics that define a good teaching plan**, we consider it necessary to attend to the following **quality indicators**:

- **Underlying unity in its structure** (its components forming a single whole logically interrelated from the merging of learning needs and interests identified in the educational project of the university), internal consistency between its learning objectives and the strategies adopted to carry them out and a harmonious sequence in their design (i.e., the steps or successive phases must proceed in accordance with the overall learning dynamics).
- **Flexibility and openness** (by using evaluation and follow-up to fine-tune as needed for ongoing improvement without upsetting or altering the basic unity of the plan and the continuity of its pedagogical underpinnings).
- **Objectivity and realism of its educational aims** (based on the analysis of the educational goals at each university, the student's initial situation, the resources and times available.)
- **Precision and clarity** (so that it can fulfil its function of guiding the teaching and learning process and avoid any ambiguities in its communication function, thereby facilitating the coordination processes).

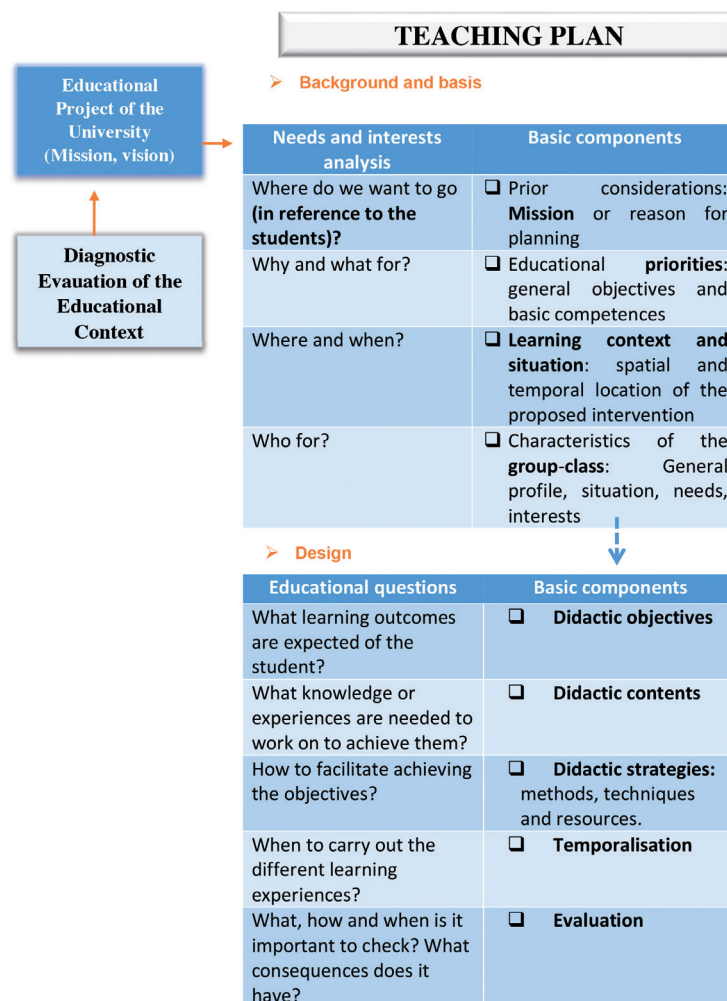
### 3. COMPETENCE-BASED PLANNING: A PROCESS MODEL

After the teacher's initial reflection on the educational context itself, and after analysing the learning material in a framework of specific circumstances and conditions, as we pointed out in another paper (Navaridas, 2013: 180-183), teachers must then design the educational activities taking important decisions founded on the following elements of the curriculum (Fig. 5):

- 1) **What situation or situations are deemed relevant to contextualising and providing meaningfulness to the students' learning?** (Description of real-life situations that are meaningful to students, that are within their circle of understanding, that will give functionality to their work and enables them to apply their newly acquired knowledge).

- 2) **What are the desired aims or results expected from the teaching-learning process?** (Definition of the level of goals to achieve). Why are such objectives being proposed? (Outlining the motives and purpose pursued: Basic competences for students for meaningful learning of human rights)
- 3) **What contents or learning experiences must be developed to facilitate achievement of these goals?** (Selection of the necessary and relevant contents to attain the competences stated in the objectives).
- 4) **How can such learning experiences and results be facilitated during the teaching activity?** (Strategic determination of the most pertinent methods, techniques and resources as per the expected learning objectives).
- 5) **When should the different stages or units of the teaching activity be carried out so as to lend continuity, sequencing and progression to the normal dynamic of learning?** (Chronological organisation of the set of activities considered in the teaching-learning process):
- 6) **What should be evaluated?** (Specification of the essential areas and elements of the input context, of the learning processes and results) What for? To check, inform, qualify, motivate, improve, research, etc.? (Depending on the purpose of the evaluation, the selection of the criteria for correctness, of worth, as well as indicators that can be used to objectively and reliably check that the expected results have been achieved and to what extent) How and when to evaluate? (Planning the procedures based on validity and reliability criteria. Chronological organisation of the assessment activity. Monitoring and control).

Figure 5: Process model for teaching plans (Source: Navaridas, 2013:183)



# SUBJECT 3:

## THE EVALUATION OF COMPETENCY-BASED LEARNING

**Hours:10**

**Subject 03.** The evaluation of competency-based learning.

**Lecturer:**

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### SUMMARY OF THE TOPIC

To guarantee the quality of education in human rights from a competence-based approach it is necessary to set up an evaluation system aimed at accurately and precisely checking the achievement of the learning results foreseen in the teaching plan, a topic we shall bring up further below.

To address this purpose effectively, we first must clarify the concept of *evaluation* and explain how it differs from other related concepts such as measurement and grade. Otherwise, the ensuing confusion regarding these concepts may negatively affect the entire learning process or lead to mistaken conclusions when decisions are to be taken.

After clearing up the conceptual problem of evaluation while bearing in mind the challenge of ensuring a quality education in human rights, we will then take a second section to explain different types of evaluation of competence-based learning, attending to basic classification criteria such as the intended purpose, the evaluating agent or the moment of application.

Fully aware of the complexity and difficulty involved in evaluating the integrated learning of human rights from a competence-based approach, in the third section we explain several procedures and instruments for obtaining relevant data from students in a way that ensures validity and reliability in identifying what they learned. To do so, an analysis must be made of their advantages and limitations, as well as of their pedagogical possibilities as regards how closely they fit the objectives being checked.

Therefore, in the last section of the topic, we outline a sample syllabus of the evaluation of learning from a competence-based approach, following basic validity and reliability criteria.

### GENERAL AND SPECIFIC COMPETENCES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General



Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the general and specific competencies described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives:

#### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.

#### SPECIFIC:

- **Make effective use of the terminology regarding the concept of evaluation,** identifying the differences with other similar terms that are closely related to the evaluative activity (measurement and grading).
- **Identify different types of learning assessment at the university,** according to important classification criteria from a competence-based approach to learning: final purpose, evaluating agent and moment of application.
- **Select and prepare valid measuring instruments** to check the degree of achievement of the results expected in human rights learning, **acknowledging their advantages and disadvantages** for effective use during the evaluation process.
- **Rigorously and precisely design the evaluation of competence-based human rights learning** following validity and reliability criteria.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

Le Boterf, G. (2015). Construire les compétences individuelles et collectives. Éd. Eyrolles (pp. 147-166).

Tardif, J (2006). L'évaluation des compétences documenter le parcours de développement. Éditeur: Chenelière Éducation Publication.

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

Biggs, J (2005): Calidad del aprendizaje universitario. Madrid: Narcea.

Morales, P. (1998): Evaluación y aprendizaje de calidad. Guatemala: Universidad Rafael Landívar.

Navaridas, F. (2010). Evaluación de la calidad en los centros educativos. In Navaridas, F.; Menorca, G. and Fernández, R. La Excelencia en los centros educativos. Madrid. CCS.

Navaridas, F. (Coord.) (2013): La gestión de los procesos de enseñanza y aprendizaje en los centros educativos. (see pp. 184-191). In Navaridas, F. Procesos y contextos educativos. Pamplona: Genuve Ediciones.

## LEARNING PROCESS

Participants will be able to:

- Understand the value of human rights in development and particularly in education.
- Understand the added value of applying the Human Rights-based Approach (HRBA) and (GBR) in the national and United Nations programming processes, and in the social intervention process.
- Apply the key elements of a human rights-based approach and a results-based management approach to reinforce the analytical work of the social, economic and cultural environment of each person's country.

## METHODOLOGY

### 1. READINGS:

- Text for Topic 3 prepared by the teacher.
- Pages 147 to 166 of document: Le Boterf, G. [2015]. Construire les compétences individuelles et collectives. Éd. Eyrolles
- Tardif, J [2006]. L'évaluation des compétences documenter le parcours de développement. Éditeur: Chenelière Éducation Publication.

### 2. INDIVIDUAL WORK:

- Based on the listed readings, prepare an integrating synthesis of the most relevant ideas contained in the evaluation of university-level competence-based learning, justifying their importance in the specific context of education in human rights **(maximum 400 words)**.

### 3. NOTES IN THE FORUM:

- Using a **specific example** from higher education and using a competence-based learning approach to human rights, explain the differences between evaluation, grading and measurement.

### 4. GROUP WORK:

- Prepare a sample syllabus of the evaluation of competence-based learning of human rights, following basic validity and reliability criteria.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Activity name	Estimated work time
Activity 1	1 hour
Activity 2	1/2 hour
Activity 3	1/2 hour
Activity 4	8 hours

## SYLLABUS

A detailed description of the activities to be carried out by students, at an individual level on in a group, specifying the expected results and, if applicable, the evaluation criteria.

# SUBJECT 3:

## THE EVALUATION OF COMPETENCY-BASED LEARNING

### 1. EVALUATION: CONCEPTUAL CLARIFICATION AND FUNDAMENTAL ISSUES IN THE DESIGN PROCESS

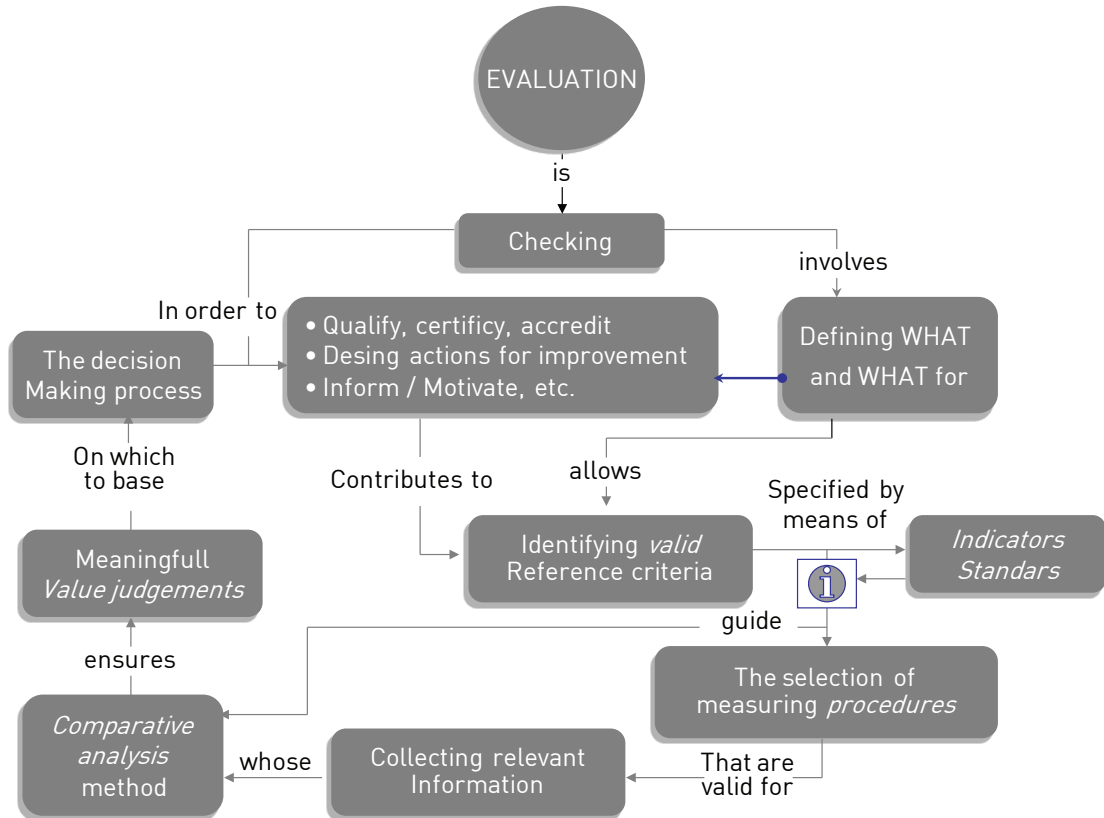
As we have seen in this module, evaluation is a fundamental element in the teaching planning processes. An initial clarification on what we understand by evaluation will let us become aware of its true meaning and the value as an essential part of the students' learning process. Similarly, a critical reflection on the essence of the concept itself can help us distinguish evaluation from other related terms whose confusion may negatively affect the educational activity.

From a teaching perspective, it is particularly useful to distinguish between evaluating, measuring and grading:

- **Evaluate:** It basically involves checking the extent to which the proposed objectives have been achieved in relation to previously established reference criteria and indicators, regardless of whether the evaluated object is to be subsequently graded or not.
- **Measure:** Quantitative appraisal of the results achieved; recognition and estimation of the magnitude or degree of the elements of the evaluated object. This requires the measuring process to have suitable procedures for collecting relevant data (validity), analysing them and taking them as the basis for subsequent assessment (reliability).
- **Grade:** Attribute value judgements on the specific qualities or circumstances of the evaluated object according to a set of criteria. To take effective decisions in continuous improvement, it is important to assess information based on reference criteria and reliable indicators..

As shown in Figure 1, the concept of evaluation is more global than that of grading. Both terms are often confused in education, which in this case may hinder the educational process or make it less effective. We need only consider, for example, how evaluation can influence the orientation and learning activity of students. Similarly, and from a competence-based approach to learning, that distinction leads us to think that not everything that is worth evaluating can also be qualified, such as the students' attitudes or interests.

**Figure 1: Evaluation: conceptual map (Source: Navaridas, 2010, p. 99).**



In accordance with this line of thinking, *designing a consistent, objective and integrated evaluation system in competence-based learning planning* requires answering certain **prior questions** such as:

<b>1. Object of evaluation</b>	What do you want to evaluate?	<ul style="list-style-type: none"> <li>Theoretical knowledge (knowing)</li> <li>Practical knowledge (knowing how it is done)</li> <li>Competence (knowing how to do it)</li> <li>Performance (actions)</li> </ul>
<b>2. Purpose</b>	Why evaluate?	<ul style="list-style-type: none"> <li>To improve the training</li> <li>For accountability</li> <li>To motivate</li> <li>To accredit...</li> </ul>
<b>3. Context (situation/s)</b>	Where will the evaluation process take place?  (The academic and/or professional scenario(s) where the evaluation will be carried out)	<ul style="list-style-type: none"> <li>Conventional classroom</li> <li>Specialised classroom (laboratory, library, documentation centre, etc.)</li> <li>Real professional scenarios</li> <li>Virtual environments</li> </ul>
<b>4. Points of reference</b>	What criteria should apply? Using what quality standards or indicators?  (Criteria of <i>merit</i> and <i>worth</i> as per the defined exit profile. To specify it by means of quality standards or indicators, the following should be considered: what type of person is considered, valued and encouraged at the university from a human-rights education approach?).	<ul style="list-style-type: none"> <li>Expected results at each phase and overall process results, with their corresponding quality standards (indicators).</li> </ul>
<b>5. Evidence</b>	For each evaluation criterion, what data or information is relevant and necessary for certifying the degree of achievement of learning results expected at each phase and at the end of the educational process? (criteria and indicators).	<ul style="list-style-type: none"> <li>Data from specific tests</li> <li>Individually generated reports (self-assessment reports)</li> <li>Documents written up in a team</li> <li>Actions</li> <li>Notes from external professionals or tutors at real work centres</li> <li>Technical reports</li> </ul>
<b>6. Procedures and measurement instruments</b>	How to collect relevant information and data on which to base decision-taking?  (From a competence-based approach, consider two important areas: a) to evaluate performance (competent behaviour in a specific situation). b) The knowledge acquired in the acquisition of competences (concepts, procedures, attitudes)	<ul style="list-style-type: none"> <li>Rubrics</li> <li>Simulations</li> <li>Portfolios</li> <li>Papers</li> <li>Projects</li> <li>Objective tests</li> <li>Oral examinations</li> <li>Scales of assessment</li> <li>Surveys</li> <li>Observation template...</li> </ul>
<b>7. Timing</b>	When to evaluate? At what moments of the process is evaluation needed?	<ul style="list-style-type: none"> <li>At the start</li> <li>On-going</li> <li>At the end</li> </ul>

## 2. TYPES AND FUNCTIONS OF EVALUATION FROM A HUMAN-RIGHTS APPROACH

The current concern shared by university teaching staff on how to deal with the evaluation of competence-based learning leads us to the following classification of the different types or evaluation types that can be used during the educational process. As the following chart shows, their characteristics and functions are determined by the educational purpose, by the agent who carries out the evaluation practice and the moment foreseen for its application.

Criterion	Type	Functions
Purpose	Educational	To inform all the agents involved throughout the entire process for on-going improvement (on-going improvement)
	Summative	Qualify or certify the level of competence achieved upon completion of a period of time (controlling responsibilities, accountability)
Evaluating agent	External	Done by people outside the process so as to contrast, explain, certify or corroborate the degree of attainment of the foreseen learning outcomes as objectively as possible
	Internal	Done by the protagonists of the process themselves. In this case, it can be categorised as self-evaluation (critical reflection by the student), hetero-evaluation (done by the teacher to the student) or co-evaluation (done by both)
Moment of application	Initial	As a diagnostic (for example, prior knowledge, interests or motivations) to make adjustments or adaptations to the syllabus
	Procedural	On-going throughout the entire process. This sets up a feedback loop that satisfactorily contributes to the student's development and motivation.
	At the end	Upon completion of a specific period for qualifying or certifying the level achieved. This helps clarify, redefine or enlarge the objectives set at the beginning of the process.

## 3. PROCEDURES AND MEASUREMENT INSTRUMENTS FOR EVALUATING COMPETENCE-BASED LEARNING

If evaluation is to fulfil the functions assigned to it in aiding the quality of learning from a competence-based approach, useful and reliable information must be collected for that aim. In this way, it should be noted that the different measurement instruments that can be used during evaluation are neither good nor bad in and of themselves. *The suitability of using one over the other must be assessed according to how closely it fits the objectives to be checked.* In other words, the instrument selected must be able to measure what is really intended and nothing else (in a broad sense, the validity criterion). In the same vein, the effectiveness of the measurement instrument in the *evaluation* process is determined to a large extent by the coefficient or degree of *reliability* of data obtained by that means (especially as input for taking relevant and meaningful decisions in the improvement process). This way, reliability involves the ability to measure with as small a margin of error as possible despite the specific circumstance of the participating agents and the variable characteristics of the reality being measured (internal consistency of the instrument and stability of the judgements issued).

Based on these coordinates, we list below some examples of procedures and instruments that may prove useful in gathering relevant information or data on some areas of the students' knowledge or performance.

AREAS OF EVALUATION	PROCEDURES	INSTRUMENTS
Student's knowledge (knowing, knowing how something is done)	Centred on what students write or say they know (written tests, oral tests)	<ul style="list-style-type: none"> <li>• Oral tests (presentations, debates)</li> <li>• Short questions</li> <li>• Objective tests</li> <li>• Essay questions</li> <li>• Problems</li> <li>• Projects</li> <li>• Essay reports and compositions</li> <li>• Portfolio</li> </ul>
Student's behaviour or actions (performance)	Centred on what students do in a specific situation (observation and monitoring techniques)	<ul style="list-style-type: none"> <li>• Practical exercises</li> <li>• Observation scales</li> <li>• Rubrics</li> <li>• Graphic and descriptive scales</li> <li>• Records of anecdotes and critical incidents.</li> <li>• Checklist</li> </ul>
Attitudes (the student's disposition during the work or behaviour)	Centred on the principles and values that guide the actions of behaviours shown (scales, interviews, questionnaires).	<ul style="list-style-type: none"> <li>• Scales of attitudes</li> <li>• Semi-structured interviews</li> <li>• Sociometric questionnaires</li> <li>• Journals</li> </ul>

## 4. SCHEDULING THE EVALUATION USING BASIC VALIDITY AND RELIABILITY CRITERIA

To endow the evaluation with a real strategic character and ensure its effectiveness as much as possible, the teacher must consciously and intentionally plan the entire evaluation process. Furthermore, that plan must necessarily be conceived of as an essential and consubstantial element of teaching planning mentioned above (forming an integral part of the teacher's overall strategy and pedagogical activity, in perfect harmony and close relation to the rest of the curricular elements), specifying each and every evaluative activity in relation to how it may affect the student's behaviour (their motivation, effort, what they study, how they study, when they study, etc.) and thus, on the learning outcomes derived from said process (cognitive level, achievement of competences). Accordingly, it should be recalled that what students do during their study activity is what most and best explains the quality of what they learn (Biggs, 2005: 19; Morales, 1998: 24).

One technique used often in the strategic planning of evaluation is the table of specifications. As can be seen in Table 1, the table of specifications is basically a cross-referenced chart



consisting of rows and columns to produce boxes we call 'specification charts'. These charts specify as precisely as possible the requirements, criteria, indicators and resources teachers consider necessary to evaluate learning under basic control conditions (especially as regards the validity of the data-collection instruments and the reliability of their results), clearly stating the limits or minimum levels of learning expected in each case.

**Table 1. Model for evaluation planning (Source: Navaridas, 2013: 189).**

Competences		Objectives		Contents: Unit 1			Procedure		
Type	Processes required	Levels of learning (expected results)		Topic 1 (20%)	Topic 2 (30%)	Topic 3 (50%)	Questions per objective	Measurement instrument	Control
Cognitive	Know	-Define -Identify -Name	5%	(4 x 0.20) 0.8	(4 x 0.30) 1.2	(4 x 0.50) 2	(80 x0.05) 4	• Objective test	On-going during each topic. Summative, upon completion of the didactic unit.
	Understand	-Predict -Differentiate -Associate	10%	(8 x 0.20) 1.6	(8 x 0.30) 2.4	(8 x 0.50) 4	(80 x 0.10) 8	• Objective test	
	Apply	-Resolve -Calculate -Construct	10%	(8 x 0.20) 1.6	(8 x 0.30) 2.4	(8 x 0.50) 4	(80 x 0.10) 8	• Practical exercises	
	Analyse	-Compare -Classify -Contrast	20%	(16 x 0.20) 3.2	(16 x 0.30) 4.8	(16 x 0.50) 8	(80 x 0.20) 16	• Objective test • Practical exercises	
	Synthesise	-Integrate -Create -Design	25%	(20 x 0.20) 4	(20 x 0.30) 6	(20 x 0.50) 10	(80 x 0.30) 24	• Practical exercises	
	Evaluate	-Judge -Argue -Decide	30%	(24 x 0.20) 4.8	(24 x 0.30) 7.2	(24 x 0.50) 12	(80 x 0.30) 24	• Value scale, • Group discussion	
				TOTAL QUESTIONS			80		





# MODULE 2 |

Human rights-based  
approach



**ABDEM**



## SUBJECT 2.1.:

# THE CONCEPTUAL FRAMEWORK OF THE HRBA

**Hours:8**

**Subject 2.1.1.** General introduction

**Lecturer:**

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## SUMMARY OF THE TOPIC

This module provides the backbone for the other two, more teaching-focused, modules on competency-based learning and service learning, which aim to provide important and transformative knowledge on the application of the human rights-based approach in higher education. For this reason, its duration is much longer (150 hours) than the rest.

Human rights, as universal values, should be a central concern for the different social and political actors, since their aim is to improve the dignity of human beings. To this end, it is necessary and beneficial to apply a human rights-based approach to the analysis of and intervention in social, cultural and economic problems, insofar as it contributes to linking human rights standards to operational activities and furthers the process of analysis and planning. The module refers to the main international, regional and national systems of the various mechanisms that guarantee justice programmes. After analysing the various elements of normative content and legal obligations that form the basis of human rights, the module aims to analyse each individual human right.

In short, this module is intended to equip students with legal, conceptual and methodological tools, with a **triple objective**:

- a) to learn to ask the right questions (What is excluded and why? Which rights are at stake? What has to be done in this regard? What is needed to act?)
- b) to identify the changes that we have set as a goal
- c) to measure, monitor, and demonstrate the changes to stakeholders.

This module is divided into four blocks, with the main aim of gaining a general understanding of the centrality of human rights in international relations as well as in the social, political and economic environment of a country in general and in education in particular. These **four blocks** sequentially address various general and specific aspects of human rights and of the human rights-based rights approach as a tool for analysis and intervention in social reality. These topics are as follows:

- a) The conceptual framework of the human rights-based approach
- b) The fundamental premises common to all human rights
- c) The operability of a human rights-based approach
- d) Analysis of specific rights and freedoms

Each of these consists of a number of sections that aim to familiarise the student with the different philosophical, legal and political conceptual frameworks that underpin the foundations and definition of human rights and their formulations in international texts. These legal instruments establish the characteristics, content and scope of each right. They also guarantee compliance with the obligations to protect, respect and promote these rights that States assume on their ratification, by means of their corresponding protection mechanisms. Thus, the justiciability of human rights commits States to upholding their citizens' rights to effective judicial protection against any violation of their rights and to implementing public policies and indicators that measure their degree of progress in compliance with human rights.

The module concludes with a final section aimed at a thorough examination of each human right, using various strategies and educational tools that enable the identification of normative standards, as well as rights violations, their causes and the corresponding capacity gaps of rights-holders and duty-bearers. This knowledge is crucial to a satisfactory diagnosis that will subsequently enable us to design and evaluate any intervention through service learning (which we will discuss in the third and final module of this training course).

Module 2: Human rights-based approach (140 hours)		
Topics	No. of hours	Brief description
1. The Conceptual Framework of the HRBA	15	<ol style="list-style-type: none"> <li>1. Fundamental concepts: human dignity, charity, needs and rights</li> <li>2. A common goal: anthropological and physiological premise for human rights, common values</li> <li>3. Religious rights and secularisation of law</li> <li>4. Development of human rights</li> </ol>
2. Operability of an HRBA	45	<ol style="list-style-type: none"> <li>1. International and regional texts on rights</li> <li>2. Scope of the obligations of international law: acceptance, renunciation, derogation and reservations</li> <li>3. International protection mechanisms: cooperation, commitment and supervision</li> <li>4. Constitutional protection of human rights and national protection mechanisms</li> <li>5. The human rights approach as a tool for social intervention and programming in development cooperation</li> <li>6. Assessment of progress: performance monitoring indicators for human rights instruments</li> </ol>
3. Fundamental premises common to all human rights	25	<ol style="list-style-type: none"> <li>1. Fundamental characteristics of human rights: universal, inalienable, interdependent and indivisible</li> <li>2. Scope of human rights obligations: respect, protect, fulfil/guarantee</li> <li>3. Cross-cutting human rights principles and standards: equality and non-discrimination, participation, access to reparation, access to information, accountability, the rule of law and good governance</li> </ol>



4. Analysis of specific rights and freedoms (practical application)	60	<ol style="list-style-type: none"> <li>1. Right to life and to physical and moral integrity. Right to liberty and security</li> <li>2. Freedom of thought, conscience and religion</li> <li>3. Freedom of opinion and expression</li> <li>4. Right to peaceful assembly and Freedom of association</li> <li>5. Right to privacy</li> <li>6. Administration of justice: Right to effective remedy</li> <li>7. Rights to a name, identity and nationality</li> <li>8. Right to participate in public life and to vote</li> <li>9. Rights to marriage and family</li> <li>10. Right to an adequate standard of living: introduction. Right to food</li> <li>11. Right to adequate housing</li> <li>12. Right to social security</li> <li>13. Human rights and extreme poverty</li> <li>14. Human rights and drinking water and sanitation</li> <li>15. Labour rights</li> <li>16. Right to health</li> <li>17. Right to education</li> <li>18. Cultural rights</li> <li>19. Companies and human rights</li> <li>20. Women's Rights</li> <li>21. Children's Rights</li> <li>22. Rights of persons with disabilities</li> <li>23. Rights of persons belonging to minorities</li> <li>24. Rights of Migrants</li> <li>25. Rights of Refugees and internally displaced persons</li> <li>26. International humanitarian Law</li> <li>27. Right to development</li> </ol>
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## LEARNING OUTCOMES

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On completion of the training course, participants will be able to:

- prepare materials, research and teaching in accordance with the human rights-based approach;
- improve their understanding of human rights (rights-holders and duty-bearers, identify capacity gaps and elements of legislative content, obligations and limitations) and international, regional and national protection systems;
- analyse the law, journalism, education and social work in relation to international, regional and national regulation and norms in the field of human rights mechanisms;
- integrate practices to promote equality and non-discrimination in education and research;
- acquire facilitation skills (management of group dynamics);
- acquire skills in conflict resolution;
- develop and plan their teaching more effectively using a participatory approach.

## SUBJECT 2.1.:

## THE CONCEPTUAL FRAMEWORK OF THE HRBA

**Hours: 8****Subject 2.1.2. Fundamental concepts: human dignity, charity, needs and rights****Lecturer:**Ana M<sup>a</sup>. Vega Gutierrez

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## SUMMARY OF THE TOPIC

This topic introduces some basic concepts comprising the key premises and points for consideration when undertaking a systematic study of human rights.

Human beings are social beings who need certain conditions to be met in order to have full enjoyment of social life. The two overarching conditions are the universal and objective basic human needs of physical health and personal autonomy.

The study of needs dates back to ancient times, since humans have always been concerned about their well-being and meeting their needs in order to feel well. The scientific analysis of how human beings respond to motivation, both individual and collective, has its roots in the social sciences and, more specifically, in the formulation of modern theories of development. From this point forward, we begin to see consideration given to people's needs and the opportunities and means required to be able to satisfy them. There are many fields involved in identifying and analysing these human needs, as well as in classifying them and structuring them in order to provide the best response and prevent social problems. Further work is needed on the prevention of social problems through the study of indicators of social conflict, as well as the establishment of a new relationship based on collaboration and mutual appreciation.

At this historic time, many international, national and even local institutions are rigorously analysing the needs of a large number of people who are suffering the effects of significant social problems. These analyses have made it possible to comprehensively map out these needs. Yet the necessary resources (whether they be personal, professional, social and economic) to remedy these deplorable situations have not been mobilised. This is a reflection of the great paradox currently facing western legal culture; it does not hesitate to recognise human dignity as a legal and ethical principle and the basis for all human rights, but fails to reach agreement on its legal and ethical implications.

Starting from this premise, this topic discusses how human vulnerability and respect for dignity has been addressed through different approaches to development agendas, given that this was the field that gave rise to the human rights-based approach. This comparative analysis allows us to compare the various ways of articulating two universal human values -

solidarity and justice - which are in turn translated into very different ways of conceiving the distribution of power and wealth and, ultimately, the freedom and equality of human beings.

## GENERAL AND SPECIFIC COMPETENCES

In general terms, following the three modules of the HRBA training programme and in line with the guiding principles of the World Programme for Human Rights Education Plan of Action, approved by the United Nations General Assembly (2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participating teachers should be able to recognise the educational potential of the general and specific competences described below in implementing meaningful human rights education. They should also be able to incorporate these competences into their teaching plans using an inclusive approach, aimed at effective application of acquired knowledge.

Specifically for this topic, participants will develop efficiently the following general and specific competences.

### GENERAL:

- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards moral goodness, whether one's own or others' (i.e., towards everything that is or that means goodness, the experience of meaning, personal fulfilment, sense of justice), and to persist with this moral goodness.

### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To contrast and evaluate situations, practices, legislation, local and national policies according to the legal human rights instruments ratified by their country, in addition to proposing and planning efficient alternatives.
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.

## LEARNING OUTCOMES

By the end of the topic, the participants in training should be able to:

- Understand, value and defend human dignity and identify its violations.
- Understand the concept of basic needs, and how to identify and classify them.
- Identify social indicators that allow us to evaluate basic needs.
- Distinguish the basis of each approach to development cooperation and its diverse connection with human dignity and innate rights.

- Undertake a reflective and critical analysis of a situation or public policy and recognise the approach that underpins it (welfare-based, utilitarian, needs-based, capacity-based or rights-based).
- Understand how to choose between various options to better ensure people's human development, i.e., freedom to decide their own life plan.

## METHODOLOGY

Methodology	Educational tools
Expository method	Reading texts and/or watching audiovisual material
Cooperative learning	Forum/wiki
Group discussions	Blog/forum

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

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## SCHEDULING OF LEARNING ACTIVITIES

**Activity 1:** Personal reflection. For a frame of reference, read the following documents and watch the video:

- **Presentation of the topic:** Reading the topic text will help the student to gain an overview of the link between the concepts of human dignity, basic needs and rights. These concepts will be examined by focusing on the relationship between human rights and development agendas, analysing different approaches to development.
- **UNDP- United Nations Development Programme:** [Human Development Report 2000: Human rights and Human Development. Chapter 1.](#)
- [Glossary](#)
- **Video about the UNDP 2011 Report:** [People-centred development](#)

**Activity 2:** Preparation of a task in small groups, with 8 participants from each country. Development of a *report reviewing a diagnosis of the development of each of the Maghreb countries* (Algeria, Morocco and Tunisia), in accordance with various international indicators and indices.

a) *Search for information.* The members of the two universities in each country will share the task of searching for information. The following resources are suggested:

- [Freedom in the World 2016 Table of Country Scores](#)
- [Civil Liberties Index](#)
- [International Human Development Indicators](#)
- [World Bank Open Data](#)

### Other resources

- Human Development Index (HDI)
- Inequality-adjusted Human Development Index (IHDI)
- Gender Inequality Index (GII)
- Multidimensional Poverty Index (MPI)
- Gender Development Index (GDI)

Course participants can prepare their presentation using open access online tools such as Google Docs, Google Drive, etc. <https://www.google.com/intl/en/slides/about/>



### b) Preparation of the presentation

The group should reach an agreement on:

- the number of slides;
- the main idea/topic of each slide; and
- the order of the ideas/slides.

Each member should be responsible for producing some of the slides. Individual work on each slide using a draft. Development of a presentation containing all the finished slides.

### c) Group discussion

The presentation will be shared with other course participants in the virtual classroom.

Each group's presentation will be discussed on the forum to identify common challenges, public policy approaches and solutions.

Finally, each student will rate the other groups' presentations on a scale of 1 to 10.

**Expected outcome:** Diagnosis on the state of human development in each country, any potential violations of human rights and the approaches which underpin their public policies.

**Activity 3:** Self-assessment test.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1: Topic text and video	2 hours and 30 minutes	Self-assessment test
Activity 2 (a): Diagnosis of the development of each of the Maghreb countries and search for information	2 hours	
Activity 2 (b): Preparation of the presentation	2 hours	
Activity 2 (c): Discussion in the virtual classroom	1 hour	Evaluation by other teachers
Activity 3: Self-assessment test	30 minutes	

## GLOSSARY

**Human development:** Development can mean many things to many people. The UNDP believes 'human development' is about expanding the choices available to people in order to live valuable lives. Economic growth is important, but it is truly only a means for expanding these choices. A fundamental part of expanding these choices is building human capabilities, the range of things that people can achieve in their life. Thus, people must be at the centre of human development, both as beneficiaries and as drivers, as individuals and in groups. People must be empowered with the tools and knowledge to build their own communities,

states and nations. Consequently, development strategies require a multi-focus approach, linking economy, policies and institutions, and based on people's rights and capacities and societies' specific needs and value-orientations.

**Resilience:** Resilience means the strength of a person or community to resist shock, manage crisis and grow stronger. Resilience in particular ensures that societies, communities and families can withstand crisis — whether it is a natural disaster or a food price shock — and bounce back with limited long-term damage, and be better prepared for the next crisis.

**Human rights:** Human rights are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity. Human rights law obliges Governments (principally) and other duty-bearers to do certain things and prevents them from doing others.<sup>28</sup>

**Needs:** Need is a state of lacking something which implies motivation towards its satisfaction. This lack must be remedied in order to survive and to be able to participate fully in society. Bradshaw (1972) distinguishes four main categories of need: normative, comparative, felt and expressed:

- 'Normative need is need which is identified according to a norm (or set standard); such norms are generally set by experts.
- Comparative need concerns problems which emerge by comparison with others who are not in need.
- Felt need is need which people feel – that is, need from the perspective of the people who have it.
- Expressed need is the need they say they have. People can feel need which they do not express and can express needs they do not feel.'<sup>29</sup>

**Human needs:** 'In general terms, we could say that human needs encompass desires, appetites and aspirations - manifestations of needs - as well as privations and human demands, i.e. all the requirements of human nature. Human needs are concerned with the necessary satisfaction of want - purposes and functions which are objectively vital to physical and mental human survival and development, or subjectively felt as such.'<sup>30</sup>

**Social needs:** Need is not the same as desire; we need things that we do not want (such as surgery) and want things that we do not need (something to which advertising, for example, devotes a great deal of attention). Needs are social in the sense that they do not relate solely to individual causes for a person's illness or poverty; they also concern the extent and distribution of disease or poverty across different social groups and the motivating factors, structures and processes that affect living conditions. There are needs of which we are aware and that we feel for ourselves, such as when we become ill or have an accident, but there are also needs defined by others, by family or friends, and especially by professionals and experts (doctors, social workers, researchers, etc.). In this sense, social needs are established through comparison with other people within the same social group; some individuals lack something that the rest possess. Moving beyond situations where the need is obvious, such as medical emergencies, a serious problem for social policy is the issue of how to measure social needs. The concept of basic needs or minimum essential levels is highly relative, since it varies according to culture, country, way of life, family and residential area. (On what level of income is a person considered poor? How severe must an illness be to require time off work? Is it necessary to have a telephone?) While the problem of measurement has not been solved, we can say that an objective interpretation of what is basic or essential is concerned with the ability of an individual to stay alive and maintain the capacity to act as 'a person' within their society.

28. [Office of the United Nations High Commissioner for Human Rights \(2006\). Frequently asked questions on a human rights-based approach to development cooperation \(HR/PUB/06/8\) New York and Geneva, p. 1.](#)

29. Spicker, P., Álvarez, S. and Gordon, D. (2007). *Poverty: An International Glossary, 2nd Edition*. London and New York: Zed Books, p. 138.

30. Kehl, S. (1992). Necesidades humanas y conflictos sociales. *Cuadernos de Trabajo Social*, 4-5, p. 204.

**Quality of life:** Quality of life should be the goal of development approaches in countries with a comprehensive concern for human beings. This concept refers to all aspects of human well-being, taking into account the creation of conditions to satisfy material needs (food and shelter), psychological needs (security and affection), social needs (work, rights and responsibilities) and ecological needs (air and water quality). In contrast, a development approach which focuses obsessively on unlimited economic growth and whose main objective is material and monetary wealth uses the concept of gross national product (GNP) as a benchmark for assessing growth and the concept of standard of living for assessing people's well-being. Gross national product (GNP) reduces all goods and services to their monetary value, ignoring social, psychological and ecological variables. In this context, activities that add nothing in terms of real production - e.g. military and hospital expenditure - and others that involve the depletion of natural resources - e.g. logging and energy - are considered as income which enriches the country. Standard of living is a strictly economic concept, which ignores psycho-social and environmental dimensions. Quality of life, on the other hand, refers to a state of complete well-being, where a high standard of living becomes less relevant. For example, a person in a high-income bracket who lives in a city with noise and air pollution and who also suffers from work-related stress has a high standard of living but a low quality of life.

**Social problems:** Social problems arise when people's needs are not met. They are the obstacles or difficulties standing in the way of people's ability to achieve full development of their potential and live a long, healthy and dignified life. A social problem is a 'social situation of instability, imbalance, disorganisation or lack of harmony, or a normal situation which, during a process of growth, enters into a crisis that requires a radical reformulation. Social problems are those which constitute the issues of concern that arise at the heart of a society, and regarding which there is an awareness of the need to find solutions for them. Social problems also include problems which cannot be solved by an individual alone, and these can range from domestic problems (such as an elderly person who needs care at home) to issues such as the greenhouse effect and the depletion of the ozone layer, which require international intervention'<sup>31</sup>.

**Poverty:** Poverty is the lack of basic resources or means necessary to meet the needs of a population or group of individuals who do not have the capacity or opportunity to be able to produce these resources. It is also defined as the 'situation of a person whose degree of privation falls below the level that a particular society considers to be the minimum to be able to maintain their dignity'. The concept of poverty has always been defined according to the conventions of each society. Our perception of what poverty is depends on our social and economic context, as well as the characteristics of our society and the objectives around which it is organised. Within this range of concepts, however, it is possible to extract a core concept common to all; poverty always refers to certain privations or shortfalls, where this lack is considered to put people at risk. In this regard, one way of defining poverty is to say that it sets out the limit that each society or human group considers unacceptable or intolerable<sup>32</sup>.

'Poverty is not only a matter of income, but also, more fundamentally, a matter of being able to live a life in dignity and enjoy basic human rights and freedoms. It describes a complex of interrelated and mutually reinforcing deprivations, which impact on people's ability to claim and access their civil, cultural, economic, political and social rights. In a fundamental way, therefore, the denial of human rights forms part of the very definition of what it is to be poor. (...) From a human rights perspective, poverty can be described as the denial of a person's rights to a range of basic capabilities—such as the capability to be adequately nourished, to live in good health, and to take part in decision-making processes and in the social and cultural life of the community. (...) Such rights have constitutive relevance for poverty if a person's lack of command over economic resources plays a role in causing their non-realization. Some human rights are such that their fulfilment will help realize other human rights that have constitutive relevance for poverty. For example, if the right to work is realized, it will help realize the right to food. Such rights can be said to have instrumental

31. Ander-Egg, E. (1995). *Diccionario del Trabajo Social*. Buenos Aires: Lumen, p. 239.

32. Dubois, A., Pobreza. In: *Diccionario de Acción Humanitaria y Cooperación al Desarrollo*, [Instituto Hegoa](#).

relevance for poverty. The same human right may, of course, have both constitutive and instrumental relevance.’<sup>33</sup>

**Inequality:** Inequality is the dispersion of a distribution, whether of income, consumption or any other welfare indicator or attribute of a population. Inequality is often studied as part of broader analyses encompassing poverty and welfare, although these three concepts are distinct. Inequality is a broader concept than poverty in that it is defined over the whole distribution, rather than merely the distribution of individuals or households below the poverty line.

**Equality:** Equality, like inequality, concerns the whole of society and refers to the way in which social stratification enables or hinders the development of capacities of individuals or groups. It does not merely refer, therefore, to the characteristics of the poor, nor to the individual characteristics of poverty or wealth of a country’s inhabitants, as measured by economic growth and its value, but to the way in which the society’s overall organisation allows or prevents access by individuals and groups to tangible and intangible resources, and, consequently, encourages or limits people’s development of capacities. Equality is a global concept that links social, institutional, regulatory, legal, cultural and ideological structures with the situation, condition, opportunities and access of individuals and groups: a link that determines the degree of capacity development.

## SELF-ASSESSMENT TEST

1. What is an essential factor in ensuring a successful intervention?
  - (a) The study of the various theoretical approaches.
  - (b) The correct understanding of the concept of social intervention.
  - (c) Properly distinguishing between needs and resources.
  - (d) The correct determination of needs.
  
2. What is the core concept of one of the main lines of thought about the concept of needs?
  - (a) Needs are considered as individual.
  - (b) Needs depend on the cultural context of the intervention.
  - (c) Needs provide validity to those who demand them.
  - (d) Needs are defined as something essential and complex.
  
3. What is the focus of ‘alternative development’?
  - (a) The safeguarding of resources for future generations.
  - (b) The people who are in need.
  - (c) The people guiding growth.
  - (d) The need to increase resources.

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33. Office of the United Nations High Commissioner for Human Rights. [Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies](#) (HR/PUB/06/12), pp. iii and 2.

4. How are needs mapped?
  - (a) Through the plans drawn up by the various social teams.
  - (b) Through the development of social policies for macro-social intervention.
  - (c) Through social indicators that reflect the basic needs which have not been met.
  - (d) Through the existence in a region of people whose basic needs have not been met.
5. How is the term 'need' defined at the operational level?
  - (a) Something craved which cannot be substituted or resisted.
  - (b) A special risk or danger, where immediate help is needed.
  - (c) A lack of things that are necessary for the preservation of life.
  - (d) A state of lacking something which implies motivation towards its satisfaction.
6. Which needs must not be confused in order to carry out a successful social intervention?
  - (a) Answers (b), (c) and (d) are all correct.
  - (b) The needs of the clients/beneficiaries and the needs of the social worker.
  - (c) The needs of the institution which is involved in the intervention.
  - (d) Those of social policies.
7. What is the triad of closely-related social work concepts?
  - (a) Needs, demands and resources.
  - (b) Desires, affection and needs.
  - (c) Resources, problems and needs.
  - (d) Problems, demands and resources.
8. What is the primary resource that must be activated in professional intervention?
  - (a) The beneficiary's/client's potential.
  - (b) The support relationship.
  - (c) Internal professional resources.
  - (d) The professional's potential.
9. What characterises a social problem?
  - (a) Its remedy stems from group action produced by the group itself.
  - (b) It violates the values of people in need within a society.
  - (c) It encourages the satisfaction of people's needs.
  - (d) It is specific to social policies.
10. What is the first phase of consolidation of the social problem?
  - (a) Determining the significance of the social problem.
  - (b) Consolidating it as a social problem.
  - (c) Having the capacity to respond to the problem.
  - (d) Making the problem visible.

11. Which human values motivate people, according to Maslow?
  - (a) Truth and beauty.
  - (b) Creativity and intelligence.
  - (c) Plenitude and perfection.
  - (d) Justice and solidarity.
  
12. Which geometric shape is used to show the different groups of needs?
  - (a) A circle.
  - (b) A rectangle.
  - (c) A pyramid.
  - (d) A pentagon.
  
13. What does the concept of development mean to Amartya Sen?
  - (a) The expansion of opportunities to develop a dignified life.
  - (b) The choice of a number of life opportunities.
  - (c) The realisation of useful actions so that people can be useful.
  - (d) Quality of life achieved through making good choices.
  
14. What is the role of social policies according to Martha Nussbaum?
  - (a) To guarantee opportunities and choices for accessing resources.
  - (b) To meet basic human needs.
  - (c) To be able to interact with each other, to love and be loved.
  - (d) To promote the acceptance of social resources in order to live a full life.
  
15. Why is it important for social work to define needs?
  - (a) To be able to design an appropriate social intervention.
  - (b) To create a relationship of professional support and to be able to actively listen.
  - (c) To be able to convert beneficiaries'/clients' potential into actions for helping them.
  - (d) All the answers above are true.
  
16. What aspect must be included in the identification of needs?
  - (a) The mapping of needs to ensure a satisfactory professional practice.
  - (b) The user's and institution's capabilities and resources for tackling problems.
  - (c) The implementation of personal resources to complete the intervention.
  - (d) The implementation of the professional's resources to meet the needs identified.

## SELF-ASSESSMENT TEST

Question	Answer
Question 1	D
Question 2	B
Question 3	A
Question 4	C
Question 5	D
Question 6	A
Question 7	C
Question 8	B
Question 9	A
Question 10	D
Question 11	A
Question 12	C
Question 13	A
Question 14	A
Question 15	D
Question 16	B



## SUBJECT 2.1.:

# 2.1.2. FUNDAMENTAL CONCEPTS: HUMAN DIGNITY, CHARITY, NEEDS AND RIGHTS

## 1. INTRODUCTION

The term dignity has many meanings. This is because it is used to cover a diverse reality and may be viewed from various perspectives. Among these meanings, we focus on its understanding as an ethical and legal principle, which is the basis of all human rights. The concept of human dignity has enjoyed a long history from a philosophical and religious perspective. From a legal point of view, however, it was not recognised until the mid-twentieth century<sup>34</sup>. The principle is enshrined in the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948), recognising it as the fundamental basis of human rights<sup>35</sup>. The Preamble to the 1948 Declaration states that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'<sup>36</sup>.

It could be argued that at the present time, human dignity is configured as a kind of universal 'legal conscience'. This principle would even, to some degree, come to assume the role traditionally played by natural law, understood as the ontological and fundamental basis of law. Nevertheless, as Aparisi<sup>37</sup> notes, a surprising paradox can be observed. While on the one hand, there seems to be a strong consensus on the understanding that dignity is the fundamental basis of law, on the other, there is a significant practical discrepancy in relation to the ethical and legal consequences that derive from this principle. Indeed, it is striking and may even seem contradictory to consider that much of current Western legal culture seems to be built on an ambiguous conception of the meaning of human dignity. This has led some authors to assert that we are faced with an empty notion or, at least, one with little

34. For further reading on this topic see Häberle, P. (2008). La dignidad del hombre como fundamento de la comunidad estatal. In: Fernández-Segado, F. (coord.), *Dignidad de la persona, derechos fundamentales, justicia constitucional y otros estudios de Derecho público*, Madrid: Dyckinson, pp. 175-237.

35. See Glendon, M. A. (2011). The Bearable Lightness of Dignity. *First Things: A Monthly Journal of Religion & Public Life*, 213, p. 41.

36. In the same vein, the Preamble to the International Covenant on Economic, Social and Cultural Rights, which entered into force on 3 January 1976, states: 'Recognizing that these rights derive from the inherent dignity of the human person...' The International Covenant on Civil and Political Rights uses the same terms, stating that 'these rights derive from the inherent dignity of the human person'. The Preamble to the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights (June 1993, Vienna), again includes these ideas: 'Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person. (...) Recalling the Preamble to the Charter of the United Nations, in particular the determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. The first article of this text also states that 'Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments'.

37. Aparisi Miralles, A. (2013). El principio de la dignidad humana como fundamento de un bioderecho global. *Cuadernos de Bioética*, XXIV(2), p. 204.

functional capacity in the legal arena<sup>38</sup>. Yet the current manipulation of the concept does not necessarily deprive human dignity of its ontological and legal importance. In fact, it is clearly not insignificant whether or not we position the principle of human dignity as the basis of a legal system. Recent history provides obvious examples in both respects.

When we say that human beings have dignity, we attach an intrinsic, i.e. ontological and non-substitutable, value to it. As stated by Spaemann, 'the notion of human dignity and its inviolability finds its theoretical foundation only in a metaphysical ontology, that is, in a philosophy of the Absolute'<sup>39</sup>. Human beings have dignity through the mere condition of being human, and do not have to prove their dignity (as in pre-modern times) through the recognition of others. Thus, legal cognisance requires an ontological level alongside an empirical/phenomenal level. This self-evidently ontological nature of human dignity does not imply that we cannot, to some extent, access its meaning and practical implications. This is because, although it is a metaphysical concept, it has perceptible manifestations.

In other words, everyone deserves respect for the mere fact of being human. Such an assertion recalls the basis of the modern definition of dignity suggested by Kant: 'humanity itself is a dignity; for a human being cannot be used merely as a means by any human being [either by others or even by himself], but must always be used at the same time as an end. It is just in this that his dignity (personality) consists, by which he raises himself above all other beings in the world'<sup>40</sup>. A human being has intrinsic value, independent of any other factor, and this gives the concept of dignity **an ontological dimension**, which suggests something sacred. In addition, this value has clear consequences for intersubjective behaviour; individuals should be treated with unconditional **respect**<sup>41</sup>. Millán Puelles suggests that 'the dignity that every human being has through the fact of being human constitutes a formal axiological determination, independent of behaviour'<sup>42</sup>. In short, dignity is a term that is applied to human beings to indicate a particular quality of being, to maintain that they are persons and not merely individuals. In other words, personhood is not a property 'added on' to human beings, but the reality of the human being, their actual existence.

This entails a demand for respect and consideration. Nevertheless, as Pelé points out, 'the concept of respect confronts us with a paradox for human beings; each individual has an absolute value (their dignity), but at the same time each individual is perceived as a potential violator of dignity - both their own and that of others. This violation derives not from their consent but from another constituent characteristic trait: **human vulnerability**. Unlike other defining traits of human beings, vulnerability may give rise to a sentiment deep within the heart of each person: a sense of the precariousness of human existence'<sup>43</sup>. Ignatieff has elaborated on this in *The Needs of Strangers*, when he defends the interest of encouraging discourse on **the needs of the individual** in order to 'express our tragic condition, our weakness and the mutual dependence imposed by this weakness'<sup>44</sup>. In these basic needs 'we find the anthropological substratum of rights, so that recognising, exercising and protecting a basic right means, ultimately, trying to satisfy a series of needs, which we understand as requirements for a dignified life'<sup>45</sup>.

This does not mean basing the idea of dignity on the precarious nature of human beings, but on understanding how and when the discourse on dignity in philosophical and legal fields

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38. See González Pérez, J. (1986). *La dignidad de la persona*. Madrid: Civitas, pp. 19-20; Melendo, T. and Millán, L. (1996). *Dignidad: ¿una palabra vacía?* Pamplona: Eunsá. García Cuadrado, A. M. (2012). Problemas constitucionales de la dignidad de la persona. *Persona y Derecho*, 67(2), pp. 456-.

39. Spaemann, R. (1988). Sobre el concepto de dignidad humana. *Persona y Derecho*, 19, p. 33.

40. Kant, I. (1785). *Groundwork for the Metaphysics of Morals*, Section 2: On duties of virtue. Trans. Abbott T. K., revised Denis, L. (2005). Canada: Broadview Press, p.173.

41. See Gonzalez, A. M. (1996). *Naturaleza y dignidad*. Pamplona: Eunsá, p. 45-.

42. Millán Puelles, A. (1976). *Sobre el hombre y la sociedad*. Madrid: Rialp, p. 98.

43. For further reading on this point, see Pelé, A. [Una aproximación al concepto de dignidad humana](#), p. 12.

44. Ignatieff, M. (1984). *The Needs of Strangers*. New York: Viking Penguin. p. 10.

45. Nino, C. S. (1990). Autonomía y Necesidades Básicas. *Doxa: Cuadernos de Filosofía del Derecho*, 7, p. 21.

arose. It is precisely when an individual, a group, or even the human species itself is in a vulnerable situation or when its integrity is at stake that the 'dignity' argument appears in the interests of remedying this situation. In this way, moral and political philosophy have been interested in defending a 'restricted' concept of dignity, from which, in the words of Hoerster, 'the minimum moral conditions of acceptable human coexistence' may be derived<sup>46</sup>. In fact, we cannot forget that the universality of rights refers to the historical fact that they have always defended the universal interests of the weak<sup>47</sup>.

Against this backdrop, this section discusses how human vulnerability and respect for human dignity have been addressed under different approaches to development cooperation. We have chosen this particular field for several reasons. Firstly, it is the perfect ground for bringing into play the value of human solidarity, since it constitutes one of the main testbeds for understanding the concept of human dignity underlying the type of response that gives rise to people's vulnerability. With good reason, Kofi Annan, former United Nations Secretary General defined the 1948 Universal Declaration as 'the yardstick by which we measure human progress'. Breaking with the individualistic inertia of the Western conception of human rights, Article 29 of this text proposes that 'Everyone has duties to the community in which alone the free and full development of his personality is possible'.

Secondly, and in connection with the above, different approaches to development cooperation are based on different concepts of human poverty, and therefore do not give the same weight to the structural causes that give rise to it or the inequalities in the distribution of power and opportunities that sustain it. Lastly, we have focused on the field of development cooperation because it was in this regard that the human rights-based approach emerged, before being extended to other areas such as education.

Human rights are necessary because we have learned from history that life is at risk when people lack what Ignatieff calls minimal 'agency' with regard to respect and the exercise of their rights, that is, an individual's capacity to meet their basic needs and rational desires - those which do not involve intentional harm to others or to themselves - without obstacle or hindrance<sup>48</sup>. Thanks to this capacity, individuals can protect themselves against injustice and can choose their value system and way of life. Defending the idea that there are people who do not know what is best for them is a hangover from colonial paternalism and tyranny. The justification for any intervention arises from demand from the oppressed, rather than the concepts or priorities of humanitarian organisations, whether public or non-governmental. What constitutes a violation of human rights for an activist must also be true for its supposed victims. Ultimately, assistance must always be auxiliary because this respects and promotes the involvement of its beneficiaries - empowering rather than supplementing or undermining - and never involves cultural assimilation.

With consideration to all the above, the concept of fundamental human rights that underpins this module is that of *positive moral claims*, based on a series of universal *values* - such as dignity, freedom, equality and solidarity - which relate to basic or essential needs and which, as such, must be recognised and guaranteed by law, thus laying out a duty. The complex potentiality that defines fundamental human rights makes them 'instruments with *ethical justification*, which have a *political function* and which are presented as *criteria of material validity* of the legal systems that recognise them'<sup>49</sup>.

46. See Hoerster, N. (1982). *En defensa del positivismo jurídico*. Madrid: Gedisa, p. 98.

47. See also Ferrajoli, L. (1999). *Derechos y garantías: Ley del más débil*. Madrid: Trotta.

48. See Ignatieff, M. (2003) *Human Rights as Politics and Idolatry*. USA: Princeton University Press.

49. De Asís, R. (2009). [Un apunte sobre la interpretación de los derechos sociales](#). *Papeles: El tiempo de los derechos*, 2, p. 2. (Universidad Carlos III de Madrid, Instituto de Derechos Humanos Bartolomé de las Casas).

## 2. NEED AND SOCIAL EXCLUSION FROM A GLOBAL DEVELOPMENT PERSPECTIVE

Technical and scientific advances, the widespread recognition of human rights and the proliferation of democratic political choice have not managed to help forge a world that is more human, more egalitarian, more united and less violent. Moreover - and despite the fact that modern industrial societies have developed social welfare systems in which a priority target was the reduction of the dividing lines between social classes - the gap between rich and poor has continued to increase.

Present-day society's social problems grow at a faster rate than their solutions. This presents us with the need to make changes that are well structured and that involve a fresh conceptualisation of the world, which is neither linear nor deterministic nor heterogeneous. Increasing complexity requires significant institutional flexibility capable of taking on new approaches, incorporating appropriate changes and seeking alternatives for resolving conflicts, in order to be able to respond to the most urgent individual and collective needs.

Concern over the study of social needs is not a modern issue. Definitions of and discussions about needs date back as far as Aristotle and have varied according to the different theoretical perspectives from which they have been viewed. The debate's significance is reflected in the fact that authors of the renown of Rousseau and Durkheim made significant contributions to its definition. Yet it was not until the advent of industrial society and its subsequent development - with the consolidation of sociology and psychology and advances in other scientific fields - that explicit questions were formulated about the motivations of individual and collective human action and their impact on the transformation of human societies, which were at the same time being modelled by the socio-cultural and natural environment.

### 2.1. CONCEPTUAL DELIMITATION OF 'NEEDS'

Need is an objective state of lacking something, caused by privation of what is necessary or simply useful for a person's development. In the ordinary sense, it refers to scarcity, poverty, shortage, destitution, hardship, distress or predicament: a lack of things which are essential for life.

It is important to distinguish need from the following concepts:

- *lack* or *privation* - an unsatisfied need;
- *desire* - the psychological state of feeling the lack of something;
- *demand* - a manifest expression of desire.

To understand the term 'need' we will be focusing on its different meanings, according to different points of view:

- Physiological need refers to the lack of elements necessary to live, which may manifest itself in the form of subjective feeling or need that modulates and conditions a person's habits and behaviours (hunger, sleep, etc.), i.e., those that constitute primary stimuli. It may also manifest in the form of unfelt or objective need, i.e., the deficiencies or excesses that need to be remedied since to do otherwise could cause disorders.
- Psychological need is the feeling linked to the experience of lacking something, associated with the effort to eradicate this lack, to satisfy the inclination and to remedy the situation of privation.
- Sociological need is used in the following two senses:
  - According to the theory of individual motivation, actions are explained with reference to needs. Societies function in order to meet human needs. Sociologists also recognise other needs that are not physiological, including needs for recognition, company, etc.

- According to the theory of social systems, all social systems have four needs or functional imperatives that must be met in order for the system to survive: economic, political, motivational and integrational needs.
- Economic need is the desire to have the means to prevent unpleasant sensations or to cause them to cease, or the desire to have the means to maintain or increase pleasant sensations. In economics, the concept of need is subjective.

The type or level of need that individuals feel does not solely depend on themselves. It also involves the degree of satisfaction of their primary needs, which in turn enables them in their desire to cover other less fundamental needs, and the social comparison that individuals make with regard to their reference group. Here, we will highlight the theories that are more closely linked to social work and intervention. In this field, we have two main doctrinal lines that incorporate the various positions, definitions and contributions to the concept of need. On the one hand, there are those which consider needs as universal, and on the other, those which argue that the definition and analysis of needs depends on the cultural context of the intervention. This duality reflects the debate between universality and relativity. To focus the debate satisfactorily, however, we have to take into account modern theories of development, which reject the interpretation of development as mere economic growth and are aimed, therefore, at empowerment in human development. These will be discussed further below.

## 2.2. TYPES OF NEEDS

Traditional belief suggests that human needs tend to be infinite, that they are constantly changing, that they vary from culture to culture and that they are different for each historical period. Yet such assumptions are not entirely accurate. They are the result of a conceptual error that confuses needs with the satisfiers of these needs. Fundamental human needs are finite, few and classifiable. In addition, basic human needs are the same across all cultures and throughout all historical periods. What changes, across time and cultures, is the way or means by which the needs are satisfied. From a more comprehensive anthropological perspective, the following fundamental needs can be identified:

- subsistence (health, food, etc.)
- protection (systems of safety and prevention, housing, etc.)
- affection (family, friends, intimacy, etc.)
- understanding (education, communication, etc.)
- participation (rights, responsibilities, work, etc.)
- leisure (games, entertainment, etc.)
- creation (skills, abilities, etc.)
- identity (reference groups, sexuality, values, etc.)
- freedom (equal rights)
- meaning (religion, spirituality, beliefs, convictions, etc., without which the human being is directionless, because needs cannot be reduced to the solely material).

Hunt<sup>50</sup>, in line with the reports drawn up by the International Labour Organization in 1976, divides basic needs into four groups:

- (a) the minimum requirements of a family for personal consumption - food, shelter, clothing, etc.;
- (b) access to essential services, such as safe drinking-water, sanitation, transport, health and education;

50. See Hunt, D. (1989). *Economic Theories of Development*, op. cit., pp. 265-266.

- (c) an adequately remunerated job;
- (d) qualitative needs - a healthy and humane environment, participation in the making of decisions and individual freedoms, etc.

Needs, narrowly conceived as deprivation, are often restricted to that which is merely physiological and as such the sensation that 'something which is lacking is acutely felt'. However, to the degree that needs engage, motivate and mobilize people, they can be viewed as potential and eventually may become a resource. The need to participate is a potential for participation, just as the need for affection is a potential for affection.

To integrate the harmonious realization of human needs into the process of development gives everyone the possibility of experiencing that development from its very outset. This may give rise to a healthy, self-reliant and participative development, capable of creating the foundations for a social order within which economic growth, solidarity and the growth of all men and women as whole persons can be reconciled.

## 2.3 THEORIES OF NEEDS

### (A) MASLOW'S THEORY OF THE HIERARCHY OF NEEDS

During the 1970s, Maslow, a humanist psychologist, developed a theory about motivation whereby needs are arranged into a hierarchy according to the order of their importance to life<sup>51</sup>. This theory attempts to explain the elements that motivate human behaviour. Maslow sees people as active beings, in constant development and in search of elements beyond their immediate reach. They are motivated to satisfy their needs in such a way that these aspirations dominate all human activities. Maslow creates a hierarchy of needs and places the most simple or basic needs at the base of the pyramid and the more 'becoming'-relevant needs at its apex. This is a dynamic process; as soon as a need is met, we try to satisfy another. There are five levels: physiological, safety, love, esteem and self-actualisation. The emergence of high-level needs entails that the more basic needs have been satisfied.

We can summarise Maslow's characterisation of needs as follows:

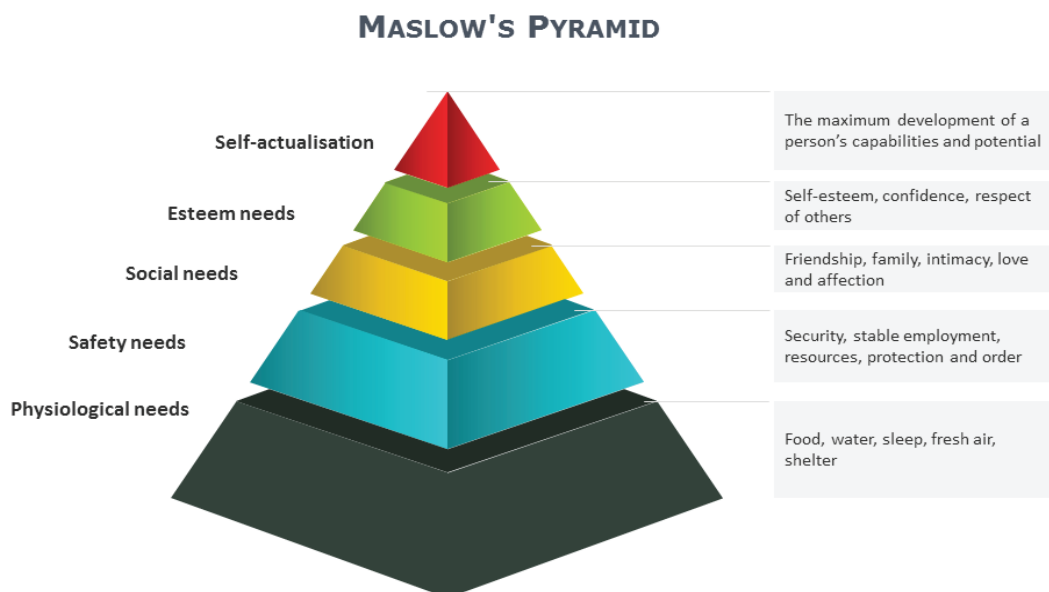
- Needs are elements inherent to humankind as a species. All types of needs are potentially present in human beings. A person's capacity to 'become more' depends on their meeting higher-level needs.
- According to the above, human needs must be considered human rights.
- Needs represent definitive values; they constitute a framework of goals and values that explain and condition a whole series of human desires and behaviours.
- Needs and their satisfaction are influenced by external conditions - culture and socialisation - as well as internal conditions - personal idiosyncrasies.
- There are two major types of needs - basic needs and higher needs or 'metaneeds'.
- Needs are universal, but they have various cultural manifestations and highly diverse specific modes of satisfaction for each culture.
- Needs are hierarchical.
- Human needs are never exhausted, nor fully satisfied. Human beings always remain in a state of relative want.
- Levels of protest indicate the levels to which needs have been satisfied.

The core of Maslow's theory revolves around the development of a classification of needs which, as indicated above, is hierarchical. It distinguishes between two types of needs: those

51. See Maslow, A. (1943). A Theory of Human Motivation. *Psychological Review*, 50, pp. 370-396 (Retrieved 22 December 2015).



which are basic and related to survival, and those, at the apex of the pyramid, which are related to development. This upper group is termed higher needs or metaneeds.



At the base of the pyramid of the hierarchy of needs, Maslow places physiological needs (hunger, tiredness, thirst, sex, etc.). These are the most urgent and appreciable needs, and if they are not satisfied, they may dominate an individual's behaviour. According to the author, it is rare for this domination to occur in our society, at least within the majority of the population.

The second level is devoted to safety needs, for the individual and the family, which is considered as the absence of threats and danger within the economic, physiological and psychosocial contexts. Physiological safety is related to whatever threatens our body or our life and may be real or imaginary. In economic and social contexts, safety refers to the diverse and necessary interrelationships of people and their desire to know, understand, have stability, etc.

According to Maslow, the need to belong to groups and for social integration, affection and love manifest when the physiological and safety needs are, at least, relatively attenuated.

Maslow places esteem needs at the fourth level. For him, this represents 'a need or desire for a stable, firmly based, (usually) high evaluation of themselves, for self-respect, or self-esteem, and for the esteem of others' (Maslow, 1985). He also distinguishes two subsidiary sets within this category. These are, first, the desire for strength, achievement, adequacy, confidence in the face of the world, and independence and freedom. Secondly, there is the desire for reputation or prestige (defining it as respect or esteem from other people). Satisfaction of these needs leads to feelings of self-confidence and dignity.

In fifth place and at the apex of Maslow's hierarchical pyramid is the need for self-actualisation - the higher needs or metaneeds. This level encompasses people's attempts to develop their capabilities and potential. This manifests in aspirations to transcendence, spiritual life, and development of values and principles that serve as guidelines. The author suggests that this category requires the relative satisfaction of basic needs and he defines those who reach it as free, with potential for self-management, autonomy and the capacity to deal with life's problems.

This classification has subsequently been the source of criticism on various counts, including claims that it is based on an erroneous hierarchy of preponderance of how people's needs arise.



## (B) DOYAL AND GOUGH'S THEORY OF NEEDS

The British authors Doyal and Gough have adopted a more ambitious angle in their development of a universalist theory of needs. Here, needs are conceived as universal objectives, rather than motivations and impulses<sup>52</sup>.

The authors reject the naturalist, relativist and culturalist conceptions of needs. Needs cannot be reduced to desires and preferences regulated by the market. They claim that while needs are historical and socially constructed, they are also universal. In response to the idea that each society has its own needs, changing according to its social organisation and structure, Doyal and Gough argue that it is the way of satisfying these needs that changes, and certain universal basic needs must be met for the development of dignified existence. Without recognition of such universality we would find ourselves in the dangerous situation of justifying situations of objective privation as cultural differences, or justifying economic differences between peoples in terms of relative cultural differences (cultural relativism). This does not imply cultural colonialism by developed nations towards peripheral countries, but the unavoidable task of finding a non-ethnocentric definition of needs, valid for all cultures.

In this regard, Doyal and Gough suggest the existence of basic human needs, which are those that cover universal preconditions for social participation and the pursuit of personal goals, namely, physical health and personal autonomy. Physical health is an obvious precondition for any human action. Autonomy is defined as the capacity to act: 'the ability to make informed choices about what should be done and how to go about doing it. This entails being able to formulate aims, and beliefs about how to achieve them, along with the ability to evaluate the success of beliefs in the light of empirical evidence'. This concept encompasses three key elements (Doyal and Gough, 1994):

- the level of cultural understanding that people have about themselves, their culture and what is expected of them as individuals within it;
- the cognitive and emotional capacity of the individual;
- the range of opportunities to undertake socially significant activities open to the individual.

Intermediate needs are those whose satisfaction enhances basic conditions, and therefore revolve around them. Although more specific, these needs are also universal and transcultural, but to satisfy them, specific means or 'satisfiers' are used which are culturally conditioned and therefore not universal. Intermediate needs for survival are those that are met with:

- adequate nutritional food and clean water
- adequate protective housing
- a non-hazardous physical environment and work environment
- appropriate health care.

Intermediate needs that improve the basic conditions of autonomy are those met with: physical and economic security; a secure childhood; significant primary relationships; appropriate education; and safe birth control and child-bearing.

At the present time, Doyal and Gough's approaches are highly influential, as is evident in much of the literature published on the subject, and also serve as a reference for international programmes such as the United Nations Development Programme.

This definition of universal, objective basic needs is significant because of what it means for the justification of social rights and the extension of social protection. If all human beings share certain general psychosomatic features, there are therefore certain basic needs common to all human beings, which give rise to states of affairs which are beneficial to

52. See Doyal, L. and Gough, I. (1991). *A Theory of Human Need*. Basingstoke: Palgrave Macmillan.

everyone. These universal goods generate universal moral demands or human rights that must be developed in the form of fundamental rights. The recognition of such needs is the core concept that justifies the existence of social protection systems and, specifically, social services geared towards ensuring the satisfaction of legitimate social needs.

### (C) MAX-NEEF'S THEORY OF THE MATRIX OF NEEDS

Max-Neef developed a 'human needs matrix' based on the distinction between needs and 'satisfiers'. Satisfiers are culturally determined forms of meeting needs. Max-Neef divides human needs into two categories:

- (a) existential categories - being, having, doing and interacting; and
- (b) axiological categories - subsistence, protection, affection, understanding, participation, leisure, creation, identity and freedom.

He formulates two postulates:

- fundamental human needs are finite, few and classifiable; and
- fundamental human needs are the same across all cultures and all historical periods, and what changes, both over time and in cultures, is the way or the means by which they are satisfied.

Each need can be satisfied at different levels and intensities:

- (a) with regard to oneself;
- (b) with regard to the social group; and
- (c) with regard to the environment.

The existential and axiological categories interrelate within a matrix which is highly useful in social planning, particularly when designing social maps. It is vital that this matrix is related to a human development perspective; it is of little use as a tool if it is not contextualised within a theoretical framework that comprehensively furthers the development of people.

Max-Neef intends the matrix to be used in participatory way, involving the entire population in the search for the relevant satisfiers to meet the different needs. He proposes the following classification of satisfiers:

- Violators or destroyers, which are forms of satisfiers that are intended to satisfy a need, but in fact annihilate the possibility of its satisfaction and also impair the adequate satisfaction of other needs (e.g. exile).
- Pseudo-satisfiers, which are elements that generate a false sense of satisfaction of a given need, since they may over time annul the possibility of satisfying this need (e.g. charity).
- Inhibiting satisfiers, which are those that oversatisfy a given need, therefore curtailing the possibility of satisfying other needs (e.g. overprotective families).
- Singular satisfiers, which are those that satisfy one particular need and are neutral in regard to the satisfaction of other needs (e.g. programmes to provide food).
- Synergic satisfiers, which are those that satisfy a given need, simultaneously stimulating and contributing to the fulfilment of other needs (e.g. breast-feeding).

It is important that the group itself analyses which satisfiers are generated exogenously and which endogenously by the group itself, to be able to establish the positive or negative effects in the identification and satisfaction of needs.

The Max-Neef matrix can make us aware of the existence of needs of absolute emergency, such as subsistence needs. If these are not met, all other needs remain blocked, most

importantly those 'other needs' that are not material and that block comprehensive human development: fundamental human rights, freedom, participation, and the manifestation of personal needs.

### Max-Neef's matrix of needs and satisfiers

Needs according to existential categories Needs according to axiological categories	Being	Having	Doing	Interacting
<b>Subsistence</b>	1/ Physical health, mental health, equilibrium, sense of humour, adaptability	2/ Food, shelter, work	3/ Feed, procreate, rest, work	4/ Living environment, social setting
<b>Protection</b>	5/ Care, adaptability, autonomy, equilibrium, solidarity	6/ Insurance systems, savings, social security, health systems, rights, family, work	7/ Co-operate, prevent, plan, take care of, cure, help	8/ Living space, social environment, dwelling
<b>Affection</b>	9/ Self-esteem, solidarity, respect, tolerance, generosity, receptiveness, passion, determination, sensuality, sense of humour	10/ Friendships, family, partnerships, relationships with nature	11/ Make love, caress, express emotions, share, take care of, cultivate, appreciate	12/ Privacy, intimacy, home, spaces of togetherness
<b>Understanding</b>	13/ Critical conscience, receptiveness, curiosity, astonishment, discipline, intuition, rationality	14/ Literature, teachers, method, educational policies, communication policies	15/ Investigate, study, experiment, educate, analyse, meditate	16/ Settings of formative interaction, schools, universities, academies, groups, communities, family
<b>Participation</b>	17/ Adaptability, receptiveness, solidarity, willingness, determination, dedication, respect, passion, sense of humour	18/ Rights, responsibilities, duties, privileges, work	19/ Become affiliated, co-operate, propose, share, dissent, obey, interact, agree on, express opinions	20/ Settings of participative interaction, parties, associations, churches, communities, neighbourhoods, family

<b>Leisure</b>	21/ Curiosity, receptiveness, imagination, recklessness, sense of humour, tranquillity, sensuality	22/ Games, spectacles, clubs, parties, peace of mind	23/ Day-dream, brood, dream, recall old times, give way to fantasies, remember, relax, have fun, play	24/ Privacy, intimacy, spaces of close- ness, free time, surroundings, landscapes
<b>Creation</b>	25/ Passion, de- termination, intuition, imag- ination, bold- ness, rational- ity, autonomy, inventiveness, curiosity	26/ Abilities, skills, method, work	27/ Work, invent, build, design, compose, in- terpret	28/ Productive and feedback settings, work- shops, cultural groups, audienc- es, spaces for expression, tem- poral freedom
<b>Identity</b>	29/ Sense of belong- ing, consistency, differentiation, self-esteem, assertiveness	30/ Symbols, language, religions, habits, customs, reference groups, sexuali- ty, values, norms, historical memory, work	31/ Commit one- self, integrate oneself, con- front, decide on, get to know oneself, rec- ognize oneself, actualize one- self, grow	32/ Social rhythms, everyday set- tings, settings which one be- longs to, matu- ration stages
<b>Freedom</b>	33/ Autonomy, self-esteem, determination, passion, as- sertiveness, open-minded- ness, boldness, rebelliousness, tolerance	34/ Equal rights	35/ Dissent, choose, be different from, run risks, de- velop aware- ness, commit oneself, dis- obey	36/ Temporal/spatial plasticity

## 2.4. THE EVALUATION OF NEEDS: SOCIAL INDICATORS

Basic human needs should be incorporated into inalienable human rights, whose possession and practice shape the dignity of individuals and communities. The satisfaction of these needs entails a sound environmental framework. The degradation of the environment, caused by pollution and the senseless exploitation of resources, poses a grave threat to this. Worldwide, current models of economic and technological development have caused millions of human beings to be without access to the satisfaction of these basic needs.

Social welfare is related to needs, but is not the same as social problems. An unemployed person may have urgent needs, but unemployment can only be considered a social problem if it affects a considerable part of the population. Needs may be individual, but social problems are not. Nevertheless, for a problem to be considered social, the fact that it affects many people is not sufficient on its own; it must also be perceived and appreciated as such by society. Perceptions are strongly influenced by value judgements. Some perceptions are widely shared - such as the condemnation of violence against women - while others are less so. For example, blame may be attached to people with AIDS, unemployed persons and the

poor. The number of individuals affected by a situation and people's perception and judgment of it are fundamental to understanding the politicisation of the problem and the government's measures for tackling it.

The analysis of social needs, as we have seen, must be interdisciplinary; moreover, it must not stop at mere qualitative and quantitative description, but rather, move on to the explanation of the causes underlying the situations of need. To do this, it is necessary to evaluate social needs within the specific space and time in which they occur. The **evaluation can be carried out from a dual perspective:**

- from the point of view of the **subject of the needs** or the people that experience them (women, children, the elderly, etc.);
- from the point of view of the **object of the needs** or areas of privation (health, education, housing, etc.).

Methodologically, an evaluation of social needs is carried out using systems of social indicators. It was not until the mid-1960s that interest in improving knowledge about the quality of life and social conditions coalesced at the scientific level. This interest led to what has been termed the Social Indicators Movement, and its consolidation continues to this day.

Depending on the paradigm in which we find ourselves, social indicators will be:

- a *direct measure of well-being* that facilitates judgments about the main aspects of society;
- a *measure of the subjective reality* that people experience or of subjective satisfaction;
- a *measure or description of a situation's characteristics* and their interrelation and change.

Social indicators can be classified according to whether they are:

- **objective or external indicators**, which are measures of specific situations or events that can be observed and verified by observers who are external to the process of measurement; or
- **subjective indicators**, which measure people's opinions, accounts or descriptions of their own perception of the world.

Currently, the majority of the theorists we have discussed agree that both these types of indicators are complementary, since they respond to the multidimensional nature of social reality. The debate about this links directly to that about the objectivity/subjectivity of social needs discussed in previous sections.

With regard to the **utility and objectives of social indicators**, these can:

- reflect underlying social problems
- facilitate comparison
- predict future social trends
- facilitate long-term planning and help determine alternatives and priorities for public programmes
- evaluate public policies and programmes.

Social indicators are therefore instruments both of knowledge and of action. We consider that their application in the field of social policy and social services is indispensable at the current time, not only for those who plan major courses of action - as has been true up until now - but also for social workers and other professionals working in the social services. Nevertheless, the development of these systems is a complex undertaking and it is therefore common to use pre-existing systems so that work can be carried out without having to create 'ad hoc' indicators for each study. Moreover, using these existing systems offers further advantages when comparing and homogenising information.

Institutions working on the development and improvement of systems of social indicators which are frequently used as benchmarks for research include: the UN, through the Statistical Commission of the Economic and Social Council; UNESCO; the United Nations Research Institute for Social Development; the OECD; the Club of Rome; the World Indicators Program of the Peace Research Institute Oslo; and the journal Social Indicators Research. All of these institutions are helping to make an enormous number of social problems visible throughout the world - social problems which are causing situations of evident disillusionment and frustration. It is important to take advantage of this situation of radical discrepancy to make a change of direction for humanity. We must move away from an economy of war and a level of consumption concentrated in the hands of 20% of humanity towards a sustainable global economy that meets the basic needs of all the Earth's inhabitants, all equal in dignity, and at the same time expanding the number of 'clients'. Quality of life depends on nutrition, water, health, energy sources, respect for the environment, education, transport and peace. The new economy should be based, therefore, on reducing expenditure on armaments and concentrating on aspects such as: food production (agriculture, aquaculture, biotechnology); water storage, recycling, piping and (where necessary) production through desalination; tackling worldwide health problems, especially through immunisation and neuroscientific research, to ensure the longevity of the world's population; major investments in renewable energy (wind, solar thermal, photovoltaic, marine, hydrogen, etc.); electric transport; and eco-friendly housing.

Professor María Novo recently stated that one of the major problems facing humanity at the moment is the frequent inability to discern limits. She also suggested that we must ensure that it is civil society that acts with deliberation in this regard. To correctly establish limits we need knowledge. There is no greater enemy than ignorance. It is worth pointing out that a few years after publishing *The Limits to Growth*, the Club of Rome issued a report entitled *No Limits to Learning*. This should be taken into account if we truly wish to tackle the great challenges that we face today. What is important is to know, invent and use this capacity - which is our hope and what sets the human species apart - to think, imagine, invent and create. 'Knowledge frees man, while ignorance restricts and constrains him', wrote the Nobel Prize-winner, Jean Dausset.<sup>53</sup>

### 3. NEEDS, INTERESTS AND DESIRES<sup>54</sup>

Alongside needs, human beings also have 'interests'. While these may be worthy of consideration, they do not deserve the same level of legal protection as needs. They are often included in legislation in the form of 'legitimate interests' and enjoy legal protection, but they should not have the same force as needs. In the event of conflict between the two categories, interests must unequivocally be sacrificed to needs.

It should be noted that the meeting of needs and the pursuit of interests often play out in an inverse relationship. Moreover, we cannot ignore the natural inclination towards masking interests: latent interests tend to be fairly well obscured, while patent interests may be fraudulently linked to needs. Ultimately, 'the principles of justice and social solidarity have a merely corrective value for practices dominated by selfish interests'. This may manifest in a variety of ways: interests of groups or individuals, business interests or corporate interests. They may even 'corrupt democracies'.

At another level, 'desires' may also be worthy of consideration, but are less frequently translated into law and can never take precedence over needs, human rights or legitimate interests. Desires may have a negative connotation that separates them from the common good of the entire human family; they may include desires for power, hoarding, profit and political control, and even for revenge.

53. Mayor Zaragoza, F. (2009). [Los límites del crecimiento. Temas para el debate, 181.](#)

54. This section is taken from the following publication: Segovia Bernabé, J. L. (2009). [Necesidades, Derechos, Intereses y Deseos: Discernimiento de la inmigración desde la justicia y la DSI. Corintios XIII, 131.](#)

Clarifying these terms in a strictly hierarchical form is not without its uses. The media, politicians and much of the population confuse them and they confuse us. Indeed, when addressing the need to survive and pursue a dignified life there cannot be a claim to national interest, nor less anyone's personal interest. These are values of different and very unequal nature. Neither can the desire not to be potentially bothered by others prevail over the needs of certain persons and social groups. It bears repeating that there is a level that is before and outside the law which determines the ethicality of a standard. This consists of verifying whether the law truly meets the needs of people or, conversely, stifles them. In the latter case, when needs are inhibited, desires - however widespread within the population - and interests - however legitimate they seem - can never prevail over the needs of the people. It is important to stress again that needs are objective, universal and are basically the same for everyone. Conversely, desires and interests are personal, subjective, capricious and often insatiable; everyone has their own, and these may be worthy of consideration. However, when they collide with each other, justice and law are duty-bound to put things in their place: first, ensuring needs are met and only then, to the extent possible, pursuing interests and finally desires.

The Earth and the universal destination of its goods is the first gift for the sustenance of human life 'by reason of its fruitfulness and its capacity to satisfy human needs'. From here, we can talk about a 'universal right to the use of the goods of the earth', constituted in the 'first principle of all social ethical management', true 'natural law', 'primary law', 'inherent in the person' and having 'priority over any human intervention'. Effectively, goods should reach 'all men and all peoples... under the guidance of justice tempered by charity'.

Because of this, science and technology, as well as law, economics and its institutions, have a substantial ethical duty and 'must be placed at the service of mankind's primary needs, gradually increasing humanity's common patrimony'.

In fact, every individual's personal needs are founded on the basis of relational subjectivity. The anthropological and ethical premise is crucial: we are neither autistic monads, nor simple rational preferers who assess the cost of opportunity of each choice, nor yet simple elements of a mass or a class; we are free beings and, at the same time, we are called upon to integrate socially and to collaborate with others, responsible for the fortunes and needs of others and capable of fellowship with them.

None of this is theoretical. It enables us to discern between a just law and one which is clearly illegitimate. In the latter case, we can and we should dissent because of the law's manifest inhumanity. The criterion of whether it protects and fulfils needs is, once again, a determining factor. Alongside this discernment, we should add two points mentioned above. The first relates to procedure (always following a process of participatory and democratic deliberation) and the second establishes the inviolable material limits: **human rights**.

Rights 'correspond to the demands of human dignity and entail, in the first place, the fulfilment of the essential needs of the person in the material and spiritual spheres'. These rights apply to every stage of life and to every political, social, economic and cultural situation. Together they form a single whole, directed unambiguously towards the promotion of every aspect of the good of both the person and society. The integral promotion of every category of human rights is the true guarantee of full respect for each individual right.

Universality and indivisibility are distinctive features of human rights. They are two guiding principles which at the same time demand that human rights be rooted in each culture and that their juridical profile be strengthened so as to ensure that they are fully observed.



## 4. THE CONCEPT OF BASIC NEEDS AND ITS LINK TO DEVELOPMENT AGENDAS<sup>55</sup>

Human needs theory is a current of thought about development that emerged in the 1970s. It focused analysis on the satisfaction of people's basic needs, as opposed to the traditional emphasis on economic growth.

After a long period of apparent economic prosperity following World War II, the persistence of situations of poverty and the growth of inequalities started to call into question the approaches that identified economic growth with development. Experience refuted the idea that the benefits of growth would automatically extend to all social strata<sup>56</sup>. During the 1970s, therefore, the need arose for a new approach, according to which true development would mean that all people would have their basic needs satisfied.

This new train of thought, as indicated by Hunt<sup>57</sup>, may encompass at least two standpoints. The first, more radical standpoint, holds that it is necessary to rethink the concept of development, the way it is measured and the prevailing economic model, using the fulfilment of basic needs that the current system is not able to meet as a yardstick. The second view, on the other hand, does not question the development model, but holds that it is necessary to intensify poverty reduction and social policies.

Although 'adjustment' policies may be justified from a strictly macroeconomic point of view, their high human cost led even the World Bank to consider that they were at a potential tipping point. This then gave rise to the search for 'adjustment with a human face'<sup>58</sup>, to reconcile the pursuit of growth, macroeconomic recovery and the protection of vulnerable populations.

From 1978 onward, the World Bank carried out several studies based on these ideas, supporting them and prioritising them in their policies. The satisfaction of basic needs can be considered, primarily, as a moral imperative. At the same time, the proponents of this approach also understand that it is not an obstacle to growth. On the contrary, they consider that the increase in demand for basic products from lower-middle-income sectors is a positive impetus for the economy. Similarly, the education and training of the population (human capital) carries with it significant potential for productive development.

The concept of human development emerges as a pragmatic attempt, at the heart of a 'global' development strategy, to reconcile approaches which have previously been considered opposing and whose application in isolation has demonstrated its limitations: the satisfaction of basic human needs on the one hand, and the pursuit of growth and economic efficiency on the other.

### 4.1. A CRITICAL REVIEW OF THE NEEDS-BASED DEVELOPMENT APPROACH

Despite its important contributions to development policies, the basic needs approach has not been without criticism. This approach attempts to answer the question: what are the

55. This section draws on the following publications: Gutiérrez, J. (2000). *Necesidades básicas*. In: *Diccionario de Acción Humanitaria y Cooperación al Desarrollo*. Instituto Hegoa. [retrieved: December 2015]; Pérez De Armiño, K. (2000). Vulnerabilidad. In: *Diccionario de Acción Humanitaria y Cooperación al Desarrollo*. Instituto Hegoa. Dubois, A. (2000). Capacidades. In: *Diccionario de Acción Humanitaria y Cooperación al Desarrollo*. Instituto Hegoa; Segovia Bernabé, J. L. (2009). *Necesidades, Derechos, Intereses y Deseos: Discernimiento de la inmigración desde la justicia y la DSI*. Corintios XIII, 131.

56. See Streeten, P. (coord.) (1981). *First Things First: Meeting Basic Human Needs In The Developing Countries*. Washington: OUP/World Bank.

57. See Hunt, D. (1989). *Economic Theories of Development: An Analysis of Competing Paradigms*. London: Harvester Wheatsheaf, p.259.

58. See Cornia, G. A., Jolly, R. and Stewart, F. (eds.) (1987). *Adjustment with a Human Face: Protecting the Vulnerable and Promoting Growth*. Oxford: Clarendon Press.

means for meeting needs? Yet the concept of need poses the problem of how, in practice, to separate the different types of needs.

#### 4.2. QUESTIONING THE DEFINITION AND IDENTIFICATION OF NEEDS

From an ideological point of view, we can question the very definition of need and its unconditional nature. For New Right authors such as Nozick, basic needs are neither universal nor objective. Individuals themselves should be the ones to decide what they need and what they spend on what they consider the needs of others, and the market rather than the State should be the mechanism to meet these needs. The Marxist viewpoint also sometimes talks about the relativity of needs, framing them within their historical and cultural context<sup>59</sup>. In short, to move forward in defining the concept of basic needs and its translation into policy, it is necessary to set out some objective basic needs, common to all human beings, whose satisfaction guarantees the minimum preconditions for developing [capabilities](#) and achieving well-being, along the lines of Amartya Sen's ideas<sup>60</sup>.

As we have already seen, there are various proposals for identifying the most basic needs in any culture or situation. There is, therefore, no precise definition of the concept of need. We can only say that a 'need is something that entails a right to satisfaction'. We could say that need is the expression of human freedom. From this point of view, human development is the objective and the focus of the debate, and the fulfilment of these essential minimums is more of a means than an end to achieving it.

#### 4.3. THE DIFFICULTY OF FINDING INDICATORS FOR DETERMINING THE LEVEL OF SATISFACTION OF NEEDS

One of the main objections to the needs-based approach centres on the difficulty of finding alternative indicators to GDP with which to set policy objectives or measure the current situation of needs. Various authors have formulated different proposals: Grant (1978) uses life expectancy, infant mortality and literacy as key indicators; Hicks and Streeten (1979) highlight six types of basic needs and their corresponding indicators; and Stewart (1985) proposes the single indicator of life expectancy, since it is so closely linked with other factors.

To take into account all aspects of human development, the UNDP has created a composite indicator, based on the work of Sen, called the Human Development Index (HDI). This allows a multidimensional analysis, taking into account various criteria. The Human Development Index (HDI) is a summary measure of average achievement in key dimensions of human development: a long and healthy life (life expectancy at birth), being knowledgeable (schooling rates across the various population categories) and having a decent standard of living (GNI per capita, PPP). The HDI is the geometric mean of normalized indices for each of the three dimensions. The HDI, however, does not reflect on inequalities, poverty, human security, empowerment, etc. The HDRO offers other composite indices as broader proxy on some of the key issues of human development, inequality, gender disparity and human poverty. A fuller picture of a country's level of human development requires analysis of other indicators and information, such as the Inequality-adjusted Human Development Index (IHDI), the Gender Inequality Index (GII) and the Multidimensional Poverty Index (MPI)<sup>61</sup>.

#### 4.4. THE NEEDS-BASED APPROACH ONLY WORKS IN THE SHORT TERM AND DOES NOT PROPERLY CONSIDER THE CAUSES OF HUMAN VULNERABILITY

Another objection to the needs-based approach is that it focuses on the immediate, while the *vulnerability* of people and families is also marked by long-term factors, many of them

59. See Doyal, L. and Gough, I. (1991). *A Theory of Human Need*. op. cit.

60. See Sen, A. (1993). Capability and Well-Being. In: Nussbaum, M. and Sen, A., *The Quality of Life*, Oxford: Clarendon Press.

61. For further information see: United Nations Development Programme (UNDP). [Human Development Reports](#), (retrieved December 2015).

structural. Traditional emergency aid is often limited to meeting the basic needs for survival and barely impacts on the factors contributing to vulnerability. Any intervention aspiring to go beyond providing immediate relief and to establish the bases of future development must be geared towards not only satisfying needs but reducing vulnerability.

Chambers defines vulnerability as 'exposure to contingencies and stress, and difficulty in coping with them. Vulnerability thus has two sides: an external side of risks, shocks, and stress to which an individual or household is subject; and an internal side which is defencelessness, meaning a lack of means to cope without damaging loss'<sup>62</sup>. This definition of vulnerability, therefore, suggests three types of risk vectors: the risk of exposure to crises or upheavals; the risk of a lack of capacities to deal with them; and the risk of serious consequences, as well as slow or limited recovery<sup>63</sup>.

Furthermore, the causes of vulnerability and its components are related to a combination of a wide range of geographical, economic, social, political and personal factors that determine both exposure to risk and the capabilities available to each family and individual within a given context. Ultimately, each person's vulnerability is the outcome of multiple causes, which may be grouped into three categories or superimposed levels: root or structural causes, medium- or short-term processes of crisis, and personal determinants.

- (a) *Root or underlying causes* are factors which remain stable and are consolidated over time (and should be analysed in a historical perspective). These are rooted in social, economic and political structures. They include: the limits and opportunities imposed by existing material bases (natural resources and environmental conditions); the local and international socio-economic structure (north-south relations), since this determines the relationship between production and power; and the ideological and political systems that underpin society (patterns of ownership, aid mechanisms, gender relations, etc.).
- (b) This set of factors constitutes the framework or basis for the development of the second level of causes, consistent across various *processes and dynamics* of vulnerability. These are of a more short-term or time-relevant nature and lead to an increase in specific forms of insecurity at a particular time and location. They include: the deterioration of the environment (which reduces production and revenues); rapid economic growth; external debt crisis; the economic impact of globalisation on poorer countries; structural adjustment programmes and the consequent reduction of budgets for basic services; the existence of authoritarian regimes; and the feminisation of poverty.
- (c) *Personal determinants* are related to how different causes of vulnerability, as we have seen, affect each individual differently. Each individual has a certain margin for decision and action, as well as specific personal determinants which affect their access to resources and their level of exposure to risk. Such personal determinants include the following:
  - Social class and economic activity - these determine the individual's socioeconomic status and therefore their resources and influence.
  - Gender - in almost all societies and circumstances. Women are subject to economic, political and social discrimination.
  - Age - children and the elderly are physiologically weak (with lower resistance to cold and heat, and more propensity to illness), have less mental and physical capability, and depend on the care provided to them.

62. See Chambers, R. (1989). Vulnerability, Coping and Policy. *IDS Bulletin*, 20(2) (*Vulnerability: How the Poor Cope*), p. 33.

63. See Bohle, H. G., Downing, T. E. and Watts, M. J. (1994). Climate Change and Social Vulnerability: Toward a Sociology and Geography of Food Insecurity. *Global Environmental Change*, 4(1), p. 38.

- Health and nutritional status - the malnourished, the sick and people with disabilities have reduced capacity to work and generate income, as well as to cope with the impacts of disasters (epidemics, food shortages, forced migration).
- Educational level and technical expertise - individuals with a lower educational level have less capacity to earn, find alternative livelihoods, or defend their rights before the government.
- Ethnicity and religion - these are defining elements of group identity, a common source both of privilege and of social, political and economic discrimination.
- Place of residence - this determines the risk of being impacted by natural disasters and conflicts, as well as access to natural resources and public services.
- Legal status - citizenship of a State or refugee status provide legal rights, which immigrants in another country and internally displaced persons within their own country lack.
- Free will and decision-making capacity - the impact of all these factors (structural, processes, personal conditions) on the individual can be modified in part, depending on the circumstances, through their capacity to decide whether or not to take certain actions (selling their goods, emigrating, joining forces with others, etc.).

The concept of vulnerability has become fertile ground for the study of social reality, the dissection of its root causes, and multidimensional analyses that take into account not only economics - as can happen with poverty (at least from a traditional viewpoint) - but also social ties, political weight, physical context, the environment and gender relations, among other factors. As Bohle<sup>64</sup> states, while poverty can be quantified in terms of economic absolutes, 'vulnerability is a social and relational concept', which is dependent on social conflicts and contradictions. It is therefore an essential concept in designing and adequately orienting public policies in the field of socio-economic development, as well as humanitarian interventions.

In opposition to vulnerability are people's *capacities*, i.e., the resources and skills that enable them to deal with and improve their daily lives, as well as face disaster and its subsequent restorative processes. Vulnerability is a relative dimension. In other words, all people are vulnerable, but each individual, depending on their socio-economic and personal circumstances, has their own level of vulnerability, as well as also their own type of vulnerability. This means that one can be extremely vulnerable to a particular type of potential disaster, but barely vulnerable at all to another, since each one strikes differently and tests different aspects.

In recent years, the concept of 'capacities' has been strongly embraced within development studies. Capacities have been defined by Anderson and Woodrow (1989) as the community's 'strengths' or resources that allow them to lay the foundations for its development, as well as to cope with disaster. These capacities can be physical/material (material resources, technical knowledge, coping strategies), social/organisational (social networks, social capital), or motivational/attitudinal (courage, initiative).

The awareness that all people and communities - including those affected by a disaster - have certain capacities has reinforced a view of recipients of international aid not as passive 'victims' but as active agents of their own development, whose participation is always required. Consequently, capacity building has emerged as one of the main tasks to be pursued in this type of aid. This is usually understood in two complementary senses: (a) as the capacity building of people through training, awareness-raising and organisation, so that

64. See Bohle, H. G. [1993]. The Geography of Vulnerable Food Systems. In: Bohle, H. G., Downing, T. E., Field, J. O. and Ibrahim, F. N. (eds.), *Coping with Vulnerability and Criticality: Case Studies on Food-Insecure People and Places*, Freiburg Studies in Development Geography. Saarbrücken: Verlag breitenbach Publishers, p. 17.

they can articulate their interests and promote social change - in other words, as a process of empowerment; and (b) as institutional development, i.e., the creation and reinforcement of local institutions or organisations that enrich civil society and defend the interests of the poor, and which can be enhanced, for example, through human resources training in management and planning, or the establishment of institutional networks.

## 5. THE PLURALITY OF APPROACHES IN DEVELOPMENT POLICIES: THE SHIFT FROM A NEEDS-BASED APPROACH TO A RIGHTS-BASED APPROACH

The difficulties described show that while development can be approached from different perspectives, these do not all share a comprehensive or holistic view of the dimensions of development, nor, as a consequence, do they guarantee human rights in the same way. We have already seen the contrast between the needs-based approach and the rights-based approach in the first section of Module 0. We refer to what is discussed there. The following table summarises the main differences of these approaches.

**Development Agenda Approaches**

Approach:	Charity	Needs-based	Rights-based
Focus on:	input	outcome	process and outcome
Emphasises:	increasing charity	meeting needs	realising rights
Recognises:	moral responsibility of rich towards poor	needs as valid claims	individual and group rights as claims toward legal and moral duty-bearers
Individuals are:	seen as victims	objects of development interventions	empowered to claim their rights
Focuses on:	manifestation of problems	immediate causes of problems	structural causes and their manifestations

Adapted from Kirkemann and Martin (2007)

The needs-based approach did, however, put a more human face on development, leading to the emergence of the concept of human development and the focus on capacities, and progressing towards the human rights-based approach.

### 5.1. THE CAPABILITY APPROACH

In the shift from a needs-based approach to a rights-based approach, the capability approach has played an important role as a basis for conceptualising human development. This premise was formulated in the 1980s by the economist Amartya Sen, winner of the 1998 Nobel Prize in Economics. According to Sen, a person's capability is 'the various combinations of functionings (beings and doings) that the person can achieve. Capability is, thus, a set of vectors of functionings, reflecting the person's freedom to lead one type of life or another'. This kind of capability approach should be understood as an alternative theory for evaluating well-being and, consequently, poverty and development. The approach is based on understanding human life as a set of actions and states (doings and beings), and considers that well-being is attained when life - the set of actions and states - acquires a

certain quality<sup>65</sup>. In other words, assessing quality of life involves assessing these factors. To proceed with this evaluative exercise, Sen uses two categories - functionings and capabilities - which are essential to the development of the approach.

*Functionings* are the states of being and the actions that a person respectively achieves and undertakes during their life: 'the things that he or she manages to do or be in leading a life'<sup>66</sup>. Functionings may be: activities such as reading or writing; physical states, such as being well nourished or healthy; mental states, such as being happy; or social functionings, such as being integrated into society<sup>67</sup>. As a result, well-being depends on the achievement of functionings<sup>68</sup>. This definition of well-being from the point of view of functionings clearly differs from the conventional approach which tends to identify well-being with affluence or mere accumulation of things. Central to the concept of functionings is rejecting the idea that the possession of goods in and of itself determines well-being; what is important is not what one has but rather the kind of life that we lead with the resources at our disposal. We do not all use the various elements in the same way for our well-being. The concept of capability lies in the difference between having the necessary means to carry out an action and the act of doing it. In other words, there is a difference between capability and potential. Under this approach, poverty corresponds to a lack of both capability and potential. Poverty must be seen as the privation of basic capabilities and not merely the absence of money, which is the usual criterion used to identify poverty.

The sets of possible functionings from which a person can choose involves *capability to function*. Capability to function means, therefore, that a person has a range of possible functionings to which they have access, but since it is not possible to do everything, they must choose one of the multiple combinations of functionings that they can achieve with their resources. In short, a person is required to choose the set of functionings that, within their possibilities, contributes most to their well-being.

There is a close relationship between functionings and capabilities which manifests itself in the following links: (a) the capability to achieve functionings will constitute the person's freedom - the real opportunities - to have well-being<sup>69</sup>; and (b) the actual well-being achieved will depend on the person's capability to function. In other words, the very fact of having access to a wide range of options to choose from should be understood as an integral part of well-being; a life will be richer when there are more choices available. In conclusion, the **freedom of well-being**, determined by the person's capability to function, becomes the key benchmark of well-being.

In accordance with these conceptual premises, Sen defines development as a 'process of expanding the real freedoms that people enjoy'. This process is at the same time an end and a means for development. People are considered the main focus of development. The capability approach developed by Sen has inspired many economists of human development and the UNDP has based its work on capabilities and functionings. The development of a country is not restricted to increasing the GDP or national revenue; development is a process for expanding people's capabilities and consequently reducing their vulnerability.

The capability approach involves a thorough critique of conventional welfare economics that throws into relief the reduced bases of information from which the idea of well-being and quality of life has been constructed: income, choice and feelings. The opening up of the concept of well-being to dimensions beyond mere personal satisfaction is an alternative vision of well-being that results in correspondingly alternative concepts of development and poverty. Sen's efforts and theories are widely recognised and even his critics consider it the

65. See Sen, A. *Capability and Well-being*, op. cit., p. 31.

66. Ibid.

67. See Sen, A. (1985). Well-being, Agency and Freedom: The Dewey Lectures 1984. *The Journal of Philosophy*, 82, pp.169-221.

68. See Sen A. (1992). *Inequality Reexamined*. Oxford: Clarendon Press.

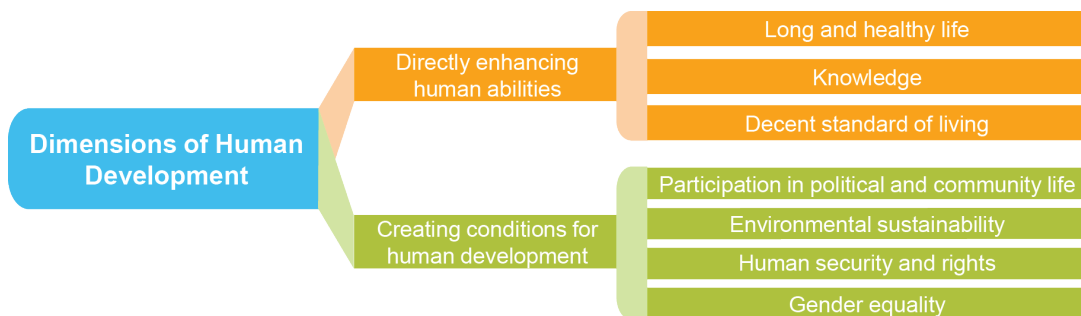
69. Ibid., p. 54.



most powerful alternative to the conventional approach of economic growth as a development goal.

## 5.2. THE HUMAN DEVELOPMENT APPROACH<sup>70</sup>

These ideas helped pave the way for the human development approach, which is about expanding the richness of human life, rather than simply the richness of the economy in which human beings live. It is an approach that is focused on creating fair opportunities and choices for all people. The human development approach, developed by the economist Mahbub Ul Haq, is anchored in Amartya Sen's work on human capabilities, often framed in terms of whether people are able to 'be' and 'do' desirable things in life. Freedom of choice is central: someone choosing to be hungry (during a religious fast say) is quite different to someone who is hungry because they cannot afford to buy food.



Source: UNDP

So how do these ideas come together in the human development approach?

**People:** the human development approach focuses on improving the lives people lead rather than assuming that economic growth will lead, automatically, to greater opportunities for all. Income growth is an important means to development, rather than an end in itself.

**Opportunities:** human development is about giving people more freedom and opportunities to live lives they value. In effect this means developing people's abilities and giving them a chance to use them. For example, educating a girl would build her skills, but it is of little use if she is denied access to jobs, or does not have the skills for the local labour market. The diagram below looks at aspects of human development that are foundational (that is they are a fundamental part of human development); and aspects that are more contextual (that is they help to create the conditions that allow people to flourish). Three foundations for human development are to live a healthy and creative life, to be knowledgeable, and to have access to resources needed for a decent standard of living. Many other aspects are important too, especially in helping to create the right conditions for human development, such as environmental sustainability or equality between men and women. Once the basics of human development are achieved, they open up opportunities for progress in other aspects of life.

**Choices:** human development is, fundamentally, about more choice. It is about providing people with opportunities, not insisting that they make use of them. No one can guarantee human happiness, and the choices people make are their own concern. The process of development – human development – should at least create an environment for people,

70. This information is taken from the United Nations Development Programme (UndP), HDRO Outreach, [What is Human Development?](#).



individually and collectively, to develop to their full potential and to have a reasonable chance of leading productive and creative lives that they value.

As the international community seeks to define a new development agenda post-2015, the human development approach remains useful to articulating the objectives of development and improving people's well-being by ensuring an equitable, sustainable and stable planet.

Human rights and human development share a common vision and a common purpose - to secure, for every human being, freedom, well-being and dignity. When human development and human rights advance together, they reinforce one another - expanding people's capabilities and protecting their rights and fundamental freedoms. This is essentially the meaning of development with a human rights-based approach.



'Human rights and human development share a preoccupation with necessary outcomes for improving people's lives, but also with better processes. Being people-centred, they respect a fundamental concern with institutions, policies and processes as participatory and comprehensive in coverage as possible, respecting the agency of all individuals.

Human rights contribute to human development by guaranteeing a protected space where the elite cannot monopolize development processes, policies and programmes. The human rights framework also introduces the important idea that certain actors have duties to facilitate and foster development. For people to be enabled to assert a legally binding claim that specific duty-bearers provide free and compulsory primary education (International Covenant on Economic, Social and Cultural Rights, Art. 13) is more empowering than it is to rely on 'needs' alone or to observe the high economic returns on investments in education, for example.

When human rights go unfulfilled, the responsibilities of different actors must be analysed. This focus on locating accountability for failures within a social system significantly broadens the scope of claims usually associated with human development analysis. In the other direction, human development analysis helps to inform the policy choices necessary for the realization of human rights in particular situations"<sup>71</sup>.

71. Office of the United Nations High Commissioner for Human Rights. (2006). [Frequently asked questions on a human rights-based approach to development cooperation](#) (HR/PUB/06/8). New York and Geneva, p. 1.

### 5.3 THE HUMAN RIGHTS-BASED APPROACH<sup>72</sup>

Human rights encapsulate the fundamental interests of human beings grounded in shared ideas about the requirements for a dignified life, which States and others are legally and morally bound to respect and realize.

All human beings have needs, whatever our individual differences, our cultural diversity, our geographical origin, even the period of history in which we live. These, besides being universal, timeless and easy to identify, are finite. **If they are not met, our dignity is compromised and the stain of injustice will attach to whoever ignored the duty to protect them. This is an unconditional duty** that affects all subjects considered individually - 'we are all responsible for everyone' - and the political structures that we have given ourselves. The fact that this is an obvious truth facilitates cross-cultural agreement. Human needs thus understood are not only a reflection of a person's needs, which must be met for reasons of charity and solidarity, but true demands for justice derived from human dignity.

The purpose of law is to regulate the life of people and institutions, in such a way that people's needs are satisfied. Just law is that which tries to satisfy them in accordance with priorities defined by political action. In contrast, spurious law, which cannot claim obedience - which absolutely requires dissent - is that which not only fails to universally meet people's needs, but rather suffocates them, sometimes literally. In short, **the category 'need' goes before the law and constitutes the basis of legitimacy.**

The increasing interdependence of our world shows how 'the common good is being universalised and increasingly becoming the common good of the whole human family'. Hence, the notion of common good, which is closely linked to the concept of need, leaving behind parochial boundaries, is understood 'dynamically' and is transformed increasingly robustly into the 'universal common good', 'the good of all people and of the whole person', 'of the whole of humanity', even 'of the whole of creation'.

The best satisfiers of needs are those which synergistically meet various needs at the same time (for example, the mother who breastfeeds her child is simultaneously meeting the needs of survival, affection and protection). Nevertheless, those which are contradictory must be avoided; acts of violence, for example (whether personal or institutional), inexorably place a person in a position where needs are smothered and asymmetry is reinforced, since there is always a perpetrator and a victim in an act of aggression.

From our point of view, the concept of need should be strengthened by separating it from the economic order and linking it to the law. In this way, it will constitute the verification of what is just and the meta-legal legitimation of human rights. These, as they have been developed in the Universal Declaration of 1948, are the legal translation of the coverage of basic needs. In this regard, **these basic needs are legal requirements for human beings in virtue of their dignity.**

Here, they are legitimised and must be referred to constantly. In this way, justice consists of ensuring that there is satisfaction of everyone's needs, i.e., what each person requires to live with dignity. Because of this, a worker's salary is not reducible to simple remuneration for a service, but rather it must meet the needs of the worker and his or her family, because work is not merely 'another factor' in the production process.

In this regard, the meeting of needs, a component of just law, means more than a formal response; it involves the comprehensive promotion of human dignity. Human rights are to be defended not only individually but also as a whole; protecting them only partially would imply a kind of failure to recognize them. They correspond to the demands of human dignity and entail, in the first place, the fulfilment of the essential needs of the person in the material and spiritual spheres.

Historically, legal recognition of specific human rights has resulted from struggles by 'powerless' groups in many parts of the world. The most prominent expression is the 1948

72. This section draws on the following publications: United Nations. (2008). [Claiming the Millennium Development Goals: A human rights approach](#) (HR/PUB/08/3). New York and Geneva, pp. 2-3 and 7; Segovia Bernabé, J. L. (2009). [Necesidades, Derechos, Intereses y Deseos: Discernimiento de la inmigración desde la justicia y la DSI](#). Corintios XIII, 131.

Universal Declaration of Human Rights, which recognizes a wide range of human rights. Indeed, the World Bank's *Voices of the Poor*<sup>73</sup> interviews found that the poor defined poverty as disempowerment and their demands read like the Universal Declaration. The Universal Declaration has since been further entrenched and expanded in international law through a range of treaties. Human rights are also set out in many regional treaties and national constitutions.

There is no hierarchy of rights: they are equal and indivisible. They are also interdependent and rely on each other for their realization. The right to free expression is dependent on freedom from hunger and vice versa. Amartya Sen found that no major famine had occurred in a democracy allowing free expression<sup>74</sup>.

Each human right also has specific content and claims; it is not just an abstract slogan. For example, the right to health requires that health care should be available, accessible, affordable and of sufficient quality. This content has been articulated in human rights texts and is more fully explored in Topic 2. In response to these rights, there are corresponding obligations on the duty-bearer. This duty-bearer has traditionally been understood as the State, which must respect, protect and guarantee human rights without discrimination of any kind.

For economic, social and cultural rights, a minimum level of the right in question must be achieved immediately. The full right must be progressively realized within the State's maximum available resources. Progressive realization also means that the level of realization of the right cannot decline without strong justification - this is the principle of non-retrogression. Many treaties require States to take steps, within their maximum available resources, to ensure that human rights are enjoyed by persons outside their jurisdiction.

There is gradual national and international legal recognition that non-State actors also carry human rights responsibilities. Examples can be found concerning individuals, corporations, armed groups and international financial institutions. The legal obligations of non-State actors may not be as strong as a State's, but it is arguable that there is a minimum duty of not interfering with human rights. For example, the OECD Guidelines for Multinational Enterprises establish a complaint system for violations by companies, and in 2007 the International Finance Corporation was piloting a human rights impact assessment toolkit for its corporate clients.

It is now generally understood and accepted that poverty results from disempowerment and exclusion. Poverty is not simply a lack of material goods and opportunities such as employment, ownership of productive assets and savings. It is also the lack of physical and social goods, such as health, physical integrity, freedom from fear and violence, social belonging, cultural identity, organizational capacity, the ability to exert political influence, and the ability to live in respect and dignity. Human rights violations are both a cause and a consequence of poverty.

'A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.

Mere charity is not enough from a human rights perspective. Under a human rights-based approach, the plans, policies and processes of development are anchored in a system of rights and corresponding obligations established by international law. This helps to promote the sustainability of development work, empowering people themselves - especially the most marginalized - to participate in policy formulation and hold accountable those who have a duty to act'<sup>75</sup>.

73. See World Bank. (2000). *World Development Report 2000/2001: Attacking Poverty*. New York: Oxford University Press.

74. See Dreze, J. and Sen, A. (1990). *Hunger and Public Action*. Oxford: Oxford University Press.

75. Office of the United Nations High Commissioner for Human Rights. (2006). *Frequently asked questions on a human rights-based approach to development cooperation*, cit, p. 15.

### Box 1. United Nations Statement of Common Understanding

1. All programmes of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Development cooperation contributes to the development of the capacities of "duty-bearers" to meet their obligations and of "rights-holders" to claim their rights.

Thus, the various human rights-based approaches have many common characteristics such as: linking development goals to human rights standards; focusing on marginalized groups, empowerment and participation; and ensuring accountability of duty-bearers. In 2003, United Nations agencies adopted the Statement on a Common Understanding of a Human Rights-based Approach to Development Cooperation (see box 1). It stated that human rights standards must

constitute the objective and guiding principles of development, and that the capacities of duty-bearers and rights-holders must be strengthened. This was later incorporated into the United Nations system's development programme guides.

A human rights approach plays two pivotal roles. First, it adds value by providing support to development practices that are designed to realize human rights. Second, it changes values by modifying development goals and practices to ensure they respect and realize human rights.

Therefore, human rights should not be viewed just as another add-on to the development agenda. While it may require checklists and other programming tools, it is a holistic agenda that should go beyond technical fixes. At the same time, human rights cannot be expected to provide detailed recommendations for good development processes or clear answers to resource-allocation and policy choices. However, they can provide a conceptual framework for evaluating and improving practice and ensuring that decision-making is more reasonable, objective and transparent, and will benefit those living in poverty.

## SUBJECT 2.1.:

# THE CONCEPTUAL FRAMEWORK OF THE HRBA

**Hours: 9**

**Subject 2.1.**

2.1.3. Common fundamentals: philosophical and anthropological premises of human rights, common values.

2.1.4. Development of human rights.

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## SUMMARY OF THE TOPIC

This topic consists of two interrelated units: the historical development of human rights up to the present day, in terms of their perception and various formulations, and the different theories about their bases.

Human rights are the common heritage of all people of good will. They have been intuited, perceived and formulated by all cultures and religions during their historical development, sometimes expressed differently, but underpinned by universal human values. It is important, however, to maintain critical precision; the various anthropological perspectives can - and do - lead to different solutions. Consequently, consideration of human rights requires us to make a value judgement about the underlying anthropological issue. This explains, firstly, the existence of an extensive range of sometimes conflicting theories and stances about the basis of human rights. In this topic, we provide a brief description of the most important of these, which aims to enable the reader to consider how and where they diverge and converge, so that they have the keys to understanding how to interpret the positions adopted by different legal systems and doctrines. In this regard, the topic provides a more detailed analysis of natural law theories, since these gave rise to the first declarations of human rights. In the same way, in describing the different theories according to the context to which they are preferably related, we have focused more on the ethical and religious basis because this is where the substantial difference lies between universal and Islamic declarations of human rights, which will be analysed later in this topic.

Secondly, it should be assumed that the question of the basis and development of human rights is in itself always an open question (consider the successive generation of rights that have appeared throughout history), from which we can never exclude further progress. Nevertheless, we already have sufficient elements to enable us to aspire to positive legal precision.

## GENERAL AND SPECIFIC COMPETENCES

In general terms, following the three modules of the HRBA training programme and in line with the guiding principles of the World Programme for Human Rights Education Plan of Action, approved by the United Nations General Assembly (2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participating teachers should be able to recognise the educational potential of the *general and specific competences* described below in implementing meaningful human rights education. They should also be able to incorporate these competences into their teaching plans using an inclusive approach, aimed at effective application of acquired knowledge.

Specifically for *this topic*, participants will develop efficiently the following general and specific competences.

### GENERAL :

- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciation of diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component for developing coexistence among people without discrimination in terms of gender, age, religion, social status, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards moral goodness, whether one's own or others' (i.e., towards everything that is or that means goodness, the experience of meaning, personal fulfilment, sense of justice), and to persist with this moral goodness.

### SPECIFIC

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To contrast and evaluate situations, practices, legislation, local and national policies according to the legal human rights instruments ratified by their country, in addition to proposing and planning efficient alternatives.
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.

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## LEARNING OUTCOMES

By the end of the topic, the participants in training should be able to:

- Identify similarities and compare differences between the various theories about the basis of human rights.
- Identify common aspects or premises in the foundations of human rights, which enable empathy, dialogue and negotiation between people from different cultures.
- Know how to extract potential practical implications from the various theories on the formulation of human rights and the limits imposed by different legal systems, for example, in the field of bioethics and bio-sanitary law.
- Recognise the different historical periods in the development of human rights and identify their main contributions and advances.

## METHODOLOGY

We include, as a suggestion, the following:

Methodology	Educational tools
Expository method	Reading texts

## SCHEDULING OF LEARNING ACTIVITIES

**Activity 1:** Read the teaching guide and the topic text.

**Activity 2:** Read the obligatory bibliographical material.

**Activity 3:** Comparative analysis. Individual work: Each student should create a comparison table including the precepts of the Decalogue, those of the Sūrat al-Isrā́ ([The Night Journey](#)) in the Quran, (17:22-38) and the corresponding rights in the 1948 Universal Declaration of Human Rights.

**Activity 4:** Self-assessment test.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
<b>Activity 1:</b> Read the teaching guide and the topic text.	5 hours	Self-assessment test.
<b>Activity 2:</b>	2 hours	
<b>Activity 3:</b> Comparative analysis.	1,30 hours	Assessment on a 10-point scale: clarity and precision of the schema.
<b>Activity 4:</b> Self-assessment test.	30 minutes.	

## SELF-ASSESSMENT TEST

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1. The different cultural traditions
  - (a) have no common elements from which to construct a universal ethic.
  - (b) are not related to the existence of the religions.
  - (c) do not include the principle by which one should treat others as one would like to be treated.
  - (d) include principles common to all of them.
2. The belief in the existence in a law superior to the laws of men
  - (a) is a concept of the French Revolution.
  - (b) is a religious prejudice linked to medieval philosophy.
  - (c) is incompatible with the principles of the American Revolution.
  - (d) can be traced back to the Code of Hammurabi.
3. Which thinkers, documents, works or institutions may be considered precedents of human rights?
  - (a) the Decalogue, Antigone, Seneca.
  - (b) the Quran, the Decalogue.
  - (c) Cicero, Aristophanes.
  - (d) the Quran, the Decalogue, Cicero, Seneca.
4. The Magna Carta
  - (a) is a document from the 16th century.
  - (b) is a document from the 9th century.
  - (c) does not contain individual guarantees.
  - (d) was imposed on King John of England.
5. In Spain
  - (a) there was no concern for the American Indians.
  - (b) Vitoria regarded them as non-persons.
  - (c) Vitoria was a theorist of just war.
  - (d) Vitoria is the exception with regard to issues relating to natural law.
6. Which of these is correct?
  - (a) the English Bill of Rights dates from 1550.
  - (b) John Locke has no relation to human rights.
  - (c) the Declaration of Independence of 1776 does not recognise any human rights.
  - (d) the French Declaration of the Rights of Man and of the Citizen dates from 1789.
7. Consideration of the social dimension of the human person
  - (a) arose in the 17th century.
  - (b) was not influenced by the Russian Revolution.
  - (c) arises in liberal democracies through the pressure of disadvantaged social classes.
  - (d) only occurred in Soviet Russia.

8. The Charter of the United Nations
- (a) has no relation to human rights.
  - (b) mentions human rights in its preamble.
  - (c) was adopted in 1943.
  - (d) was adopted in New York.
9. Human rights are classified today as
- (a) civil, property and safety rights.
  - (b) rights corresponding to nationals and rights which may correspond to foreigners.
  - (c) rights of individual, collective and national determination.
  - (d) civil and political rights; economic, social and cultural rights; and third-generation rights.
10. The International Criminal Court
- (a) has not had the opportunity to act.
  - (b) has only 25 signatory States.
  - (c) already had 89 signatory States by February 2003.
  - (d) enjoys the unanimous support of all nations.

## SELF-ASSESSMENT TEST

Question	Answer
Question 1	d
Question 2	d
Question 3	d
Question 4	d
Question 5	c
Question 6	d
Question 7	c
Question 8	b
Question 9	d
Question 10	c

## SUBJECT 2.1.:

# 2.1.3. COMMON FUNDAMENTALS: PHILOSOPHICAL AND ANTHROPOLOGICAL PREMISES OF HUMAN RIGHTS, COMMON VALUES

## 1. STARTING POINT: THE UNIVERSALITY OF HUMAN RIGHTS VERSUS THE DIVERSITY OF CULTURES<sup>76</sup>

As Pallard points out, 'the ideology of human rights is based on the philosophical movement that was born with the Age of Reason; it stems from the idea that all human beings have a universal nature that conforms to reason. This thinking was, however, very soon the object of severe criticism. The same ideas can be found in the origin of these criticisms as we find the in the origin of diversity as a defining characteristic of human culture: the denial of a reason that can accede to a universal truth and, in its wake, the denial of a homogeneous human nature. The Eurocentric perception of the modern world is replaced by a more modern design that is characterised by the contingency or relativity of values'<sup>77</sup>.

What importance must we then attach to different legal and political statements to affirm the universality of fundamental rights? Are there undeniable rights to which all governments should be subject and, if so, why are these rights necessary? Or are human rights nothing more than a contingent expression of certain cultural values for which governments should not be responsible? Is it then possible to guarantee the universality of fundamental rights, respecting cultural diversity?

Here we find significant discord. Some researchers believe there is a basis for fundamental rights which is rooted in ontology or metaphysics. With regard to cultural specifics, these are contingent elements and must yield to the need for fundamental rights. Other researchers reject the possibility of a universal truth to which human beings may have access. As a result, fundamental rights have no universal validity. Having reached agreement on this point, researchers are divided on the following steps. One group stands firm and denies any need for fundamental rights. The second believes that there is a need - a universality that is based on human experience and that supersedes cultural diversity.

What meaning should we attach to fundamental rights? Here, we encounter a great multiplicity of views, with each researcher defending a different point of view. This multiplicity is based on a common idea, the person, but what is this 'person'?

Human beings today have a more comprehensive - though still imperfect - understanding than before of a number of practical truths relating to their life together on which they can agree. This, however, is derived from theoretical conceptions which are radically different and

76. This topic is taken, with slight adaptations, from the IEPALA [systematic course on human rights](#).

77. Pallard, H. (1997). *Personne, culture et droits: harmonie, polyphonie et dissonance*. In: *Les droits fondamentaux*. II: [Universalité des droits de l'homme et diversité des cultures. Aspects philosophiques des droits fondamentaux](#), p. 121. Translation from the original.

sometime fundamentally opposed, according to their ideological allegiances, philosophical and religious traditions, cultural backgrounds and historical experiences.

The Universal Declaration of Human Rights, published by the United Nations in 1948, clearly shows us that, while it is certainly not easy, it is possible to establish a common formulation of such practical conclusions or, in other words, the various rights that human beings possess in their personal and social existence. Article 1 proclaims universality in these terms: 'All human beings are born free and equal in dignity and rights'. Yet it would be very difficult to attempt to find a common rational justification for these practical conclusions and these rights. If we did so, we would run the risk of imposing arbitrary dogmatism or of being stopped short by irreconcilable differences. The issue raised here is that of the practical agreement between people who are theoretically opposed to each other<sup>78</sup>.

We are, in the words of Maritain, faced with the following paradox: rational justifications are indispensable yet at the same time incapable of creating agreement between people. They are indispensable because we all instinctively believe in the truth and do not want to give our consent to anything beyond what we have recognised as true and as rationally valid. They are incapable of creating agreement between people because they are fundamentally different and sometimes opposing. Should we be surprised about this? The problems posed by rational justifications are complex and the philosophical traditions that give rise to these justifications have been in conflict for a long time.

Many of these difficulties are due to discrepancies in jurisprudence on the radical issues implicit in the generic notion of fundamental rights and even subjective rights. The first of these is the evaluation of human beings by the State and the law. Not surprisingly, the tension between individual and social has been one of the constants of contemporary legal and political thinking and, in this regard, serious doctrinal divergences about its resolution have been reflected in the concept of subjective and fundamental rights - extending as far as their denial - since both concepts are directly related to the value which the law assigns to freedom and human will.

Another issue central to the basis of fundamental rights is the concept of law itself. The denial of metaphysics and legal axiology as scientific knowledge, along with the reduction of law to the sphere of positive law, as a consequence of positivist, historicist and materialist tendencies, leads to the neglect of all concern for the basis and teleology of legal norms and the rejection of the natural law roots of subjective and fundamental rights, which gradually become a purely technical concept, not infrequently used in the service of undisclosed ideologies.

Nor should we forget the political resonance of the concept of fundamental human rights, especially in the context of a society in which political thought would trickle slowly from liberal individualism to a collectivist and totalitarian conception of coexistence. Of course, the modern crisis of positivism, historicism and materialism, coupled with the resurgence of individualistic and democratic political tendencies also involved the re-establishment of legal evaluation and the belief in the existence of universal, inalienable and inviolable fundamental rights over and above the power of the State. For this reason, the concept of fundamental human rights today has more political than legal implications.

These premises may help explain the anecdote about one of the meetings of the French National Commission for UNESCO discussing human rights, where someone expressed surprise to see that certain defenders of violently opposed ideologies had been in agreement on drawing up a list of rights. 'Of course,' they replied, 'we agree on those rights on condition that we are not asked why'. The discussion begins precisely with that 'why'. Since the Commission's aim was practical, agreement could be reached spontaneously, not on common speculative notions, but on common practical notions and not on the affirmation of the same conception of the world, humankind and knowledge, but on the affirmation of the same set of convictions concerning action. This is doubtless very little; it is the last refuge of

78. Il y a longtemps déjà que Maritain a montré la possibilité et l'opportunité d'une collaboration dans la pratique entre des familles spirituelles et idéologiques en profond désaccord sur le plan de la théorie: Maritain, J. (1953). *L'Homme et l'Etat*, Paris: PUF, pp. 69-99.



intellectual agreement. Nevertheless, it is enough to be able to undertake a great work and it would mean a great deal to become aware of this body of common practical convictions.

## 2. THEORIES ABOUT THE BASIS OF HUMAN RIGHTS

According to Bobbio, 'The fundamental problem concerning human rights today is not so much how to *justify* them, but how to *protect* them. This problem is political, not philosophical'<sup>79</sup>. What is certain, however, is that the guarantee of fundamental rights and their legal interpretation depends largely on their foundations. Thus, according to the position taken, some rights may be prioritised over others, as often happens in the case of liberally inspired rights, which triumph more easily over social rights. Similarly, the foundations of rights will indirectly impact on the content and on the direction of the legal system itself, since fundamental rights are the criteria of validity of other standards and of the legal system<sup>80</sup>. In short, the concept and the basis of rights are closely interrelated<sup>81</sup>.

As we have already mentioned, there is a great diversity of opinions on and approaches to the foundations of human rights, which has given rise to numerous classifications of modern human rights theories. We follow that of Rodríguez-Toubes<sup>82</sup>, shown in the table below<sup>83</sup>.

79. Bobbio, N. (1966). L'illusion du fondement absolu. In: *Le Fondement des droits de l'homme: Actes des Entretiens de l'Aquila*. Florence: Nuova Italia, p. 8/ (1991). Sobre el fundamento de los derechos del hombre. In: *El tiempo de los derechos*, trans. De Rafael de Asís, Madrid: Sistema, p. 61. See also Cotta, S. (1977). Attualità e ambiguità dei diritti fondamentali. *Quaderni di Iustitia*, 27, p. 2.

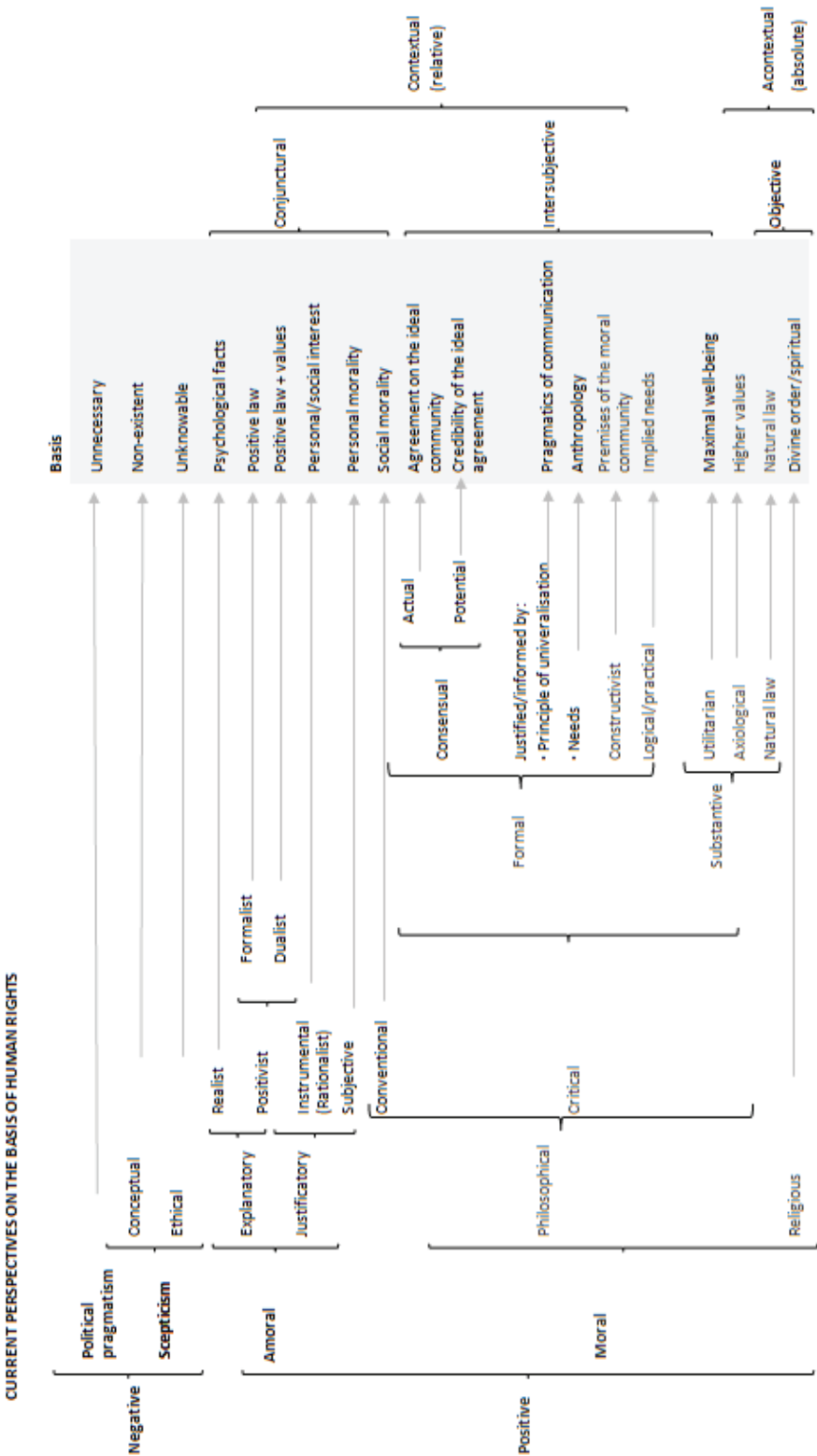
80. De Asís, R. (2001). *Sobre el concepto y el fundamento de los derechos: una aproximación dualista* (Cuadernos Bartolomé de las Casas 17). Madrid: Dykinson, p. 19.

81. Ibid., p. 5.

82. See Rodríguez-Toubes Muñoz, J. (1995). *La razón de los derechos*. Madrid: Tecnos. This is not the only possible schema; the author proposes several other possible classifications including the following four: (a) that of Antonio-Enrique Pérez Luño, who recognises four major ways of addressing the issue - realism, positivism, natural law and dualism; (b) that of Antonio Fernández-Galiano, who discusses the relativistic, axiological, logical/sociological, legalistic and natural law bases; (c) that of Eusebio Fernández, who distinguishes between natural law, historicist, ethical and axiological foundations; and (d) that of Jerome Shestack, who distinguishes five sources of human rights - religion, natural law, positivism, Marxism and the sociological approach. Shestack in turn identifies seven groups of modern human rights theories: (1) those based on natural rights; (2) those based on the value of utility; (3) those based on justice; (4) those based on reaction to injustice; (5) those based on dignity; (6) those based on equality of respect and concern; and (7) those based on cultural relativism. Rodríguez-Toubes Muñoz, J. op. cit. pp. 128-133.

83. Source: Rodríguez-Toubes Muñoz, J. (1995). *La razón de los derechos*. Madrid: Tecnos, p. 9.

CURRENT PERSPECTIVES ON THE BASIS OF HUMAN RIGHTS



The author acknowledges the existence of two perspectives in relation to the basis of rights: one negative and one positive. The **negative perspective** is represented by (1) political pragmatism, which negates the basis because it is unnecessary<sup>84</sup>, and (2) scepticism, with its two sides: the conceptual side, which denies the very existence of the basis, and the ethical side, which denies the possibility of understanding the moral ideal that serves as the basis of fundamental rights.

The **positive perspective** is divided along the lines of whether or not it is accepted that the basis is found in morality, i.e., 'that which refers to a moral ideal or criticism, and not a ("positive") conventional or subjective morality<sup>85</sup>'.

**Amoral** standpoints include:

- a) The *explanatory position*, which covers:
  - a. Empiricist realism, which accepts human rights as *de-facto* rights, with their basis in psychological facts.
  - b. Formalist positivism, which does not accept morality as a basis, because it posits that there is a clear-cut separation between law and morality. This theory positions the basis of rights in the same place as that of any other component of the system, i.e., in the material source of positive law. Accordingly, it conceives human rights as those that are valid at a determined time within a legal system.
- b) The *justificatory position*, whose two most important exponents are:
  - a. Instrumental rationalism, which links the basis with (personal and collective) protected interests and purposes.
  - b. Dualist positivism, which also argues that there is a separation between law and morality, but does not reject an intersection between the two. Rather, it suggests that morality plays an important role in the basis of human rights, since they share a dual nature; they are moral claims that have been translated into law. This thesis 'stems from an interpretation of human rights as moral rights [and] considers that they are not true rights until they have been incorporated into positive law, and it positions their basis in moral standards'<sup>86</sup>. This brings it closer to moral foundations.

Those who defend this standpoint argue that fundamental rights have a legal as well as a moral aspect, consisting of certain underlying values (dignity, freedom and equality). The legal aspect shows that fundamental rights are legal standards. This means, as Ansuátegui has stated, that 'one can only speak of rights, within the framework of legal expertise, when we refer to certain realities which have been translated into law. In other words, basic rights are legal institutions'<sup>87</sup>. Fundamental rights only exist when they are entered into a legal system as standards that meet the criteria of formal and material validity<sup>88</sup>. We must keep in mind that fundamental rights are, at the same time, elements which legitimise other elements in the system, since they constitute the subsystem that enables identification of the material validity of other legal standards<sup>89</sup>.

84. One exponent of this theory is Bobbio.

85. Rodríguez-Toubes Muñoz, J. op. cit. pp. 123.

86. Ibid., p. 120.

87. Ansuátegui, F. J. (1997). *Poder, ordenamiento jurídico, derechos* [Cuadernos Bartolomé de las Casas 2]. Madrid: Dykinson, p. 2.

88. Ibid., p. 3.

89. See Peces-Barba Martínez, G. (1999) *Curso de derechos fundamentales: Teoría general*. Madrid: Universidad Carlos III de Madrid/BOE, pp. 109-110. Barranco, M. C. (2009). *Teoría del derecho y derechos fundamentales*. Lima: Palestra, pp. 9-30. (The author discusses the irradiative effect of rights due to the fact that they are higher-level standards.)

Some authors, in addition to recognising that fundamental rights have a moral and a legal aspect, include a third element: their effectiveness. This involves turning to the 'analysis of reality, with its corresponding obstacles and impediments to the actual implementation of moral claims translated into human rights law'<sup>90</sup>. Thus, effectiveness is related to the possibility or impossibility of satisfying and guaranteeing a right. There is, however, a potential objection to this standpoint; since there is always scarcity, it could justify the eternal postponement of rights and consequently be used as an excuse to avoid political action. The argument gains strength, however, insofar as effectiveness is understood in terms of rationality/irrationality, i.e., of the logical (not political) possibility that rights are fulfilled. For example, it would be irrational to argue for a fundamental right to never become ill. Only in this context would it be possible to talk about the effectiveness of the legalised moral claim as a basis for rights. Yet in such a case, effectiveness would be integrated into the moral aspect.

As can be seen, the line between moral and amoral bases starts to become blurred by positivism.

**Moral perspectives** are classified as:

- a) **Theological (religious)** perspectives, which attribute the ultimate reason for rights to divine or spiritual reasons, according to the belief systems of each religion.
- b) **Philosophical** perspectives, which may be (1) formal or (2) substantive.
  - a. *Formal or ethical discourse* positions are as follows:
    - i. The consensus theory, which argues that the basis can be found in current moral consensus (arising from the ideal moral community) or in potential consensus (that will arise from the likelihood of the ideal agreement).
    - ii. Ethical constructivism, based on Carlos Nino's approach, which finds the basis in the premises of the moral community, i.e., in the justificatory force of social practices, understanding that there is a positive morality from which we can infer critical morality, since they share essential features.
    - iii. The logical/practical theory, which recognises the basis in implied human needs. As will be seen later, this position offers solidity to the moral argument, but it cannot be understood as a single element, since it does not explain the logical nexus between rights and their rationale.
  - b. *Substantive* positions, which have been criticised for the arbitrariness of their choice of values for the ultimate basis of human rights, include those listed below:
    - i. Utilitarian - while there are multiple forms of utilitarianism, this approach is based on the principle of utility, which implies the maximisation of welfare.
    - ii. Axiological - indicates that the origin and basis of rights is not legal, but rather before the law, since they are essential requirements for a dignified life.
    - iii. Natural law-based - positions the origin of human rights in a normative order whose validity is prior and superior to positive law, for which reason, human rights have virtual legal existence even before their positive recognition.

90. The author continues, 'Justice and validity need effectiveness'. This mainly relates to scarcity, which impacts on the possibility of egalitarian content of rights and, consequently, more on their justice than their validity. Scarcity impacts on the possibility of considering the extent to which moral claims may be generalised, i.e. their potential to be translated into general law'. (Peces-Barba Martínez, G. *Curso de derechos fundamentales*, op. cit., p. 108).

This overview of the different perspectives on the foundations of human rights may lead us to infer that, at first glance, it is impossible to speak of an absolute basis for all times and all places. It would only be possible to talk about rational and objective foundations that explain why fundamental rights exist and for what they should be used. Countering this objection, Rafael de Asís offers an enlightening explanation, distinguishing between the basis and the meta-basis of rights. 'The meta-basis of rights,' he claims, 'is the scope of abstract justification, while the basis is the scope of concrete justification'<sup>91</sup>. The *meta-basis*, therefore 'aims to build the justificatory foundations of rights discourse either without reference or with minimal reference to any spatial or temporal situation'<sup>92</sup>, while the *basis* will present these foundations within a determined spatial and temporal situation. Moreover, the meta-basis is related to the attainment of moral freedom, while the basis is related to the attainment of social freedom<sup>93</sup>.

### 3. THE BASIS OF HUMAN RIGHTS IN DIFFERENT SPHERES

This thought-provoking clarification enables us to pause in our consideration of theories about the basis of human rights and try to identify those that best offer a point of intersection between people and groups marked by a diversity of temporal, geographical or cultural circumstances. We have grouped these standpoints by the primary area to which the basis relates:

- a) Ethical-legal or legal-philosophical, whose field of study corresponds to the philosophy of law.
- b) Ethical-religious, whose field of study corresponds to various religions (in Christian thought, moral theology).
- c) Positive law-based, whose field of study corresponds to jurisprudence.
- d) Legal-political, whose field of study corresponds to political philosophy.

This classification suggests, to some degree, that the best chances of finding similarities on which to base and conceptualise human rights will be found in the ethical-legal sphere and, to a lesser extent, in the positive law and political spheres. This is because it is easier to find the meta-basis of rights - their rational justification - in the first sphere than in the other two. Ultimately, rights are 'ethical instruments that have different trajectories through history but that start from a common moral basis'<sup>94</sup>. This common moral basis must be understood from the starting point of the 'designation of equal value to human beings as subjects capable of choice, which implies establishing, as a requirement for all discourse, respect for physical integrity, personal autonomy (moral integrity) and the satisfaction of basic needs'<sup>95</sup>.

#### 3.1. ETHICAL AND PHILOSOPHICAL BASES

This type of basis offers two ways of approaching the argument, which determine two completely opposing lines of response spanning the entire history of legal-philosophical thinking. This dual approach corresponds to two major currents of thought: natural law and positive law.

91. De Asís, R. (2001). *Sobre el concepto y el fundamento de los derechos: una aproximación dualista*, op. cit. p. 19.

92. Ibid.

93. Ibid.

94. Ibid.

95. Ibid., p. 89.

### 3.1.1. NATURAL LAW

Natural law encompasses a large number of schools of thought including Thomism, the school of rationalist natural law, Neo-Thomism and Marxist humanism. This current of thought is *metaphysical and fundamentally affirms the legal nature of rights*. In this line of thinking, the basis of positive law - and consequently of fundamental rights - lies in human nature, or more specifically, in natural law. Human rights are rights which correspond *per se* to human nature, which is the same for all people.

Humans are beings endowed with intelligence and, as such, they are aware of what they do and thus have the power to determine for themselves the purposes which they pursue. At the same time, because their nature or ontological structure gives rise to intelligible needs, humans have purposes which necessarily correspond to their basic constitution and which are the same for all. Moreover, since humans are endowed with intelligence and determine their own purposes, it is their responsibility to bring themselves into line with the purposes demanded by their nature. This means that, by virtue of human nature, there is an order or a disposition that human reason can uncover and according to which human will must act, in order to fulfil the necessary and essential purposes of the human being. Unwritten law or natural law is nothing more than this.

That said, natural law has legal force only to the extent that it is known and expressed in assertions of practical reason. So how do we understand this law? The way in which human reason understands natural law is not through rational knowledge, but knowledge by inclination. In other words, human knowledge of natural law has been progressively formed and modelled by the inclinations of human nature, starting from the most fundamental of these. Natural law is unwritten law. It is unwritten in the profoundest sense of the word, because the understanding we have of it is not the product of free conceptualisation, but stems from a conceptualisation linked to basic inclinations - being, living nature, reason - which constitute the ontological structure of human beings, and also because it develops in proportion to the degree of moral experience, personal reflection and the social experience of what humans are capable of at different stages in their history. Thus, in Antiquity and during the Middle Ages, more attention was paid in natural law to human obligations than to human rights. The main work of the 18th century was to fully expose human rights as equally demanded by natural law. This was essentially due to progress in moral and social experience. Nevertheless, this indisputable progress deviated, in the theoretical field, due to certain liberal ideological standpoints that shifted the focus from human obligations to human rights alone. A clearer and more comprehensive view of the subject, however, requires us to focus on both the obligations and rights inherent to the demands of natural law.

The natural law basis relies on a dual, intermediate and immediate basis.

**A. The ultimate basis of human rights** lies in *human dignity*. In medieval natural law (see Aquinas and Averroes), personal character was what made man the image and likeness of God. In modern natural law, this character lies (as an objective, real and social fact) in the very existence of humans as rational beings, with the possibility to be equal, free and have solidarity with other human beings. Personhood, therefore, is not merely self-determination, but rather self-determination alongside others who also have the right and duty to self-determination.

Hence, this basis is found in the peculiarity of human nature with respect to other beings: its special dignity. Human dignity refers to the essence of human beings: to their innate worth. This is not an accidental feature, but a distinctive property attributed exclusively to every living human being. It is not a descriptive concept but affiliative, since to assert someone's dignity is to assert their humanity<sup>96</sup>. Dignity is non-negotiable, inviolable, inalienable and non-disposable. It obstructs any attempt at dehumanisation by oneself or others, at the same time as it imposes duties and confers rights.

96. See Garzón Valdés, E. (2011) ¿Cuál es la relevancia moral del concepto de dignidad humana? In: *Propuestas*. Madrid: Trotta, pp. 35-102.

Where there is a human being, there is a person in the legal sense, i.e.: (a) a *holder of rights* and bearer of obligations; (b) a *subject entitled* to rights and obligations; and (c) a *being* before the law.

In this sense, human rights are universal, inalienable and inherent to the person; they correspond to them simply for the fact of being a person and they cannot be voluntarily renounced by the person, nor may anyone else deprive him or her of them. Without doubt, human rights are absolutely inalienable in the sense of their possession, but as soon as they are exercised, all human rights are subject to limits. These rights are assigned to a person, and consequently are due to that person, by title of nature and according to a natural measure of equality<sup>97</sup>. Their enforceability, therefore, also comes from human nature; they are not concessions of society or of power granted through positive law. These rights, which belong to the person because they are integral to their being - over which the person has the utmost control - engender in others the duty of respect and, in the event of unjust injury, the duty of restitution and, where this is not possible, the duty of compensation. Accordingly, the denial of human rights can only be sustained by denying people their status as persons.

The assertion of human dignity involves two dimensions, one negative and one positive. By virtue of the first, the person cannot be subjected to humiliation and offense. By virtue of the second, the assertion of human dignity means the full development of the human personality and sociability.

The *full development of personality* implies: (a) the recognition of complete *autonomy*, without interference and external impediments, over the possibilities of one's own specific actions; and (b) the *self-determination* which arises from the free historical trajectory of human reason.

*Sociability entails conscious, critical and responsible participation* in the decision-making of the different groups or communities to which the person belongs, whether naturally (family, village, etc.) or by choice (trade union, political party, etc.).

Dignity therefore requires negative freedom in the sense of non-interference, i.e., self-determination without coercion, as well as positive freedom, since if needs are unmet, they impede or hinder the exercise of freedom in the first sense. It also requires freedom of participation, which relates to involvement in the formulation of political decision-making criteria, law-making and establishment of the purposes and values of State activity<sup>98</sup>. In short, natural law asserts that what makes humans worthy of all these rights is freedom, which entails rationality, possibility of self-control, communication, love and solidarity.

The consequences of dignity being an inherent (or necessary), rather than contingent, attribute of human beings, are that it corresponds to everyone equally and that the human being is considered an end in his or herself, never a means. The main architect of the modern concept of human dignity is Kant<sup>99</sup>. This teleological, not purely negative, element which is inherent to human dignity - being an end and not a means - is what allows us to declare the person a subject. Dignity to Kant means that the human person has no price but dignity: According to Kant, 'That which constitutes the sole condition under which anything can be an

97. Hervada, J. (1981). *Introducción crítica al Derecho natural*. Pamplona: EUNSA, p. 81.

98. Peces-Barba, G. et al. (1999). La libertad social, política y jurídica. In: *Curso de derechos fundamentales: Teoría general*. Madrid: Universidad Carlos III de Madrid/BOE, p. 228.

99. In his works *Groundwork of the Metaphysics of Morals and Metaphysics of Morals: I. The Doctrine of Right*, in support of the dignity of the human person, he used the argument according to which 'Beings whose existence depends not on our will but on nature's, have nevertheless, if they are irrational beings, only a relative value as means, and are therefore called things; rational beings, on the contrary, are called persons, because their very nature points them out as ends in themselves, that is as something which must not be used merely as means, and so far therefore restricts freedom of action (and is an object of respect). These, therefore, are not merely subjective ends whose existence has a worth for us as an effect of our action, but objective ends, that is, things whose existence is an end in itself'. (Kant, I. (1979). *Die Metaphysik der Sitten in Werkausgabe*, Band VII:II. Frankfurt: Suhrkamp Verlag, pp. 33-34. Kant, I. (1978). *Principios metafísicos de la doctrina del Derecho*. (trans.) Mexico: Universidad Nacional Autónoma de México, p. 24).



end in itself does not merely have a relative value - that is, a price - but an intrinsic value - that is, dignity'.

Nevertheless, the original idea of natural law is a legacy of both Greek and Christian thought. It dates back not only to Grotius, but before him, to Suárez and Francisco de Vitoria, and, even earlier, to St. Thomas Aquinas. Going back still further, these were preceded by St. Augustine, the Fathers of the Church and St. Paul<sup>100</sup> and, more remotely, Cicero, the Stoics, and the great moralists and poets of Antiquity, including Sophocles. Antigone, knowing that in transgressing against human law and being crushed by it, she was obeying a higher commandment - unwritten, immutable laws - is the eternal heroine of natural law. As she says, these unwritten laws are 'not of today or yesterday, but from all time, and no one knows when they were first put forth'.

The concept of human rights in the 18th century without a doubt presupposed the long history of the idea of natural law throughout Antiquity and the Middle Ages, but its more immediate origins lay in the artificial systematisation and rationalist recasting that this idea had undergone since Grotius and, more generally, since the advent of a geometrising reason. By a fatal error, natural law was thus conceived on the basis of a written code applicable to everyone, of which all just law would be a transcription and which would determine a priori, and in all respects, the rules of human behaviour through decrees prescribed in the name of nature and reason that were, in reality, arbitrary and artificially formulated. Furthermore, following Rousseau and Kant, this philosophy of rights culminated in treating the individual as a god and making all their corresponding rights the absolute and unlimited rights of a god. Free will and human freedom had to replace god as the supreme source and origin of natural law. Natural law had to be deduced from the so-called autonomy of will. The rights of the human person had to find their basis in the assertion that human beings are not subject to any law other than those of their own free will and their own freedom. 'A person,' wrote Kant, 'is subject to no other laws than those he gives to himself (either alone or jointly with others)'<sup>101</sup>. In other words, and as Rousseau argued, 'man should obey only himself', because any measure or regulation deriving from the world of nature (and, ultimately, from creative wisdom) would destroy his supreme dignity and autonomy.

For this reason, if Locke's doctrine is the culmination of modern natural law, Kant's philosophy represents its most radical questioning. Kant transforms natural law and rights into rational law and rights. During the 20th century, a large part of Neo-Kantian and Kant-inspired thinking followed along the same lines. Von Stein considers that a 'person is that which is determined by itself, in contrast to a thing or nature, which cannot be determined by itself'<sup>102</sup>. Henkel suggests that human rights, insofar as they are rights of self-determination, entail the prohibition against man being made subject to the will of others; i.e., it is prohibited for a person to intervene in a means-end relationship that is completely beyond their own shaping<sup>103</sup>. In Larenz's view, ethical personalism attributes a sense of ethics, a value in itself, to a human being, precisely because they are a 'person' - not merely a means to the ends of others - and in this sense, a 'dignity'. From this, it follows that all human beings have the right to be respected as persons and not to be prejudiced against for their existence<sup>104</sup>.

There is frequent reference to human dignity in the norms of international law governing human rights. Occasionally, however, this reference may be incorrect because it has been improperly characterised in the form of a right. For example, Article 11.1 of the American Convention on Human Rights states, 'Everyone has the right to have [...] his dignity recognized'. On other occasions, however, dignity appears correctly recognised as the basis

100. 'Indeed, when Gentiles, who do not have the law, do by nature things required by the law, they are a law for themselves, even though they do not have the law'. Romans 2:14.

101. Kant, I. *Die Metaphysik der Sitten en Werkausgabe*, op.cit.

102. See Garcia Pelayo, M. (1949) La teoría de la sociedad en Lorenz Von Stein. *Revista de Estudios Políticos*, 47, p. 57.

103. Henkel, H. (1968). Introducción a la filosofía del Derecho: Fundamentos del Derecho. Madrid: Taurus, pp. 319-320.

104. Larenz, K. (1978). *Derecho civil: parte general*. Pamplona: Editoriales de Derecho Reunidas, pp. 45-46.

of human rights. This is the case in a large number of norms, both international and national. These include the following:

- The opening paragraph of the preamble to the Universal Declaration of Human Rights states that 'recognition of the inherent dignity [...] of the human family is the foundation of freedom, justice and peace in the world'.
- The fifth paragraph states that 'the peoples of the United Nations have in the Charter reaffirmed their faith in [...] the dignity and worth of the human person'.
- The first article of the Universal Declaration states that 'All human beings are born free and equal in dignity and rights'.
- The second paragraph of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10 December 1984, explicitly states that 'those rights derive from the inherent dignity of the human person'.

B. the **immediate or direct basis** of human rights lies in *security* and, therefore, in the need to guarantee human rights insofar as they specify aspects of the values of justice, life, freedom, equality and solidarity. According to this basis, there is no true protection of rights if there is no prior affirmation of the requirement to assign human beings the guarantees that correspond to them by virtue of their nature. In short, this basis alludes to the legal aspect discussed above, by virtue of which human rights are authentic rights, defensible through judicial action before the courts, as long as they are not incorporated into positive law (into national, regional or international law) and there are appropriate legal mechanisms for their defence.

The immediate basis is also referred to in international declarations of human rights:

- Although incorrectly terming it a right, Article 17 of the American Declaration of the Rights and Duties of Man states, 'Every person has the right to [...] enjoy the basic civil rights'.

On other occasions reference is made to the immediate basis, again incorrectly recognised in the form of a right, but at the same time referring to the generic consequence of legal recognition of the dignity of the human person: legal personality.

- Thus, Article 3 of the American Convention on Human Rights sets out that 'Every person has the right to recognition as a person before the law'.
- Likewise, Article 16 of the International Covenant on Civil and Political Rights sets out that 'Everyone shall have the right to recognition everywhere as a person before the law'.

There is, therefore, a fundamental link between the problem of the basis of human rights and the problem of human rights guarantees. The practical dimension - the guarantee - of the basis of human rights becomes particularly evident in its legal and political specification. Human dignity appears as the essential purpose of States organised according to the rule of law. So, for example, Franz Wieacker defines the rule of law as that in which the law and legal procedure are based on concern for human dignity, personal freedom and the equality of human rights<sup>105</sup>. Totalitarian states, in contrast, entail the radical denial of human dignity. Rocco, one of the theorists of fascism, stated: 'The individual cannot, according to the fascist conception, be considered as society's end, but only its means. The entire life of society consists of making the individual the instrument of its social purposes... from which this consequence can be extracted: that for fascism, the fundamental problem is not that of the rights of the individual or of the classes, but merely the that of the right of the State, which is dependent on the duty of the individual'<sup>106</sup>.

105. Wieacker, F. (1957). *Historia del derecho privado de la Edad Moderna*. Madrid: Aguilar, p. 445.

106. Rocco, A. La crisis del Estado: la solución fascista. In: Torrelli, M. and Baudouin, R. (1972). *Les droits de l'homme et les libertés publiques par les textes*. Quebec: Presse de l'Université du Quebec, p. XVII.

### 3.1.2. POSITIVE LAW

Positive law, like natural law, encompasses a large number of schools of thought. Positivism is *anti-metaphysical and essentially asserts the non-legal nature of human rights*. In this line of thinking, the legal basis of fundamental rights is found exclusively in the very standards of positive law which recognise them.

The reduction of the legal aspect to the sphere of positive law would entail that individual rights were understood to be completely subordinate to the positive law, beyond which legitimacy would not be possible. So-called natural rights underwent a perversion of their original meaning or, put another way, a purge of their philosophical resonances. They thus became converted into rights attributed by the positive legal system to a self-capable subject, without reference to earlier subjective rights which were logically and chronologically superior to the State. In this ideological context, a subjective right exists when the positive legal system sets it out, at the same time as it guarantees through coercive legal means the impossibility of the obligated subject(s) to ignore it or transgress against it. The old natural rights go on to be created and protected by positive law and, in this scenario, cease to be natural, inalienable, imprescriptible and superior to the State, and are converted into a technical concept created by logical deduction from positive data, in the same way as the concepts of capacity, personality and legal relationship, etc. Natural rights are not considered under positive law and, consequently, they are neither rights nor have relevance to jurisprudence. The horrors of Nazism offer a good account of the extreme consequences to which these approaches can lead.

Positivism stems from the idea that an individual is not person, but merely one individual of the species, to whom the community assigns rights with no other basis than social consensus, expressed through the provisions of the law. This may be a kind of pact of happiness and freedom (liberal-bourgeois thought), or of racial supremacy (Nazism), or of any of the values that have shaped different societies through the ages. All rights would be creations or gifts from the legislator - in short, from society. The reason for injustice would be born solely and exclusively from positive law. Before it, or in its absence, it would not be unjust to murder, injure or defame. Moreover, if the reason for the injustice of attacks against such rights lay in positive law, when this proscribed its violation - as in certain political regimes - there would be no reason for injustice. Legal positivism leads to absurdity and also entails an insurmountable aporia.

According to this current of thought, positive rights are the only real rights. Nevertheless, in order for an individual to have real rights it is necessary that they possess the ontological capacity to be a subject of law. If their being, their nature, was not capable of rights, the granting of rights under positive law would be nothing more than illusory. Thus, positive law, in order to exist as real law, requires at least that an individual is naturally - ontologically - capable of possessing rights. Consequently, either the individual is a person and therefore has natural rights, or they are not and positive rights are therefore not true rights<sup>107</sup>.

### 3.2. ETHICAL AND RELIGIOUS BASIS

There are many religions that recognise the creative will of god as the ultimate foundation of human dignity. Human beings have a transcendent dignity, given by god insofar as they are his own creations; their origin and destiny are in him. Therefore, man exists because God 'wants' it, through a pure, free act. Some religions, especially Judaism and Christianity, consider this creation as an act of love; on discovering that they are loved by god, humans understand their own dignity and learn to love and respect others, to consider others as themselves and above all consider their life and the means necessary for living it with dignity. A consequence of this creative condition is the primacy of the person, the ultimate end of society, which is

107. See Hervada, J. (84). *Introducción crítica al Derecho natural*, op. cit., pp. 84-87.

ordered by and for the person, without this entailing an individualistic or mass vision<sup>108</sup>. This is the basis for a large part of the humanism that underlies many religions.

Nevertheless, this premise seems especially developed in the revealed religions, i.e., in the three monotheistic religions or religions of the book: Christianity, Judaism and Islam. Our analysis will focus mainly on these.

The three monotheistic religions are founded in a divine law, whose understanding by humankind happens by God's initiative, through revelation contained in the Holy Scripture or Bible (Judaism and Christianity) or the Quran (Islam). Divine rules require absolute obedience, even when they come into conflict with the norms established by human power. This divine law serves, therefore, as the basis and limit of human rights. Yet the concept of divine right which underpins each of these religions is diverse, and this substantially influences their relationship with human rights and, above all, the corresponding theory and basis of human rights for each of them.

Each of these religions defends a different way of considering the conditions of existence and effectiveness of divine law. First of all, as Ferrari underlines, 'there is a fundamental difference between the Quran and the Gospel: the first is divine revelation, while the second is actually a compendium of the revelation, rather than the revelation itself'. In the case of Christianity, 'the word became flesh' in the person of Jesus Christ; in the case of Islam (and Judaism), the word is 'embodied' in a text. Consequently, the revelation contained in the Quran and the Pentateuch is binding not only in its content but also in its words. Moreover, the Quran revealed by Allah to Muhammed is the copy of a heavenly book coexisting with god for all eternity. Both in Islam and in Judaism, the sacred text (as with the rules which it contains) is not mediated, either in its contents or in its words, by a human instrument<sup>109</sup>. This explains the tendency, both in Islamic and Jewish law, to link legal propositions to sacred texts and to assign maximal importance to the literal exegesis demanded by the nature of the text. The situation is very different with the Gospels, which were inspired - but not dictated - by god and present literal differences that must be analysed by interpreters to understand whether they derive from divine revelation or from the human instrument through which they have been transmitted.

Divine law as a whole has less quantitative significance, less normative value and a lesser reach in the legal experience of Christianity than in Judaism or Islam. Some authors have gone so far as to conclude that canon law is not divine revelation. It is based on the revealed principles of Christian faith and morality, but it is a human work and not the word of god. In contrast, Jewish and Muslim jurists who follow traditional learning argue that their sacred texts contain standards in and of themselves, produced by god in both words and content and, therefore, not requiring human mediation to acquire validity. This does not mean, of course, that the work of the legislator, the interpreter and the judge is unknown, merely that this does not aim to discover and put divine law into practice, but rather to extract all its implications and possible applications<sup>110</sup>.

At the same time, there is a wide disparity between the areas of material competence claimed by each of these systems. Judaism and Islam consider that culture and society form a whole with religion, so there is no distinction between the secular and the religious, or religious and civil power, as there has been in Christianity since the Constantinian era. This difference has a direct impact on the concept of secular matters and the identification of the limits that

108. 'The human person may never be thought of only as an absolute individual being, built up by himself and on himself, as if his characteristic traits depended on no one else but himself. Nor can the person be thought of as a mere cell of an organism that is inclined at most to grant it recognition in its functional role within the overall system'. Compendium of the Social Doctrine of the Church, No. 125. See also No. 132 and Catechism of the Catholic Church, 2235.

109. Ferrari, S. (2003). *El espíritu de los derechos religiosos. Judaísmo, cristianismo e islam*. Barcelona: Herder, pp. 151-152.

110. Ibid.

separate them from religious matters, as well as the recognition of the autonomy of the former with respect to the latter<sup>111</sup>.

Finally, and in direct relation to the above, there is a substantial difference between the three religions, which constitutes the key to understanding their different ways of explaining the basis of human rights. Christianity argues that not all divine law is revealed (or positive) law, while Islam and, in its own way, Judaism argue that divine law and revealed law coincide. Christianity, whose main exponent is St. Thomas Aquinas, holds that within divine law, it is possible to distinguish a *positive or revealed law (lex aeterna)*, which affects every believer, and a *divine natural law (lex naturalis)*, which concerns every human being, regardless of their religious faith, and which can be rationally understood. The first of these has been promulgated through revelation, i.e. through god's interventions in history, and humans cannot understand it by reason alone. These revealed truths are found in Holy Scripture and the tradition of the Church. Divine natural law has also been given by god, but through creation; it has been written into human nature and can be understood through the proper use of reason, which all people have. Thus, natural law is a form of divine law, and nature, a form of revelation<sup>112</sup>. According to Catholic doctrine, natural law 'is nothing other than the light of intellect infused within us by God. Thanks to this, we know what must be done and what must be avoided. This light or this law has been given by God to creation. It consists in the participation in his eternal law, which is identified with God himself'<sup>113</sup>. This law is called 'natural' because the reason that promulgates it is proper to human nature. It is universal; it extends to all people insofar as it is established by reason. The natural law expresses the dignity of the person and lays the foundations of the person's fundamental duties'<sup>114</sup>.

In accordance with these premises, according to Catholic doctrine, 'the roots of human rights are to be found in the dignity that belongs to each human being. This dignity, inherent in human life and equal in every person, is perceived and understood first of all by reason. The natural foundation of rights appears all the more solid when, in light of the supernatural, it is considered that human dignity, after having been given by God and having been profoundly wounded by sin, was taken on and redeemed by Jesus Christ in his incarnation, death and resurrection. The ultimate source of human rights is not found in the mere will of human beings, in the reality of the State, in public powers, but in man himself and in God his Creator'<sup>115</sup>.

As Laghamani states, 'the theological legacy of the Middle Ages was the theoretical condition of the possibility of humanism and the theory of human rights. Without St. Thomas Aquinas, this theory would perhaps not have been possible.

The theory of human rights accepts human nature, i.e., it presupposes knowledge of the essence of the person and also presupposes that this nature is the basis of the values on which we can create norms. This theory was not possible, for example, under atomism and the voluntarism of Duns Scotus and William of Ockham. In fact, Ockham's reasoning went on to establish legal voluntarism and not the theory of natural law.

Nevertheless, based on the concept of God's pure rationality, Aquinas was able to deduce the existence of a *lex aeterna* that is merely the same law of divine reason. On submitting to god the will to understand, St. Thomas grants autonomy to human reason. This can give rise to a part of the truth, in the part of the *lex aeterna* accessible to him: *lex naturalis*. Therefore, the truth exists on Earth, things have a nature, and in observing them, one can deduct autonomous norms. Michel Villey suggests that the law of secularism is already present

111. See Ferrari, S. (2003). *El espíritu de los derechos religiosos. Judaísmo, cristianismo e islam*. Barcelona: Herder, pp. 92-93.

112. Kerr, M. H. (1966). *Islamic Reform: The Political and Legal Theories of Muhammad Abuduh and Rashid Rida*. Berkeley: University of California Press, p. 58.

113. See St. Thomas Aquinas. *Summa Theologiae*, I-II:91:2: 'participatio legis aeternae in rationali creatura lex naturalis dicitur'.

114. See Compendium of the Social Doctrine of the Church, No. 140.

115. Ibid., No. 153.



in Saint Thomas<sup>116</sup>. Modern thought shifts the object of reflection towards nature, from the nature of things to the nature of man and the nature of the individual, and the modern theory of natural law is born.

The theoretical condition for the possibility of a philosophy of human rights is the recognition of the existence of the nature of things and, therefore, of human beings and the capacity of human reason to discover it<sup>117</sup>.

Neither the Islamic nor the Jewish tradition recognise the idea, of Greek origin, of an eternal and immutable 'logos' written into the rational nature of human beings, but only that of a law revealed by god - a personal and immediate source of the law - as his will, which leaves no room for natural law other than the divine positive law of the ten commandments in the case of Judaism, and its homologous passage in Islam: the 23-27 verses of Sūrat al-Isrā (The Night Journey).

Jewish doctrine argues that, until the revelation of Yahweh to Moses, humanity was governed by the Noahide laws, which God gave first to Adam and then Noah. These were: do not deny god (no idolatry); do not murder; do not steal; do not engage in sexual immorality; do not blaspheme; do not eat from a live animal; and establish courts and legal systems to ensure obedience of these laws. These are precepts that are characterised as being universal, immutable, and mandatory for all human beings. These precepts would form the basis of the Jewish concept of natural law<sup>118</sup>, while Jews would be bound only by the tablets of stone bearing the law which god gave to Moses on Mount Sinai. The fact is that this is a minority position within the Jewish world, where theories based on natural law have never triumphed 'because Judaism is fundamentally a positivist legal system based on the covenant at Sinai'<sup>119</sup>. Nevertheless, the Holy Scriptures, as we will see, provide a framework which is not only religious but also moral and ethical, and which contributes to the bases of human rights as we conceive them today.

The Torah, like Christianity, teaches that every person is created in the 'image and likeness of God'<sup>120</sup> and this would be the ultimate foundation of human dignity. A human being is not just something, but someone: a person by nature. Man exists as a unique and unrepeatable being, he exists as an "I" capable of self-understanding, self-possession and self-determination. He is capable of freely giving himself and entering into communion with other persons. Further, he is called by grace to a covenant with his Creator, to offer him a response of faith and love that no other creature can give in his stead<sup>121</sup>. This entails above all the requirement not only of simple respect on the part of others, especially political and social institutions and their leaders with regard to every man and woman on the earth, but even more, this means that the primary commitment of each person towards others, and particularly of these same institutions, must be for the promotion and integral development of the person<sup>122</sup>. By virtue of being a person, they are by nature a subject of rights. From the ethical-religious standpoint,

116. See Villey, M. (1962). De la laïcité du droit selon Thomas. In: *Leçons d'histoire de la philosophie du droit*. Paris: Dalloz, pp. 189-201. See also, more generally on the issue of human rights: Villey, M. (1983). *Le droit et les droits de l'homme*, Paris: PUF.

117. Laghmani, S. (1997). Pensées Muslim et théorie des droits de l'homme. In: *Les droits fondamentaux. II: Universalité des droits de l'homme et diversité des cultures. Aspects philosophiques des droits fondamentaux*, p. 150. Translation from the original.

118. See studies on the Jewish perspective on the commandments in Novak, D. (1998). *Natural Law in Judaism*. Cambridge: Cambridge University Press, p. 191, and Novak, D. (1983). *The Image of the Non-Jew in Judaism: An Historical and Constructive Study of the Noahide Laws*. New York: Edwin Mellen Press.

119. Dorff, E. (1978). Judaism as a Religious Legal System. *The Hastings Law Journal*, 29, p. 1352.

120. God created man in his own image, in the image of God he created him; male and female he created them' (Gen 1:27 and Ps 139:14-18). Islam denies this possibility because it contradicts the nature of god. God says in the Quran that nothing resembles him: 'There is nothing like unto Him, and He is the Hearing, the Seeing' (Quran 42:11); 'Nor is there to Him any equivalent' (Quran 112:4).

121. Compendium of the Social Doctrine of the Church, Nos. 108 and 131.

122. Ibid.

there are no functional definitions of a person. This view explains its opposition to abortion and euthanasia, for example. In contrast, while contemporary secular ethics generally allows that there are beings who are people, it defines them according to their capabilities or functions, not because of what they are - i.e., the image of god - but because of what they can do.

In Islam, natural law is absorbed by the revealed divine law. There is no distinction between them. This premise gives rise to significant consequences for the foundation of human rights in Islam, even if some are more direct than others. On the one hand, this premise offers us a key to understanding the attitude of Muslims to dogma, to revelation, and to the possibility or impossibility of developing and adapting Islamic law to current social and political transformations. On the other hand, it holds no key to understanding whether or not Islam integrates the philosophy of human rights, i.e., the ontological or metaphysical problem of the statute of man, in short, human nature.

According to Laghmani, in Sunni thinking 'since the end of the first century of the Hegira, it has been possible to distinguish the contours of a rationalist tendency and a voluntarist tendency (*Ahl ar-ra'y* and *Ahl al-Hadith*). In terms of the method of interpretation, this division has given rise to opposition from the rational interpretation (*ta'wil*) to the literal interpretation (*hashwiyya*).

The Muhaddithin, or traditionalists, were extremely hostile to the use of reason in the understanding of faith. (...) The original Mutakallimun, the Mu'tazilites, supported the concept of the rationality of god and therefore of human freedom, a concept expressed in their second principle: the principle of 'adl, divine justice.

God is necessarily just and acts in pursuit of an ultimate purpose which is the most advantageous and useful for humankind (*al-aslah*). Thus there is a law that governs the universe, a purpose that moves it, which St. Thomas Aquinas later called *lex aeterna* and which the Stoics had already noted; there is a divine reason that governs the universe, which extracts from nature the risks of free will.

On the other hand, god is just in himself; he cannot punish an innocent nor reward the undeserving. Therefore, one must assume that humans are the authors of their actions and free will is the condition of responsibility. However, people may choose; they must be capable of doing so. It is important to recognise that human beings can describe things as just or unjust, beautiful or ugly (*tahsin wa taqbih*), which means that things intrinsically contain value and that human reason is capable of discerning that value. The divine decrees are not the cause of the ugliness or beauty of human actions, but, independent of revelation, attest to the beauty and ugliness in the nature of things. Thus, there is a nature of things, a divine law mediated by the things themselves, a natural law that man is capable of discovering.

We can see that such a theoretical premise could have given rise to a theory of human rights. It might have been a comparable theory to the theology of Saint Thomas in modern western thought: a theoretical condition of possibility. But while Saint Thomas was called the 'Angelic Doctor', the Mu'tazilites were accused of heresy. (...) This occurred during the reign of Al-Mutawakkil (AH 225-245/847-867 AD). Traditionalism took power and became the orthodoxy. Ibn Hanbal became the symbol of this orthodoxy. And this is a strict orthodoxy, a divine voluntarism, the absolute dogma of the freedom of divine will and the complete absence of power of reason in the understanding of dogma. This orthodoxy that is today synonymous with Islam was, however, simply an approach. The 'Ilm al-Kalâm, considered honourable up until this point, was condemned. From here onwards, the sovereign science will be *fiqh*. The competition was eliminated. (...)

The will of God is absolutely free; no *lex aeterna* nor *lex naturalis* is conceivable. They constitute the greatest number of limitations to divine omnipotence. Human beings cannot discover the nature of things; it does not exist. A law of human nature makes no sense. Human actions are neither beautiful nor ugly, because God wills it. In his infinite power, he can decide everything. Such is the predominant orthodoxy in Sunni Islamic thought from the fourth century of the Hegira (10th century AD) until today. It creates paradoxical orthodoxy in the theory of human rights. Human beings have no rights; their nature cannot discern any point of view. A theory of human rights is impossible. From the traditionalist perspective, if man enjoys protection, it is not because of his nature, but through the expression of divine will. Man, in the strict sense, is not a subject of law. (...)



Consider the inequality between men and women. From the traditionalist point of view, this inequality of rights corresponds to an inequality of duties. Would it not be possible, to the extent that the purpose is equality, to increase the duties of women and establish balance? Under the traditionalist approach, this is inadmissible because god has willed that equality takes the form of an inequality of rights and duties, rather than any other form. [...]

From the traditionalist perspective, man not is the referent of the rules that apply to him, but only the object. This is not due to his nature; it is due only to divine will. If it were God's will that Man would not be protected, this would not have been any less just. We cannot read the Quran and interpret it, as the Mu'tazilites did, by reference to other things that can be discerned through reason. *Ta'wil*, the return to wisdom, beloved by the Mu'tazilites, is possible only because they consider that the Quran does not create value, but merely consecrates it; it does not create the truth, but merely tells it. [...] The Mu'tazilites refer to the nature of things and apply reason to reach what they supposed was the final objective of Islam: the best for humankind. This is the Islam which cannot be separated from the theory of human rights: Humanist Islam.

In traditionalist Islam, man is considered an *'abd*, the slave to a completely free divine will. No theory of human rights can be derived from this version of Islam, for the simple reason that man is absent'<sup>123</sup>.

'Certainly,' argues Borrmans, 'the pluralism generated by the extreme methodological variety of *fiqh* in the canonical schools depends largely on the theological vision that some have of the divine mystery: Is god the superior wisdom and are his orders reasonable, or is there absolute freedom and are his orders arbitrary? The Mu'tazilite theologians of the Middle Ages defended the first hypothesis - as their followers continue to do in modern times - while Ash'ari theologians representing classical and modern Sunni profess the second hypothesis. In this last case - and this is the common doctrine defended by the Salafists of today - the human act is perceived as good or bad (beautiful or ugly, useful or harmful), not because it is so and reason has discerned this, but rather because religious law, and therefore the will of god, says so. What is good, beautiful and useful is what God commands; what is bad, ugly and harmful is what God forbids. Everything, therefore, depends on the 'text' of the Quran and the Sunnah. Thus, the centuries-long debate which began between the Mu'tazilites and the Ash'aris continues today between Muslim traditionalists and modern believers. [...]

The current debates which Islamic countries face regarding the fundamental references of legislation still reflect this problem, and this was particularly evident when were deciding whether or not to accept the Universal Declaration of Human Rights in 1948'<sup>124</sup>.

The main obstacles to acceptance are as follows: the denial in Muslim law of the freedom to change religion; the threat of the death penalty for apostasy; corporal punishment (*hudud*), contrary to the right to physical integrity and human dignity; and, finally, the three fundamental inequalities enshrined in Islam between the free man and the slave, Muslim and non-Muslim, and man and woman<sup>125</sup>. These disparities, both with regard to the foundation of human rights and their formulation, are also reflected in the Islamic declarations<sup>126</sup>, as we will see below. We refer to what is discussed there regarding the basis of human rights underlying these texts.

It should be pointed out that all texts drawn up by Muslims in the field of human rights today are based on the primordial and universal power of a god who creates and provides (in the name of his *hakimiyya*) and the dignity of the human being elevated by god himself to the rank of his 'representative' (*khalifat Allah*) in the created world. God has incontestable rights

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123. Laghmani, S. (1997). Pensées Muslim et théorie des droits de l'homme. In: *Les droits fondamentaux. II: Universalité des droits de l'homme et diversité des cultures. Aspects philosophiques des droits fondamentaux*, p. 150. Translation from the original.

124. Borrmans, M. (2013). Éthique, Loi divine et lois civiles en pays d'Islam. *Se Comprendre*, 13/07, p. 6.

125. Charfi, M. (1983). Droit musulman, droit tunisien et droits de l'homme. *Revue Tunisienne de Droit*, pp. 405-423. See pp.408-411.

126. The Universal Islamic Declaration of Human Rights of 1981 proposes, in a preamble covering several pages, a 'confessional approach' to human rights, listing various theological principles that underpin these rights.

(huquq Allah) over human beings, to which correspond the consequent duties of human beings towards him, duties that become rights through their relationships with others<sup>127</sup>.

Nevertheless, there are currents in Sunni legal thought which are favourable to an interpretation of the law and human rights in accordance with the international texts of the United Nations. These lines of thought defend a thorough review of the traditionalist standpoint, and offer a point of contact with both Thomist thought and the reactionary school of natural law. 'These tendencies admit the existence of rights derived from nature as the order of created things, beloved by god. The precepts and principles of natural law can be reached by human intellect. And these precepts, therefore, can be used as a key for interpreting the revelation or the source of the law, with regard to issues not defined by revelation'<sup>128</sup>.

Both Christianity and Judaism consider that the movement towards the identification and proclamation of human rights is one of the most significant attempts to respond effectively to the inescapable demands of human dignity<sup>129</sup>. The Magisterium of the Catholic Church has continued to approve the Universal Declaration of Human Rights, proclaimed by the United Nations on 10 December 1948, and which Pope John Paul II defined as 'a milestone on the path of the moral progress of humanity'<sup>130</sup> and 'one of the most precious and important documents in the history of law'<sup>131</sup>. The Magisterium proclaims the characteristics of human rights - universality, inviolability, inalienability and indivisibility - in the same terms as the civil authorities<sup>132</sup>. It also defends the mutual complementarities between rights and duties, which are indissolubly linked - an issue on which both Judaism and Islam agree - since every right entails a corresponding duty<sup>133</sup>. Furthermore, it asserts the rights of peoples and the rights of nations - an issue under much discussion in the international community - and defines these as 'nothing but "human rights" fostered at the specific level of community life'<sup>134</sup>.

127. See Borrmans, M. (2000). Convergences et divergences entre la Déclaration Universelle des Droits de l'homme de 1948 et les récentes Déclarations des Droits de l'homme dans l'Islam. *Conscience et liberté*, 60, p. 34.

128. Ben Achour, Y. (2008). *Aux fondements de l'orthodoxie sunnite*. Paris: PUF, pp. 190-193. Ben Achour explains: « La philosophie sous-jacente à cet ordre naturel s'articule autour des idées fondamentales suivantes: 1) L'ordre naturel constitue, en soi, la démonstration de l'existence, de la puissance et de l'intelligence de Dieu [...], 2) Il n'y a donc pas d'aberration dans l'univers [...], 3) Etant ordonné, l'univers est explicable et compréhensible [...], 4) Cet ordre doit nécessairement être suivi de normes destinées à sa conservation [...], 5) Ces normes sont donc, sauf exception, elles-mêmes explicables et compréhensibles [...], 6) La raison et la révélation se conjuguent donc pour confirmer l'harmonie à l'intérieur de la nature et du droit [...], 7) Le caractère obligatoire de la norme vient, entre autres considérations, de ce qu'elle est une dictée de la nature, car c'est une contradiction absolue de supposer que les dispositions obligatoires qui règlent la vie peuvent aller à l'encontre de la nature qui est l'essence de la vie [...], 8) Cependant l'être humain, contrairement à l'animal, est un être intelligent et qui se sait voué à Dieu et à la reconquête de la vie éternelle. Cela l'oblige à sortir en partie de ses déterminismes naturels et d'être ainsi un 'être réglé', un 'être obligé' (*mukallaf*) [...]. L'homme est un obligé, par seconde nature en quelque sorte ».

129. Compendium of the Social Doctrine of the Church, No. 152. See also *Dignitatis humanae* (1966).

130. *Address of His Holiness John Paul II to the 34th General Assembly of the United Nations* (2 October 1979), Section 7. For Pope John Paul II, the Declaration 'remains one of the highest expressions of the human conscience of our time'. *Address of His Holiness John Paul II to the 50th General Assembly of the United Nations* (5 October 1995), Section 2. See also Compendium of the Social Doctrine of the Church, No. 152.

131. [Message of Pope John Paul II to H.E. Mr. Didier Opertti Badán, President of the 53rd Session of the UN General Assembly](#) (30 November 1998).

132. See Compendium of the Social Doctrine of the Church, Nos. 153-154.

133. *Ibid.*, No. 156.

134. *Address of His Holiness John Paul II to the 50th General Assembly of the United Nations* (5 October 1995), Section 8. In this speech, the Pope also states that the nation has: a 'fundamental right to existence'; 'the right to its own language and culture, through which a people expresses and promotes [...] its fundamental spiritual "sovereignty" '; 'the right to shape its life according to its own traditions, excluding, of course, every abuse of basic human rights and in particular the oppression of minorities'; and 'the right to build its future by providing an appropriate education for the younger generation'.

Despite the differences we have noted, the three monotheistic religions share an important area of common ground. Their respective sacred texts include a moral code that constitutes a solid foundation for human rights. The main precepts of divine and natural law are presented in the Decalogue - a text expressly revealed by god and shared by both Jews and Christians - which indicates the primary and essential norms regulating moral life that, to some degree, are known by all people<sup>135</sup>.

These precepts were formulated in Exodus 20:2-17 and Deuteronomy 5:6-18, although neither of them specify their distribution into 10 commandments. There are two divisions - those of St. Augustine and St. Thomas Aquinas - in common use by Catholics and some Protestants. The division by Philo, Josephus, and Origin, used by other Protestants, splits the first commandment into two and merges the final two.

Division according to JOSEPHUS and PHILO	Division according to AUGUSTINE and AQUINAS	Exodus 20:2-17	
		I am the Lord your God, who brought you out of Egypt, out of the land of slavery.	2
1	1	You shall have no other gods before me.	3
2		You shall not make for yourself an image in the form of anything in heaven above or on the earth beneath or in the waters below.	4
		You shall not bow down to them or worship them; for I, the Lord your God, am a jealous God.	5
3	2	You shall not misuse the name of the Lord your God, for the Lord will not hold anyone guiltless who misuses his name.	7
4	3	Remember the Sabbath day by keeping it holy.	8
5	4	Honour your father and your mother.	12
6	5	You shall not murder.	13
7	6	You shall not commit adultery.	14
8	7	You shall not steal.	15
9	8	You shall not give false testimony against your neighbour.	16
10	9	You shall not covet your neighbour's house. You shall not covet your neighbour's wife,	27
	10	or his male or female servant, his ox or donkey, or anything that belongs to your neighbour.	17b

Source: Maritain, J. (1986). *La loi naturelle ou loi non écrite*. Fribourg: Éditions universitaires, pp.228-229.

135. See Compendium of the Social Doctrine of the Church, No. 140 and Catechism of the Catholic Church, 1955.

Deuteronomy 5:6-21		
Division	First tablet of the Decalogue: honour God and his representatives on Earth	verses
1	I am the Lord your God, who brought you out of Egypt, out of the land of slavery. You shall have no other gods besides me. You shall not make for yourself an image in the form of anything in heaven above or on the earth beneath or in the waters below. You shall not bow down to them or worship them; for I, the Lord your God, am a jealous God, punishing the children for the sin of the parents to the third and fourth generation of those who hate me, but showing love to a thousand generations of those who love me and keep my commandments.	6-10
2	You shall not misuse the name of the Lord your God, for the Lord will not hold anyone guiltless who misuses his name.	11
3	Observe the Sabbath day by keeping it holy, as the Lord your God has commanded you. Six days you shall labour and do all your work, but the seventh day is a sabbath to the Lord your God. On it you shall not do any work, neither you, nor your son or daughter, nor your male or female servant, nor your ox, your donkey or any of your animals, nor any foreigner residing in your towns, so that your male and female servants may rest, as you do. Remember that you were slaves in Egypt and that the Lord your God brought you out of there with a mighty hand and an outstretched arm. Therefore the Lord your God has commanded you to observe the Sabbath day.	12-15
Second tablet of the Decalogue: honour your neighbour, as the image of god		
4	Honour your father and your mother, as the Lord your God has commanded you, so that you may live long and that it may go well with you in the land the Lord your God is giving you.	16
5	You shall not murder.	17
6	You shall not commit adultery.	17
7	You shall not steal.	17
8	You shall not give false testimony against your neighbour.	17
9	You shall not covet your neighbour's wife.	18
10	You shall not set your desire on your neighbour's house or land, his male or female servant, his ox or donkey, or anything that belongs to your neighbour.	18

Source: Developed by the author.

The equivalent of the Ten Commandments at Sinai is found in Sūrat al-Isrā (The Night Journey), in the Quran (17: 22-38):

22. Do not set up any other god together with Allah and so sit there reviled and forsaken.
23. Your Lord has decreed that you should worship none but Him, and that you should show kindness to your parents. Whether one or both of them reach old age with

you, do not say 'Ugh!' to them out of irritation and do not be harsh with them but speak to them with gentleness and generosity.

24. Take them under your wing, out of mercy, with due humility and say: 'Lord, show mercy to them as they did in looking after me when I was small'.
25. Your Lord knows best what is in your selves. If you are righteous, He is Ever-Forgiving to the remorseful.
26. Give your relatives their due, and the very poor and travellers but do not squander what you have.
27. Squanderers are brothers to the shaytans, and Shaytan was ungrateful to his Lord.
28. But if you do turn away from them, seeking the mercy you hope for from your Lord, then speak to them with words that bring them ease.
29. Do not keep your hand chained to your neck but do not extend it either to its full extent so that you sit there blamed and destitute. Your Lord expands the provision of anyone He wills and restricts it. He is aware of and sees His slaves.
31. Do not kill your children out of fear of being poor. We will provide for them and you. Killing them is a terrible mistake.
32. And do not go near to fornication. It is an indecent act, an evil way.
33. Do not kill any person Allah has made inviolate, except with the right to do so. If someone is wrongly killed We have given authority to his next of kin. But he should not be excessive in taking life. He will be helped.
34. Do not go near the property of orphans before they reach maturity, except in a good way. Fulfil your contracts. Contracts will be asked about.
35. Give full measure when you measure and weigh with a level balance. That is better and gives the best result.
36. Do not pursue what you have no knowledge of. Hearing, sight and hearts will all be questioned.
37. Do not strut arrogantly about the earth. You will certainly never split the earth apart nor will you ever rival the mountains in height.

Is this not, like an echo, the natural law that inspires every well-born man and what his Muslim *fitra* (natural disposition created by Allah) dictates in his heart of hearts? Yadh Ben Achour does not shy away from seeing here what he calls 'a 'second Fatiha', due to the majesty of its inspiration, at the same level as the verses of the first Surah of the Qur'an, the Fatiha (the Opening)<sup>136</sup>. We find here the very origins of the 'divine law' that Muslims call the *Shari'a*.

This second Fatiha has the privilege, according to Ben Achour, of guiding both believers and non-believers towards an inspiring, universally acceptable ethic of modern rights. 'Our Pakistani, Saudi, Egyptian and European fatwas simply arouse the derision of the world and the contempt of non-Muslim countries. Their inspiration is treason, because they condemn Islam to be no more than a religion of religious display and accoutrements, in which symbol takes the place of faith'. We would not stone Sakineh but for Islam. This is a grim and repulsive scenario from a discredited view of humanity. It is not possible to love Islam and accept such brutishness. We avert our eyes from these awful spectres and read the fourteen commandments of the second Fatiha<sup>137</sup>.

136. The Fatiha forms the obligatory opening of all Muslim prayers.

137. Ben Achour, Y. (2011). *La deuxième fâtiha: L'Islam et la pensée des droits de l'homme*. Paris: Presses universitaires de France, p. 21.

### 3.3. POSITIVE LAW BASIS

The positive law basis for human rights lies essentially in the values - and in the principles that derive from them - recognised in constitutions, whether explicitly or implicitly. There is a broad consensus which accepts dignity, freedom, equality and solidarity as the main founding values. As Pérez-Luno points out, constitutional values are threefold:

- (a) **Founding values**, which are static and form the basis of the set of constitutional provisions and institutions, as well as the legal system. German doctrine conceived them as core values (*Grundwerte*) and in the Spanish Constitution they are known as higher values (*valores superiores*), to emphasise their significance as the central basis which informs the entire legal and political system.
- (b) **Guiding values**, which are dynamic and orient the legal and political system towards certain predetermined goals or purposes and invalidate any normative provision that pursues different purposes or impedes the achievement of those set out in the axiological constitutional system.
- (c) **Critical values**, whose function, like any other value, lies in their fitness to serve as criteria or parameters for judging deeds or conduct. These enable jurisdictional control over all other norms in the legal system, which may entail their being judged worthy or unworthy, due to their conformity with or breach of constitutional values<sup>138</sup>.

In this context, the issue of the legitimacy or foundation of human rights becomes transformed into the issue of the legitimacy or legality of fundamental rights. Insofar as the principle of legality is one of the cornerstones of human rights guarantees, we will consider this principle in the section covering the internal institutional guarantees of human rights. It is enough at this point to indicate, by virtue of the above, the connection between the immediate basis of human rights and their positive law basis.

### 3.4. LEGAL-POLITICAL BASIS

As we pointed out when analysing the legal-philosophical basis of human rights, the idea of human dignity underpins the legal and political structure of the rule of law. Nevertheless, the issue that arises from this perspective is of how to lay the foundations of this connection between dignity and the rule of law, or - since it is the same thing - the basis of the legitimacy of the democratic state.

In this regard, current thinking provides two main responses: the theory of consensus and the theory of dissent.

- The **theory of consensus** is currently represented mostly by Rawls and Habermas, and to some extent Apel. Contemporary consensualists' antecedents can be found in modern contractarianism (Locke, etc.), but there is a key difference between them. While the latter concerned themselves with the problem of the origin of a legitimate power (the 'social contract'), consensualists focus on the mechanism guaranteeing not only the legitimacy (referring to the origin) of power, but also its legality (referring to its exercise). The mechanism of consensus involves certain ethics of 'communicative action' (Habermas), according to which all persons who are capable of speaking and acting can participate in discussion.

138. See Perez Luño, A. E. (1987). Sobre la igualdad en la Constitución española. *Anuario de Filosofía del Derecho, Nueva Época, IV*, p. 141.

- Everyone can:
  - (a) question any piece of information;
  - (b) introduce any statement into discussion;
  - (c) express their standpoints, desires and needs.
- No interlocutor can be prevented from exercising these rights.

On the basis of this mechanism, Habermas proposes a categorical imperative similar to Kant's, since it tends towards universal criteria, albeit different in origin. It is also similar to the procedure proposed by Rawls for establishing the principles of justice, whereby all interlocutors, covered by a 'veil of ignorance' that prevents them understanding their social situation, choose impartial principles which allow them to benefit even in the event that they are in the most disadvantaged social situation.

- The **theory of dissent** is represented in Spain principally by Muguerza, through what he calls 'the alternative of dissent' and the 'imperative of dissidence'. In Muguerza's view, the consensualist premise falls victim to saintliness, because such an 'ideal community of communication' and consequent consensus is impracticable. At the same time, he proposes that the foundation of human rights is not so much consensus on what is right, but the fact of there having been prior dissent among people, which is precisely what drives them to seek consensus<sup>139</sup>.

139. See Muguerza, J. (1989). La alternativa del disenso. In: Muguerza, J. et al. *El fundamento de los derechos humanos*. Madrid: Ed. Debate, pp. 19-56.



# SUBJECT 2.1.:

## 2.1.4. DEVELOPMENT OF HUMAN RIGHTS

### 1. INTRODUCTION

Before examining the international system for the protection of human rights, we need to look at the place of human rights in history. Indeed, human rights, contrary to what is often claimed, are neither a creation of the United Nations nor of European modernity, but arise in all cultures, religions and traditions.

The UN/UNESCO report *Our Creative Diversity* stated, in precise terms: “There are some recurrent themes that appear in nearly all cultural traditions. They can serve as an inspiration for a global ethics. The first source is the idea of human vulnerability and the attendant ethical impulse to alleviate suffering where such is possible and to provide security to each individual. Some notion of this is to be encountered in the moral views of all major cultures. (...) Similarly, it is part of the fundamental moral teachings of each of the great traditions that one should treat others as one would want to be treated oneself. Some version of this ‘Golden Rule’ finds explicit expression in Confucianism, Taoism, Hinduism, Buddhism, Zoroastrianism, Judaism, Christianity and Islam, and is implicit in the practices of other faiths”<sup>140</sup>.

### 2. ANTIQUITY

While this may be a long and winding road, a brief historical review takes us back to Antiquity. In around 1793-1750 BC, the Code of Hammurabi, King of Babylonia, was written. This is a text on jurisprudence inscribed on a basalt stele, which might be considered the first ‘code of human rights’. The act of writing laws in itself may also be considered an initial triumph in the protection of the individual against arbitrary power. Hammurabi wanted to ‘bring justice to prevent the powerful from doing harm to the weak’. But if the law is the antidote to the arbiter of power who imposes it as a norm, laws can also create the arbiter. Therefore, it is important to state that there is a law superior to human laws, namely natural law or divine law.

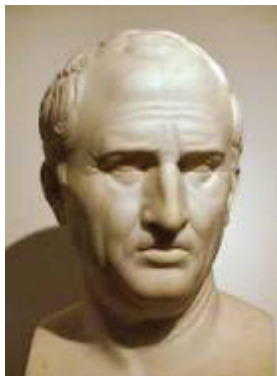
According to tradition, in around 900 BC, the ten commandments (or the Decalogue) were given by god to Moses on Mount Sinai. This is one of the fundamental texts in Judaism and Christianity, containing a number of requirements in the form of prohibitions, including several which are negative. They recognise specifically the right to respect for life, the duty to respect the property of others, the obligation not to give false testimony, and parents’ right to enjoy the respect of their children. (You shall not murder. You shall not steal. You shall not give false testimony against your neighbour. Honour your father and your mother.)

The Egyptian Book of the Dead and the Code of Manu can also be considered as antecedents to the encoding of human rights. These texts set the rules for the functioning of human societies that operate under a universal principle called natural law (Greece), Tao (China) and dharma (India).

140. UNESCO (1995). *Our Creative Diversity: Report of the World Commission on Culture and Development*. Paris: Oxford & IBH Publishing Co./UNESCO Publishing.

In the 5th century BC, Sophocles' Antigone proclaims the superiority of the individual conscience of human law.

In the century following, Plato seeks 'justice and otherness', while Aristotle seeks 'equality'. Meng Tzu wrote in 300 BC that 'The people are to be valued most [...], the ruler least.' and Siun Tzu, following the same line in the next century, wrote 'what makes society possible? Individual rights'.



Among the movements that tended generally towards respect for human rights and freedom, we should mention the three slave revolts that took place in the Roman world between 140 and 70 BC. The most famous of these Servile Wars - the revolt of Spartacus between 73 and 71 BC - was, like the first two, an attempted war to abolish slavery, which ended in bloodshed and torture.

The first theory of human rights owes a debt to the stoic philosophers, including Seneca and Cicero.

According to Cicero, 'True law is correct reason congruent with nature, spread among all persons, constant, everlasting. It calls to duty by ordering; it deters from mischief by forbidding. Nevertheless it does not order or forbid upright persons in vain,

nor does it move the wicked by ordering or forbidding. It is not holy to circumvent this law, nor is it permitted to modify any part of it, nor can it be entirely repealed.'<sup>141</sup>.

In another text he states, 'nothing is preferable to the plain understanding that we have been born for justice and that right has been established not by opinion but by nature. (...) we have been made by nature to participate in right, one with another, and to share it among all persons. And I want that to be understood in this entire debate when I say that [right] is by nature. But there is such corruption from bad habit that it is as if the sparks given by nature are extinguished by the corruption, and the opposite faults arise and are strengthened. But if whatever is according to nature were also according to judgment, and if human beings "thought that nothing human is alien to themselves" (as the poet [Terence] states), right would be cultivated equally by all. Those who have been given reason by nature have also been given correct reason, and thus law, which is correct reason in ordering and forbidding'<sup>142</sup>.

Seneca, in the 1st century AD, following the tradition of the stoics, states that 'man is sacred to man'. Christianity, which will focus on the 'human being' without exception or distinction in the name of individual conscience, will be systematised in the 1st century AD by St. Augustine, who, in referring to the concept of justice, effectively opens up the right to protest in the name of freedom of conscience.

The Quran, meanwhile, in the 6th century AD, states that the human being is deserving of unconditional respect.

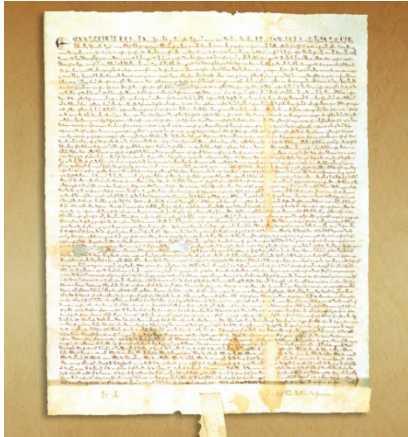
### 3. THE MEDIEVAL PERIOD: THE EMERGENCE OF THE CITIZEN

The influence of Christianity in medieval Europe gave rise to the emergence of the citizen as a rights-holders and not merely as the subject of a sovereign. The concept of the person had a considerable effect on the constitution of national law in European countries.

At this time, new claims emerged, as well as revolts against the arbitrary nature of absolute monarchies. In this regard, the earliest movements appeared in England. Provoked by the excesses of the monarchy. In 1215, rebel English barons drafted the Magna Carta Libertatum

141. Cicero. *On the Republic*. Trans. (2014). David Fott. Ithaca, N.Y.: Cornell University Press.

142. Cicero. *On the Laws*. Trans. (2014). David Fott. Ithaca, N.Y.: Cornell University Press.



(The Great Charter of Liberties). The barons severed their feudal ties and imposed their demands on King John. This became England's first constitutional document. It lists the privileges granted to various societal groups as well as guarantees of individual freedoms. Is also the first document to provide guarantees in writing of people's individual freedoms: the right to a fair trial, freedom of movement, etc.

In Geneva, in 1387, Prince-Bishop Adhemar Fabri ratified the Charter of Customs, Laws, Franchises, and Freedoms of the city.

## 4. MODERNITY



In the 16th century, two Spanish theologians, a Dominican, Vitoria, and a Jesuit, Suarez, contemplated the problems of peace, nature and the law. Vitoria was a professor at the prestigious University of Salamanca, in around 1535-1540.

Vitoria studied the 'rights of the [American] Indians'. In his *De Indis*, Vitoria expressed his points of view on the many excesses committed by the Spanish in America. He argued that Indians were not inferior beings, that they had the same rights as all human beings and that they were the legitimate owners of their land and property. At the same time, Bartolomé de las Casas exerted his influence over Carlos V during the approval of the new Laws of the Indies, which placed the Indians under the protection of the crown.

In one of the main treatises on 'just war', *De iure belli*, Vitoria examined the limits of the use of force to resolve conflicts between nations. He argued that war is lawful, but can only be waged in response and in proportion to an attack. Therefore, it is not lawful to wage war because of religious differences or to annex territory.

In *De civili potestate*, Vitoria reaches towards the theoretical bases of modern international law, of which Hugo Grotius is now considered one of the founders. He was one of the first to propose the idea of a community of nations based on natural law and to consider that international relations cannot simply fall back on the use of force. While Machiavelli considered the State as a morally autonomous institution (which cannot be judged by external standards), Vitoria demonstrated that its action in the world is subject to moral boundaries.

Francisco Suárez (1548-1616) taught in the universities of Alcalá, Rome, Coimbra and Salamanca. His thinking developed along the lines of Vitoria's and he is considered the father of international law.

In 1598, King Henri IV of France signed the Edict of Nantes, an edict of toleration. This document defined the rights of Protestants within France and ended the Wars of Religion between Catholics and Protestants. The Edict of Nantes allowed Protestants freedom of belief, where this already had been authorised, and in certain other cities. It also granted them some political rights (access to public positions), legal guarantees (equal distribution of Protestants and Catholics in all courts) and some military protection (around a hundred of places of safety for a period of eight years). In 1685, less than a century later, however, the Edict of Nantes was revoked by King Louis XIV, obliging between 200,000 and 300,000 Protestants to flee the country. The Edict of Nantes applied to only one of the country's minorities. The Jews, alongside other minorities, did not enjoy its protections.

## 5. THE LIBERAL REVOLUTIONS

Some experts hold that there is little support for the idea that human rights first appeared at the beginning of the 13th century. For others, the concept of human rights as such is contemporaneous with the Bill of Rights of 1689, which stemmed from the English Revolution of 1688 and put an end to royal absolutism. This is the first binding contract between the monarch and the self-declared 'sovereign' people. This 'contract' puts an end to the concept of royal absolutism and the power of divine right. It incorporates a declaration recounting the misdeeds of James II and enumerates the rights conferred on the people since 1215 (e.g. 'the execution of laws by regal authority without consent of Parliament is illegal'). The recognition of the Petition of Right by King Charles I in 1628 guaranteed the principle of political freedom (respect for the rights of Parliament) and individual freedoms (safety of the people).

Later, in 1679, and also in England, the procedure of Habeas Corpus was established, guaranteeing the rights of defendants and prisoners. In 1689, the Bill of Rights proclaimed the bases of the English constitution, putting an end to the royal absolutism of the Stuarts and declaring the rights of Parliament and citizens. It recognised respect, to some extent, for individual freedoms and freedom of belief for English Protestants.

Most historians agree that the modern concept of rights was born in the 18th century. The philosopher John Locke established that the social contract does not nullify the natural rights of individuals, and that there should be separation between the State - which should not interfere in the freedom of worship - and the Church - which should not interfere with civilian interests. This paved the way for the first modern text on human rights, the Virginia Bill of Rights in May 1776, formulated in the new land of America.

This, in turn, would form the basis for the Declaration of Independence of 4 July 1776. It was the first text presented in the form of a declaration of rights. The text set out the self-evident truths that all men are created equal, and are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness and that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed to effect their safety and happiness.

Throughout the 18th century, among the philosophers of the Enlightenment, the idea thrived of founding a democratically governed society ensuring citizens equal legal treatment, order, security and happiness. This, therefore, advocated the emergence of a relatively self-contained legal system with respect to politics and the establishment of democratic procedures through a recognised and stable set of rules, which could be invoked against the power of the State in the name of civil society.

These principles would guide the work of the National Constituent Assembly, formed from the Third Estate of the *Estates-General* at Versailles on 9 July 1789, putting an end to royal absolutism in favour of a constitutional monarchy and dedicating itself to the abolition of feudalism and the privileges of the two other Estates (the nobility and the clergy). On 26 August, it proclaimed the Declaration of the Rights of Man and of the Citizen.

This statement of principles, inspired by the 1776 American text, is considered a true founding text of human rights, since these rights are held to be universal and valid in all times and places, thus enshrining their 'universal' focus. It defined the 'natural and imprescriptible rights of man' as 'liberty, property, security, and resistance to oppression'. 'Liberty consists in the freedom to do everything which injures no one else'; this only makes sense when reliant on the principle of equality, which endows it with a revolutionary character. The first article reads, 'Men are born and remain free and equal in rights', while the second article reads, 'The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression'. Its focus is on civil and political rights, with an emphasis on exercising the necessary rights to make them effective; 'ignorance, neglect, or contempt of the rights of man are the sole cause of public calamities'.

While it has no normative value, the Declaration of 1789 was reaffirmed in the preamble to the Constitution of 27 October 1946, endowing it with constitutional status. The preamble to the Constitution of 4 October 1958, still in force, merely references the principles of the Declaration of 1789, confirmed and completed by the preamble to the Constitution of 1946.

In France in the 19th century, following the revolution of February 1848, the Provisional Government of the Second Republic, taking a major step forward, drafted a new Constitution. This established universal suffrage, abolished the death penalty for political reasons, reduced working hours, introduced social measures guaranteeing freedom of education and freedom to work, recognised the right of association and petition, and abolished slavery throughout the territory of the metropolis and the colonies.

During the 19th century, however, voices rose in opposition; while the industrial revolution flourished, the masses were suffering in miserable circumstances. The excesses of the industrial revolution gave rise to the first texts on workers' rights. This century was instrumental in the advent of social rights (rights that constitute effective state action and, in the majority of cases, a significant allocation of public funds).

The exploitation of man by man during the expansion of capitalism during the 19th century goes hand-in-hand with colonial conquest, demonstrating the limits of human rights in their reduced definition whereby they refer solely to individual rights. Yet on the emergence of Soviet Russia in 1917, constructed on the ruins of the Tsarist regime, and during the period immediately following, even liberal democracies granted social rights, under pressure from the lowest classes, and this gradually expanded the field of action on human rights to collective rights that considered the social dimension of the human person.

## 6. THE INTERNATIONALISATION OF HUMAN RIGHTS

The first half of the 20th century, scarred by two world wars and the Holocaust, gave rise to the internationalisation of human rights. The two wars demonstrated to world leaders that the idea that it was States alone who could make decisions on how to treat their citizens could not continue.

At the end of the second world war, the human community was confronted with the awareness of the acts of barbarism committed under Nazism, which had culminated in the genocide of Jews and Gypsies. This provided the impetus to organise international relations according to the principles of rights and common humanity in order to preserve the peace. Until then, the management of human rights had been considered a purely internal matter.

1945 also saw the emergence of the demands of colonised peoples who had fought as part of the 'forces of freedom' against the 'totalitarian powers' to exercise their right to self-determination as a human and a people's right. At the same time, the preamble to the Charter of the United Nations, adopted at San Francisco on 26 June 1945, sets out respect for human rights as one of the fundamental purposes of the organisation.

In the aftermath of the Second World War, the Universal Declaration of Human Rights was adopted by the United Nations General Assembly on 10 December 1948. This was the starting point for an extremely lengthy process of internationalising the concept of human rights. Douglas Griffin, American lawyer, suggests 'this internationalisation is one of the 20th century's most important legacies. It enshrines the recognition of individual rights and establishes the need for international cooperation among States'.

The United Nations Commission on Human Rights set up a Drafting Committee for the Universal Declaration, which included Eleanor Roosevelt (USA) as Chair, Peng Chun Chang (Republic of China) as Vice President and Charles Malik (Lebanon) as Rapporteur. René Cassin, the French member of the Committee and a respected jurist, prepared the draft, giving the Declaration its underlying structure, which he compared to the portico of a temple. The seven clauses of the Preamble are the courtyard steps, moving by degrees from the recognition of human dignity to the unity of the human family to the aspiration for peace on earth. Articles 1 and 2 are the foundation blocks, with their principles of dignity, liberty, equality and brotherhood. The main body of the Declaration forms the four columns. The first column (Articles 3-11) represents personal rights and freedoms. The second column (Articles 12-17) represents the rights of the individual in civil and political society. The third column (Articles 18-21) represents spiritual, public and political freedoms. The fourth column (Articles 22-27) represents social, economic and cultural rights. Crowning the portico is a pediment comprising three concluding articles that concern the duty of the individual to society (Articles 28-30).



The two main innovations to bear in mind are: firstly, the affirmation of a set of rights applicable not only to individuals but also to social groups and sovereign nations, especially in cases of interference; and secondly, the indivisible character and equal importance of collective rights, economic, social and cultural rights, and individual, civil and political rights, as the first specifically allows the application of the latter.

On 10 December 1948 at the symbolic location of the Palais de Chaillot in Paris, the final text of the Universal Declaration of Human Rights was formally adopted by 48 votes out of 56, with 8 countries abstaining. Yet while there are now more than 180 signatory countries, the principles set out in the Declaration remain merely 'guidelines'; it is a 'ray of hope', and a 'foundation for future commitments'; as with simple resolutions adopted by the United Nations General Assembly, the Declaration is not legally binding on the Member States. The covenants that protect and guarantee its application, however, are directly binding on signatory States, once they have been ratified.

The Universal Declaration of 1948 was followed by more than 70 international treaties, including the International Covenant on Civil and Political Rights of 1966. In Europe, most of these texts were absorbed and incorporated into the European Convention on Human Rights, adopted in 1950.

The many international treaties have gradually expanded the scope of human rights. In the 21st century, we need to distinguish between three types of rights: civil and political rights, which protect the individual (the right to life, freedom of religion, etc.); economic, social and cultural rights, whose objective is to ensure access to a range of benefits (the right to work, the right to social security, etc.); and 'third generation' rights, which are intended to serve the international community as a whole (protection of the environment and of heritage, for example). While on paper, fundamental rights seem to be adequately protected in many States, there remains the fundamental problem of applying the protection of human rights at international level.

The comprehensive internationalisation of human rights, together with the legal tools that enable the text to be enforced, is slowly progressing. According to Henri Leclerc, Honorary President of the League of Human Rights, 'Europe is an interesting and encouraging example of supranational human rights protection'. Europe has created the first supranational jurisdiction in the world, equipped with the European Court of Human Rights, based in Strasbourg. It has extended and strengthened the concept of the rule of law. States have agreed to reduce their powers in favour of a higher court whose judges necessarily transcend national and nationalistic divisions. At another level, the very existence of the European Union provides grist to the mill for promoters of human rights.

Yet the establishment of an international court capable of complying with the treaties seems a more delicate proposition. The aspiration to effective international justice gave rise to the International Criminal Court (ICC), which has been officially in operation since 1 July 2002. By February 2003, there were already 89 signatories. While the emergence of the ICC represents a significant step forward in the fight against impunity and the promotion of equity, its mere existence cannot change the situation within a few months. French Jurist Antoine Garapon suggests that 'the International Criminal Court's difficulty now lies in how to synthesise a product that does not yet exist - an operation based not only on international justice, but also on international political considerations'. These political considerations threaten the progress of the ICC. The United States has consistently opposed an international court that could hold US military and political leaders to a uniform global standard of justice. Patrice Rolland points out that 'the sovereignty of the State has always been the main obstacle to the protection and promotion of freedoms'.

To accelerate the process of protecting, promoting and internationalising human rights would require that countries accept that they must sacrifice part of their sovereignty. However, as the General Counsel to the International Commission of Jurists, Federico Andreu-Guzmán, indicates, 'reasons of State and humanitarian law are often contradictory.' The recent repeal, on 12 July 2003, of the Belgian universal jurisdiction statute shows that there is strong pressure in this area.

Universality, which guarantees maximum protection of human rights, has not yet been realised. Philippe Kirsch, President of the ICC, suggests, 'there will be decades to wait before we achieve universality, but I think that it is only a matter of time'.

## 7. DEFINITIONS OF HUMAN RIGHTS

At this point we can begin to define human rights. Among the many existing definitions, we submit the following three for further reflection:

1. Human rights are the rights derived from the inherent dignity of all human beings.
2. Human rights are the sum of individual and collective rights in State constitutions and international law.
3. Human rights are individual subjective rights guaranteed by international law, which can be claimed by any person against the State. They serve to protect human beings and their dignity in times of both peace and war.

Eleanor Roosevelt eloquently defined them in the following terms:

*'Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world'*<sup>143</sup>.

143. Excerpt from a speech by Eleanor Roosevelt at the presentation of *In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights*. 27 March 1958. United Nations, New York.



## SUBJECT 2.1.:

# THE CONCEPTUAL FRAMEWORK OF THE HRBA

**Hours: 7**

**Subject 2.1.5.** Religious rights and secularisation of the law

**Lecturer:**

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## SUMMARY OF THE TOPIC

The purpose of this topic is to facilitate how to understand basic rights in a secular society, both in the West and in countries of Islamic tradition. This context of secularization is where the nature, content and limits of basic rights have been proposed as we understand them today. It is true that it is a Western society phenomenon, but it is also true that it is spreading to other places on Earth as a result of "globalisation". The concept of basic rights that was born in this context is the one that has had the greatest repercussion in international organisations of a universal, European and American scope; but it is also one of the reasons that explain the main differences between the universal declarations of human rights and the Islamic declarations.

To better understand these phenomena, it was decided to outline the historical evolution of the secularisation process of society, especially in Western society (Sections 1 to 4). In turn, this makes it possible to check how far rights "of spirit" have evolved (i.e., the right to religious ideological freedom and conscience (Section 5). Finally, an explanation is hazarded as to how all these factors affect a globalised society as the one today (Section 6), and the challenges faced for the future of countries with a Muslim majority (Section 7). Thus, the goal is to relate secularization, its most important manifestations, at least from the legal point of view, and religious rights. In contrast, there is no intention of delving deeper into the meaning and regulation of these rights at the present moment, since that task is taken on in another unit.

It will be seen that the secularization of Western society first originated in the time of the Renaissance, although it was not brought into sharper focus until rationalism and the Enlightenment. Since those times there has been a separation in the different spheres of life (science, the interpretation of history, philosophy or politics) regarding religiousness, as if God no longer had room in society, or at least, as if all reality could be explained by reason without need of appealing to arguments of a religious nature. Man is left on his own with reason to draw up concepts (legal ones included) and solve problems. However, experience shows that the use of only reason does not offer solutions as stable as had been thought, which has led man into a situation of disappointment and loneliness which ends up in relativism. This latter assumes that the meaning of concepts is relative, even to the point of-in the case of axiological concepts-ethical subjectivism. From the legal point of view, a neutral third party

is invoked (the State) to draw up rules for everyone, but they at least theoretically supposed to be deprived of moral or ethical contents, which is not always possible.

Because of rationalism and the Enlightenment, some sectors even came to believe religion should be fought against for being irrational. As a result, in the case of the French Revolution and the Declaration of the Rights of Man and of the Citizen, only a right to voice an opinion on religious matters is recognised. In contrast, in the American context the right to religious freedom is guaranteed on account of the positive concept had of religion. This different starting point has marked the regulation of this right throughout the entire 19th century and part of the 20th in terms of both traditions, with the influence it has had on other countries. In any case, religious freedom today is a right recognized internationally and in most constitutions (which does not mean it is granted the same meaning) and is an important factor in understanding society and law in a global world.

While this discourse explains some of the most noteworthy characteristics of Western society and law, it is not necessarily applicable to Islamic societies, at least from the historical point of view. Indeed, in the Islamic world it becomes more difficult to draw a dividing line between religiousness on one side and political or legal on the other, since Islam encompasses and explains all reality. Therefore, it is also impossible to easily extrapolate Western-style concepts such as democracy, laicism (understood as the separation of church and State, or the State's neutrality toward religion) and the interpretation of some human rights. This has not prevented these concepts from penetrating into these places, whether by international pressure or by internal changes, as witnessed by the uprisings taking place in many countries since 2011.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for Human Rights Education approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

Specifically for *this topic*, participants will develop efficiently the following general and specific competences:

### GENERAL:

- **Appreciate diversity and multiculturalism:** understand and accept social and cultural diversity as an enriching personal and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** analyse and evaluate the consistency of the approaches, in particular, the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** to be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

### SPECIFIC:

- Suitably identify, interpret and apply the international, regional and national norms on human rights applicable to the different assumptions posed in their respective disciplines and professional areas.

- Contrast and evaluate situations, practices, legislation, local and national policies in accordance with the legal instruments on human rights ratified in your country, and suggest and plan out some efficient alternatives.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

United Nations, [Human Rights, Office of the High Commissioner, International standards on freedom of religion or belief](#).

Exposition of the topic included in the Educational Guide.

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

Ben Achour Yadh, « Droits du croyant et Droits de l'homme. Un point de vue islamique », *Islamochristiana*, 2008, n° 34. p. 111. Vid. aussi Aspects. Revue d'études francophones sur l'Etat de droit et la démocratie, 2008, numéro hors-série, pp. 113-124.

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## LEARNING OUTCOMES

By the end of the topic, the participants in training should be able to:

- Understand the advent of the progressive secularisation of society and its main effects throughout history and in the present day.
- Verify the effects secularisation has had on law, both historically and in the present day, and in particular, on the recognition, interpretation and protection of religious rights.
- Analyse the characteristics of globalised society and the function of law and religious rights in it.

## METHODOLOGY

Methodology:	Teaching tools
Expository method	Reading the unit and the texts proposed in Appendix 2. Interpreting and speaking about the pictures in Appendix 1.
Group discussions	Group solving and discussion of the activities proposed in Appendices 1 and 2.
Work groups	The activities in Appendices 1 and 2 can be carried out in teams.

## DESIGNING A SYLLABUS OF LEARNING ACTIVITIES

- Each student must read the topic given in the corresponding section. Self-evaluation exercises should be done.
- Whether individually or, preferably, in groups, the activities proposed in Appendices 1 and 2 will be carried out following the indications given. If done in groups, their members will elect a speaker to present the conclusions. The other groups can ask questions and debate not only with the speaker from that group but with any of its members.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Assessment criteria
Activity 1: Reading and reviewing the thematic unit	<ul style="list-style-type: none"> <li>5 hours</li> </ul>	
Activity 2: Performing the activity proposed in Appendix 1	<ul style="list-style-type: none"> <li>Interpreting the pictures and preparing a report: 20 minutes</li> <li>Presenting the group's conclusions: 10 minutes</li> <li>Debate: 15 minutes</li> </ul>	<ul style="list-style-type: none"> <li>Suitability of the interpretation and originality of the ideas: 40%</li> <li>Ability to give concise ideas: 20%</li> <li>Clarity of the presentation: 20%</li> <li>Participation in the debate: 20%</li> </ul>
Activity 3: Performing the activity proposed in Appendix 2	<ul style="list-style-type: none"> <li>Interpreting the texts and preparing a report: 30 minutes</li> <li>Presenting the group's conclusions: 10 minutes</li> <li>Debate: 15 minutes</li> </ul>	<ul style="list-style-type: none"> <li>Suitability of the interpretation and originality of the ideas: 40%</li> <li>Ability to give concise ideas: 20%</li> <li>Clarity of the presentation: 20%</li> <li>Participation in the debate: 20%</li> </ul>

## EVALUATION SELF-TEST

Five to ten multiple-choice questions for self-evaluation of learning.

- When can the secularisation of society be said to have started?
  - With the fall of the Roman Empire
  - With the development of the sciences in the Modern Age
  - With the Enlightenment
  - After the liberal revolutions
- Choose the correct answer
  - During modernity it is considered that reason, if well used, can generate legal concepts that may be generally shared
  - Modern man considers that rational legal rules can be used to regulate society so as to prevent discord and conflicts
  - Modern man identifies Right with law, such that outside the written (or positive) law there is no true Right
  - All the above are correct
- Postmodernity is characterised by:
  - Trust in human reason
  - Considering that God is the basis of Justice and Right
  - Trust in natural law
  - Fragmentation of ethics, values, and the different ways of developing human reasoning

4: Choose the incorrect answer

- a) Ideologies originated in the Enlightenment and the French Revolution
- b) Ideologies do not deal with ethical or moral questions
- c) Ideologies are usually based on very basic, elemental contents that, along with persuasive language, try to attract people more than prove the truth of what they propose
- d) Ideologies consist of a system of opinions and beliefs aimed at channelling attitudes and behaviours of the members of society or a social group

5: As regards globalisation, indicate which answer is correct

- a) The feeling of being uprooted that can come from globalisation is a good occasion for religions to appear as agglutinating elements that offer signs of identity to those who profess them
- b) It is a phenomenon that started in the late 19th century
- c) It has made migratory phenomena difficult, since people no longer need to go out to get products from other places or learn about other cultures
- d) In a globalised world, where economic and political factors are particularly emphasised, religion is not the object of attention in international circles and international organisations pay greater attention to it

6: Which of these elements characterised the French Revolution of 1789?

- a) It aimed to ensure peaceful coexistence among religions and ensure the free exercise of religion
- b) It was a revolution marked mainly by tensions between workers and owners of the means of production in the early stages of the Industrial Revolution
- c) It had a decidedly anti-religious nature. It considered religion as something irrational. It even tried to replace worshipping God with worshipping a Supreme Being or the goddess of Reason
- d) It tried to establish a union between civil power and religious authorities

7: The 1776 Virginia Declaration of Rights...

- a) Ensured the right to religious freedom for all people as a result of the positive concept it had the phenomenon of religion
- b) Established a system of religious tolerance
- c) Recognised the right to express an opinion on religious matters
- d) Wanted religious confessions to be subject to civil authority

8: Choose the incorrect statement

- a) The religious phenomenon was not related to the main historical events of the 20th century
- b) The Second World War was transcendent for guaranteeing basic rights, as it made people reflect back on them and recognise them in international declarations and covenants
- c) The right to religious freed is recognised in most constitutions
- d) The totalitarianisms of the 20th century attempted to eliminate religions or at least control them

## SELF-EVALUATION TEST

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Question	Answer key
Question 1	b
Question 2	d
Question 3	d
Question 4	b
Question 5	a
Question 6	c
Question 7	a
Question 8	a



## APPENDIX 1

Compare these two pictures shown below and relate them to the questions explained in this unit. The purpose of this practice is to understand the different way of reasoning in modern man—who trusts reason, and can lead him to conclusions shared by all—and postmodern man who understands that everything is relative. State their different interpretations and how these ways of reasoning can be transposed to the area of laws.

Diego Velázquez: *The surrender of Breda* (1635)



Pablo Ruiz Picasso: *Man with clarinet* (1911):



## APPENDIX 2

Read the following sets of texts and compare the concept they show about religion, and the way of recognising the right to religious freedom. In addition, take into account the way in which the State and the religious confessions should relate to each other in each one. Furthermore, relate these sets of texts to the way of recognising religious freedom in the Universal Declaration of Human Rights (United Nations, 1948).

1. On one hand, the 1776 Virginia Declaration of Rights, and the United States Constitution of 1791 (especially the 1st amendment).
  - [http://www.archives.gov/exhibits/charters/virginia\\_declaration\\_of\\_rights.html](http://www.archives.gov/exhibits/charters/virginia_declaration_of_rights.html)
  - [http://www.archives.gov/exhibits/charters/bill\\_of\\_rights\\_transcript.html](http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html)
2. 1789 Declaration of the Rights of Man and the Citizen, and the French Law of Separation of Church and State in 1905.
  - <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000508749>
  - <http://www.legifrance.gouv.fr/Droit-francais/Constitution/Declaration-des-Droits-de-l-Homme-et-du-Citoyen-de-1789>
3. [Universal Declaration of Human Rights, 1948.](#)

## SUBJECT 2.1.:

# 2.1.5. RELIGIOUS RIGHTS AND SECULARISATION OF LAW

## 1. DEFINITIONS

John Sommerville notes six uses of the term secularisation in the scientific literature. The first five are approaches to the definition while the sixth is more a clarification of its usage: <sup>144</sup>

1. With respect to **macro-social structures**, secularisation alludes to a differentiation, i.e., a process in which different social, economic, political, legal and moral aspects become increasingly specialised and different from one another.
2. For **individual institutions**, secularisation denotes the transformation of a religiously denominated institution into a secular institution.
3. In terms of **activities**, secularisation alludes to transferring religious activities into secular institutions. This is the case of social services, which used to be provided by a religious group but today are provided by the government.
4. As regards **mentalities**, secularisation refers to the going from life issues marked by transcendental or final concerns to more immediate concerns. For example, many Westerners today guide their actions more by their immediate consequences than by their eventual consequences after death. This reflects a religious decline on the personal level, or a dynamic toward a secularised lifestyle.
5. As it relates to **populations**, secularisation refers to broad social matters in religious decline, in contrast to the individual secularisation in point (4) above. This definition of secularisation is different from the one in point (1) above, as it specifically refers to religious decline rather than social differentiation.
6. Where **religion** is involved, secularisation can only be applied unequivocally to religion in the generic sense of the term. For example, reference to Christianity makes little sense without specifying exactly which Christian denominations.

In this topic we will mainly concern ourselves with secularisation as it related to the first, fourth and fifth points above.

Another important conceptual distinction is the one between secularism and laicism. We distinguish the *secular nature* of society (the population shows a clear religious indifference) from *lay society* (the State institutions are not subject to any constraint or justification of a religious, spiritual or theological kind).

Jean Baubérot also offers a definition of the process of secularisation and laicisation: "secularisation means a relative and progressive loss (with zigzags) of social (and thus individual) relevance of the religious universes with respect to common culture (...). Laicism, however, is mostly concerned with the place and social function of religion in institutional

144. C. J. Sommerville, "Secular Society Religious Population: Our Tacit Rules for Using the Term Secularization", *Journal for the Scientific Study of Religion*, 37 (2) (1998), pp. 249-53.

spheres and the diversification and social changes there in relation to the State and civil society.<sup>145</sup>

Ferdinand Buisson, one of the people who inspired the lay laws of the French Third Republic, defines laicism as the secularisation of a State's political institutions, taking into account that this State is not bound to any official religion nor takes on any religious conviction. The principle of the separation of State political and administrative powers from religious power is one application: "Only over centuries of long labour did the different functions of public life distinguish themselves little by little, separate themselves from each other and free themselves of the tight guardianship of the Church. The same force of events soon led to the secularisation of the army, and then to civil and administrative functions, and then to the judiciary. Any society that does not want to remain in a state of pure theocracy is obliged to separate the three branches of power (legislative, executive and judiciary) and make them independent and sovereign from the Church.

But secularisation is incomplete if the clergy conserves a right to interfere in, supervise, control or veto each of those powers and all of public and private life. This was precisely the situation our society was in until the Declaration of Human Rights. The French Revolution for the first time brought to light a clear idea of the lay State, a state neutral to all religions, independent from all clergy, unbound by any theological conception.

The equality of all French people in the eyes of the law, freedom for all religions, the constitution of the civil state and of civil marriage, and in general, the ensured exercise of all rights regardless of any religious condition were all decisive steps in consecrating secularisation.

Despite the reactions, despite the direct or indirect return to the old regime, despite nearly a century of political switchbacks and oscillations, the principle survived: the great idea, the basic concept of the lay State, i.e., the profound demarcation of the temporal from the spiritual, has come into our customs, never to leave again. Nothing, not the inconsistencies in practice, minor concessions, hypocrisies hidden under the name of respect for traditions, nothing has been able to stop French society from becoming the most secular, the most lay society in Europe".<sup>146</sup>

## 2. A SECULARISED SOCIETY

Talk of secularisation began with the crisis of the *Ancien Régime* and subsequent revolutionary period. The term is used to designate the gradual separation of civil from religious, to the point of a rupture between the two that has made a definitive mark on Western culture over the last two centuries. Over time, this word has expanded its meaning to include a varied set of phenomena that reach different cultural areas: the increasing separation of Church and State, and in broader terms, between religious life and civil life; the weakening of the sense of sacredness, the loss of the transcendental meaning of life and the need to keep up the relation with the divine or the need for salvation.

The earliest symptoms of secularisation date back to the Renaissance in Europe (late 15th-17th century). It was then that the autonomy of civil and cultural institutions began versus the ecclesiastic authorities under whose guardianship Europe had lived and grown ever since the crisis of the Roman Empire (the fall of the Western Roman Empire took place in 476 AD). However, we cannot truly say that there was any systematic rejection of the sacred or transcendental in those days.

The secularisation of society originated in the development of empiricism and science that began in the Modern Age (16th-17th centuries) and in the subsequent Enlightenment (18th century). On one hand, scientific advances gave rise to ruptures in the ways of understanding the world. The medieval universe, hierarchical and perfectly directed by God, was being

145. Jean Baubérot, *Laïcité 1905-2005, Entre passion et raison*, Seuil, 2004, p. 53.

146. Ferdinand Buisson, Extrait de l'article Laïcité, dans Dictionnaire de pédagogie et d'instruction primaire, Hachette, 1888. Facsimilé Gallica.

replaced by a mechanical-based universe that only functioned according to exact rules that man could understand-also on his own-and master by observation and experimentation alone. In this way, the discoveries by Copernicus and Galileo on the movement of the heavens, and specifically, the Earth orbiting the Sun, proved key to ending a theocentric concept of the world. First, Newton's discovery of the universal law of gravity showed that the world operated by its own laws, with no need for "anyone" to help it, nor for any "outside force" to sustain it and push it. Divine intervention is only required to create this world and set it in motion. Later on, Laplace denied the need for any type of divine intervention at all, which thus relegated God to a heavenly world far removed from ours.

Science explains the world better and better, making God less and less necessary for giving reasons about anything, especially from the time Newton's laws began spreading into all areas of knowledge. Natural laws are invariable and explain everything: the universe, life, society, even psychology and the human spirit. This leads to a progressive expulsion of God from every area.

Similarly, with Darwin, science came to biology. For him, the mechanism that explains the evolution of species is natural selection: the survival of the fittest and best adapted, and the disappearance of the weakest. Mankind runs the same fate and must evolve to survive. Man's existence and function no longer depend on divine will to create him for some purpose, but rather, natural selection alone is enough to explain the continuity of his existence.

Then with Marx, science was brought to bear on society. According to dialectic materialism, everything that exists is matter. This matter changes and develops in an interlinked manner. History is not made by ideas, but by facts and deeds, especially economic ones. It is enough to observe the history and deeds produced in society-the same way a scientist analyses a natural phenomenon-to understand the laws underlying how society operates. History, which until then had been believed to depend on divine providence, is now explained on the basis of economic and social mechanisms that can be determined scientifically. This, and not religious ideas, becomes for Marx the true driving force of history. The consequence is that God is also expelled from society and history.

And what of the soul? Does God still have a place in it, or can it also be done without Him? With Freud's theory of psychoanalysis, God is also banished from his last holdout: the human soul. Freud's theory extends the domain of science to this area as well, to explain its operation rationally, and thus provide a rational explanation of religion, art, dreams, and all human phenomena. God becomes nothing more than a sublimation of unconscious desires, a human creation.

All of this resulted in the positivism of Comte. From this perspective, the only knowledge from positive data is deemed reliable, from data proved empirically by experimentation and demonstrable by reason. Everything else that falls through the cracks is unworthy of being considered scientific, and thus real or true. Only the scientific method can reach the truth. After several centuries of evolution finding the meaning of things in myths or in the divine, humanity finally reaches what Comte called the scientific (or positive) stage. In it, man gives up on knowing the essence, the meaning or final purpose of everything and instead concentrates on explaining how it works, all without the burdens of the past.

Nietzsche went one step further by proclaiming the death of God. However, he went even further by also rejecting faith in reason, science and progress. He left man alone and questioned the whole Western civilisation. Life is the only thing that exists, and beyond it there is nothing, which is nihilism. Only a superman is able to enjoy a full life with its new values: strength, pleasure, the will to power and dominion, in sum: the intense quest of life. In this context, religion has no place, as it is a set of ideals meant to protect the weak and mediocre, and to constrain the action of those who seek life strongly.

As can be seen, we are at a time of full trust in reason, characteristic of modernity, that originates in the 16th and 17th centuries, is strengthened in the 18th century and reaches its peak with the theories by authors in the 19th century, as we have cited, that radicalise its philosophical underpinnings and ends in formal atheism. This trust is optimistic, as reason, science and the discovery of laws governing a great variety of phenomena (nature, society, history, even the soul) offer an uninterrupted progress able to explain everything. From the legal point of view as well, it was considered since the 18th century that reason, if well employed, is able to generate legal concepts that may be shared generally. If we take

into account that the way society and man function can be explained in laws and principles, modern man's necessary conclusion is that, by means of rational legal codes, society can be regulated in such a way as to prevent discord, social conflict and war. The law dominates everything, and beyond it are only chaos and disorder. Right is identified with law, such that outside the law there can be no Right. Thus, no legal value is granted to natural law or any other content that is beyond the written or positive law. However, as we shall see in the following section, this situation begins to break down with postmodernity and relativism.

Before discussing that, it is best to finish the exposition of the progressive secularisation of the West. We have seen that it has involved a continual expulsion of God from the different areas of life to the point of atheism. These currents of thought made their way into the political in totalitarian regimes such as communism and-at the other extreme-Nazism. The violence produced by these movements, and above all World War I and especially World War II, gave rise to a new current of thought that focused on the individual man and his specific existence: existentialism. Born in the context of those disorders, it was presented as an authentic humanism. One of its representatives, Sartre, based it on the idea that man is pure existence and pure freedom. Man is constantly creating himself based on acts of free will, without anything determining it, not even God. Another representative, Camus, sees the evil around him and concludes that the world is absurd. God cannot exist because evil exists. Given the evil that exists, there is only one path, and that is the fight against evil in favour of the specific man, the achievement of small goals in favour of the rest, the practice of solidarity.

We thus reach the current reflexive-conscious kind of atheism, i.e., a negative position with respect to the existence of God by those who have thought seriously about the question of God and, after making a reflexive effort (correct or not, or on the mark or not) have concluded that God does not exist. Therefore, human life can carry on without appealing to Him. An outcome of this reflection is that this contemporary atheism presents itself as a kind of intellectual integrity, a pitting of man against himself to explain what human life is to its last consequences, even if means stripping him of what little he has left of the concept of the sacred and renouncing the consolation of the divine. Man is left alone and takes on the responsibility of forging his own destiny in accordance with purely human criteria, offering it as an authentic humanism. Nevertheless, this is a conclusion reached by the few who have deliberated on this matter and, as a result of their reflection, have come to it. Most of the population living now as if God did not exist do not do so as a result of an intellectual process, but due to a relaxation of customs, by inertia, and indeed because materialism and hedonism have buried the transcendental and it is more comfortable to live as if God did not exist. In short, instead of outright rejection, the result is great indifference.

Nevertheless, we cannot ignore the fact that along with it, religious living is still alive in many sectors of Western society. For example, we find religious practices such as Sunday mass are still the phenomena that bring more people together at the end of the week. Furthermore, renewed efforts have been made at studies aimed at reaching God by faith as well as by reason. In other words, theological and philosophical studies are still being done to show that the existence of God is due not only to a leap of faith but is also reasonable. Despite all the scientific and satisfactory explanations of the world, man is still wondering about the ultimate basis of things, of why he exists and what it means. Therefore, true knowledge is not content with merely knowing how things work, but why they are as they are, where are they from and where are they going, what is their deeper reality. In short, people still need to learn about the world and about man in all his extension and about everything absolute in existence. When opening up to the world, man feels compelled to a foundation that is not identifiable with anything that exists, with the factual. He is placed on a new level or reality in which he outdoes himself to reach a higher, transcendental order that gives him stability and where he finds meaning in things. He is thus projected toward the Absolute, or in other words, toward God.

As can be seen, the initial affirmation of the consistency and worth of what is human-which has been under way with particular intensity since the Renaissance-has ended up in atheism. However, this is not a necessary consequence of reassessing what is human. Rather, this value of what is human is fully reconcilable with what is religious, because in appealing to what is transcendental, the mundane realities may also find solid footing. It may thus be concluded that the decision facing contemporary man is the one that mediates between full acceptance of the worth of secular reality, and thus of history thanks to its basis in God; and the attempt to face the event from an atheist view of the world.



### 3. RELATIVISM

As we have seen, modern man fully trusts in reason. Reason explains everything, even how society works and the set of human behaviours. In ordering society, the expression of reason is the law, and its content can be understood by anyone who suitably employs his capacity to reason, without appealing to elements beyond positive law, as occurs in natural law. Man has banished God from his life and he is left alone with himself. However, modern man is optimistic: reason is enough to progress in science, knowledge and even in social order. But what would happen if man's reason failed, his only basis that offers explanations about everything?

This collapse in the trust in reason occurred during the 20th century, originating at the end of the 19th century. Man found that, despite the achievements of reason and having eliminated the different elements that shrouded it and kept it from moving forward (God, religion, the transcendental), social conflicts still exist. Moreover, they are even more violent than the ones history had offered up to then: revolutions with massacres, new persecutions, and finally, two atrocious world wars. Reason had failed. Otherwise, none of that would have happened. Man plunges into deep loneliness and disappointment: reason no longer solves all his problems. No longer can we trust it to come to universal, generally shared concepts; there is no more talk of shared values or ethics. Reason only serves man for himself, but not to reach any conclusions that he can necessarily share with everyone else. Reason only lets him find "his" truth, but not a truth common to all peoples. Thus, began postmodernism, characterised by the fragmentation of ethics, values, and the various ways of developing human reasoning. It is the time of man's loneliness: in the modern age, he expelled some of the fundamental elements to his life and values, such as God, religion, tradition and customs, and was left alone with reason, as yet universal. But with postmodernity he sees he cannot trust that universal reason either, so in the end he can only trust his personal judgement and individual conscience. No truths are absolute or susceptible to being shared; rather, they are only the ones created individually by man and valid only for himself. Ethical subjectivism prevails.

One of the products of postmodernity is relativism: everything is relative, there is no absolute truth, everything depends on what each person believes. Differences are praised, considering that the only thing clearly acceptable to everyone is the rejection of universalist discourse, usually qualified as the wish to impose one specific culture on the others. In this way, religions, with their proposal for universal explanations to man's deepest questions and their eagerness to spread, are considered particularly dangerous, which leads to the proposal of banishing them from the public sphere and confining them to personal privacy.

This situation gives rise to an exaltation of what is legal. The existing ethical dispersion makes it difficult to reconcile the different orientations. All are understood as having equal value, and for that very reason they must coexist without overlapping, even without mixing, in order to maintain their "integrity" or "purity". The only way to reconcile these ethics is through an external mechanism based on mutual agreement: the law. The legal code thus becomes the place to find the criteria that can overcome their moral disorientation. Citizens find that positive law provides the trust they refuse to give to natural law.

In this process, ethics is split into unequal systems. In turn, morality is separated from law so that there is no confusion between the two, and thus, law can then regulate social co-existence, from a distance with respect to morality presented as the sole attempted safeguard of its neutrality. What legitimises the lawmaker is not so much the content of the law as it is showing that it is fair. This becomes utopian from the moment no one knows any more what justice is, there is no shared concept of it, and the proposal of a general idea of it may elicit criticism because it is seen as imposing a certain set of moral values. Legitimacy is thus shifted to the rules being approved in accordance with the due procedure. The result is that it elevates what is procedural to the highest rank of importance while dropping its content- the material aspects- down to second place. The only thing that matters is that the content be as aseptic as possible so as to avoid any suspicion of wanting to impose a particular belief.

This way of thinking does not take into account that there are matters that need to be legislated that show a clear and undeniable ethical dimension. This is the case with teaching,



and with bioethics, among others. Consequently, there will always be a need to make a value choice. At this point, the lawmaker must make an effort to find ethics generally shared in a society, regardless of whether such collective ethics are based on a particular belief. On the other hand, the desire to preserve what is legal from the influence of religious beliefs may give rise to the lack of the latter being replaced by non-religious beliefs, or most likely, by ideologies. Indeed, as they are not schools of thought of a religious nature, they appear to be free of any ethical or axiological contents, so they are presented as neutral and thus apt for informing the actions of public powers. However, it will not always be that way. As we have seen -and will examine more of in the next section- some schools of thought and ideologies take on a clear ethical dimension and offer an answer to man's deepest questions and his relationship to the transcendental (whose existence they sometimes deny) with arguments that axiologically bind man with the same strength as religious beliefs do to those who profess them. This attitude also means a failure of the principle of neutrality or laicism in the terms studied in the third lesson.

## 4. IDEOLOGIES

An ideology is often described as a system of opinions and beliefs aimed at channelling the attitudes and behaviours of the members of a society or social group. Although ideologies vary and their orientation and content largely depend on the adjective that accompanies them (political, economic, moral, etc.), all of them participate in this general definition and share this intention of guiding collective life on the basis of a particular concept of man or society.

To find their origins we must go back in time to the Enlightenment and the French Revolution. That was when the established order from centuries past was severely criticised to the point of bringing it down. Ideologues, as the intellectuals were called who set the climate of ideas that encouraged the bourgeois uprising, not only went about drafting a theoretical critique against the past, but also realised the importance it could have in the future to make thought come true. That is why there too particular care with the practical dimension of their theoretical activity. Indeed, ideology was shown on one hand as a general science that would be the basis for all the orders of knowledge (nature, man, society, etc.) and thus encompassed the grounds for public and economic life of the new society so as to establish and maintain a fair and rational State. These lines of thought were criticised by philosophers, who saw them as lacking in any scientific base and not constituting a systematic set of reasoning, but proposals that varied according to the circumstances of each time and place.

With the later arrival of liberal and democratic regimes, ideologies became increasingly more important. On one hand, ideologies -especially political ideologies- appear as theoretical supports for the action plans of parties or organised groups who intended to participate in public life. In this way, they have a practical orientation, as they appear as the theoretical underpinnings of decisions taken to achieve specific goals, such as economic plans, social reforms, infrastructures, etc. On the other hand, the heterogeneity of thought in society today has set them ahead of other belief systems to give an apparently satisfactory answer to mankind's questions, even though they are sometimes more appealing because of how they are said than how solidly they are constructed.

The function of ideologies at the present time can best be understood if we go back to the definition given above and analyse its constituent elements. First, ideologies are presented as systems of opinions and beliefs. The fact of being a system implies a formal, orderly exposition, which, as they are meant to be spread, does not exclude them from using persuasive, emotional language, simplifying the contents by means of resources from propaganda (symbols, slogans, style of speaking or writing, etc.). They aim at convincing before proving the truth of their contents. This system made up of a set of opinions or even beliefs. Generally, they start with very basic contents that are then used to give an overall explanation of whatever the ideology refers to (politics, the economy, ecology, etc.) but that one way or another end up affecting the way of conceiving the social order and man himself. Some ideologies never go beyond the purely political, economic or otherwise. But others manage to reach the spiritual sphere of the person from the moment their contents, no matter how innocuous they may seem, harbour an undeniable moral or ethical nature. This is an important fact that political powers would do well to heed, since the choice of a particular ideology as an object of preference or aversion may cause a rupture in the principle of laicism

or neutrality. Thus, just as there cannot be a privileged or persecuted religious belief, nor can there be a privileged or persecuted ideology (at least among those that feature axiological contents). As soon as an ideology is projected on the ethical or moral field, it should be treated by the public powers in a similar way as religious beliefs.

Second, such as system of opinions or beliefs is aimed at channelling attitudes and behaviours of the members of a given group, class, or society. This means that ideologies have functions to meet in their target area, whether a group, a class or all of society. The functions usually considered as fundamental are the following two. The first consists in developing or maintaining a system of aptitudes or behaviours adapted to the goals set by the ideologues who have established this system of opinions or beliefs. The second one encourages the cohesion of the members belonging to the area under the influence of a particular ideology so as to make it easier to achieve the aims of the ideology.

## 5. RELIGIOUS RIGHTS

This is not the time for a profound examination of the meaning of the right to free thought, conscience and religion at this time. There is already a specific unit on that subject. It suffices to say here that these rights have been evolving as society been undergoing the secularisation discussed above, along with other related phenomena (also examined here) such as relativism and the spread of ideologies.

First to be mentioned are two ways of assessing the religious phenomenon, both of which arose from the Enlightenment: one is French in origin, which took form with the French Revolution and the liberal revolutions. It was a negative concept of religiousness. Therefore, there was not so much recognition of the right to religious freedom as a right to voice opinions on the matter.

The other way was the one forged in the British colonies in America, inhabited by people who had been exiled from the metropolis for basically religious reasons and who wished to carry on professing their beliefs peaceably. Thus, they started from a positive concept of religiousness. How this right is recognised on the international stage up to the present day will be examined below.

### 5.1 RELIGIOUS RIGHTS IN THE FACE OF RATIONALISM AND LIBERALISM

After the excesses of absolutism of European monarchies that reached its peak in the 17th and 18th centuries, and in the face of religious persecutions throughout Europe since the 16th century as a result of the separation of the protestant churches from the Catholic Church, the idea of religious tolerance began to take hold. This line of thought was the result of the influence of the rationalist school of natural law in the 18th century, during the time of the Enlightenment. Thus appeared the declaration of the existence of a set of rights inherent to human nature, and upholding that the people are the holders of power.

As a result of these ideas, the late 18th century saw the French and American Revolutions, each of which put forth its own declaration of the rights of man. One of those rights is that of religious freedom. The aim was firstly to assert the individual right to religious freedom and secondly, try to settle the relationships between the State and religious confessions.

Even though the American and French declarations are based on rationalism, the religious factor is treated differently in France and in the United States. In America, men were founding a new society, free from the past, and they aimed to ensure a co-existence free of any intolerance. This is reflected in Section 16 of the **Virginia Declaration of Rights from 1776**, which stated the following: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity toward each other".

France, however, started from a past marked by royal absolutism and a State-mandated confession. This gave rise to greater tensions that were attempted to be solved in different

ways. On one hand, they sought to control the Church more by subjecting it to the State. On other occasions, the aim was to replace worship of God with worship of Reason or the Supreme Being, which led to Deist philosophies replacing traditional religion. Religious freedom was consecrated in France in article 10 of the **Declaration of the Rights of Man and of the Citizen** (1789), which established that no one could be disturbed because of their opinions, even religious ones, within the limit of public order. Unlike the Virginia Declaration, however, it did not expressly guarantee freedom of worship. In the United States, religion was seen as something positive whereas in France it was considered negative because it gave rise to discrepancies among men and to wars. It was also given a bad reputation because, in the opinion of some rationalists and the Enlightened, the Church had been allied to the power of the kings and had favoured the continuation of the absolute monarchs. In the end, they believed the postulates of religions were irrational, as the truths of faith were neither empirically nor scientifically provable. For that reason, they concluded that they were not in fact true and should be banished for hindering the progress of science, knowledge and the use of reason.

Little by little, people began to understand that the best way to guarantee religious freedom was to separate religious confessions and the State. This was made expressly manifest for the first time in the First Amendment of the **Constitution of the United States of 1791**. The State was considered incompetent on religious matters. The separatist model was taken to Europe later on. However, in Europe the separation took on an anti-religious connotation, a legacy from the motivations stated above.

At first, the intention was to subject religious confessions to the common legal code. That way, inside the State there would be nothing that could escape the arm of the law. However, the State was anxious to control all ecclesiastical matters -a phenomenon known as **liberal jurisdictionalism or regalism**, which even led to the State's dictating specific norms to regulate this matter. Thus, a Law of a special nature appeared and spread throughout Europe and some countries in the Americas during the 19th and early 20th centuries.

This type of policies that attempted to ignore the structure of the Church and subject it directly to the empire of state law was not successful due to the people's adherence to the Catholic faith.

## 5.2. RELIGIOUS FREEDOM IN THE 20TH CENTURY

The 20th century began with a prolongation of the British and French imperial colonies following the fall of the Spanish and Portuguese empires. Also, the Austro-Hungarian Empire in Europe and the Ottoman Empire in Asia Minor were still existing at that time. Tensions between the two powers resulted in the First World War.

This was also a time which saw, from the legal point of view, the consolidation of **positivism** and **formalism**. In addition, the social issues left over from the previous century caused numerous tensions that resulted in revolutions such as the Russian Revolution in 1917. The new regimes resulting from these evolutions, along with the wounds left by the First World War, favoured the appearance of totalitarian regimes that generally featured a hostile attitude toward religion.

One of these regimes was **communism**, for which the citizen's religious freedom was *freedom from the narcotic of religion*. Religion was an alienating phenomenon that tried to keep man from real problems by putting his faith in a make-believe world. It formed part of a superstructure created by the powerful classes to continue oppressing the people under them. Only by means of class struggle and overcoming this alienation can man be truly free. It is true that most communist regimes disappeared along the 20th century, particularly after the fall of the Berlin Wall in 1989. However, even today there are occasional versions of this overlap as a result of lay ideologies that wish to eliminate religiousness from the public sphere, relegating it only to the private sphere.

Another type of totalitarianism was **German Nazism**- which arose in 1933- and **Italian fascism**, which came to power in 1922, being less extreme than Nazism. This was what has generally been called "right-wing totalitarianism". As concerns their stance on the phenomenon of religion, Italian fascism showed a less aggressive attitude than German National Socialism. For practical reasons, realising the presence of the Church in Italy, fascism tried to draw in

the Catholic population and get close to the Church. However, this did not mean the regime was accepted by the Church, as witnessed in Pope Pius XI's circular from 1931, titled *Non abbiamo bisogno*. An achievement at the time was the signing of the Lateran Pacts in 1929, creating the State of Vatican City and settling the "Roman question", i.e., the problem of reaching an understanding with the Church as a result of the invasion of the Papal States by the Kingdom of Italy in order to complete its process of unification.

As regards German Nazism, its politics were soon condemned by the Catholic Church, which brought about the immediate persecution against it and its members (obviously aside from the well-known persecution against Jews for racial reasons). Pius XI censured Nazi politics in his circular *Mit brennender Sorge* in 1933.

The Second World War not only put an end to these regimes; it was also cause for deep reflection on human rights to prevent such disasters from ever happening again. From then on, international organisations began to spring up to watch over the recognition and guarantee of these rights, on both a regional and worldwide level. The new States' constitutions also reflected the guarantee of these rights.

## 6. GLOBALISATION AND RELIGION

Globalisation is the situation of communication and interdependence that has taken place in countries around the world as a result of advances in communications, science and technology. A unification is under way in a broad range of fields giving rise to an interdependence in economy, politics, culture and other fields. This makes people from all over the world become inhabitants of the so-called "global village".

The driving force behind this phenomenon has been Western civilisation, which led the advances in the aforementioned fields and has let their values spread, thereby tending to the unification of the planet. This has taken place particularly since the Second World War, and even more clearly since the fall of the Berlin Wall in 1989 and the disappearance of communism. It is one more factor configuring society today and also affects the areas of beliefs and law. Regarding beliefs, it is true that the globalised world lets us travel to places where the cultural and religious context is certainly different from the one we are accustomed to seeing around us, and it also lets us easily find texts and images from other cultures that help us learn more about them.

However, the nexus between globalisation and religion takes on other, broader and richer dimensions. First, cultural expansion and the ability to transmit messages to far-off places is nothing new for most religions. Because of their universalist vocation, it has been a constant historical process of tending to spread across the globe to preach their doctrines and convert people.

Furthermore, we cannot ignore that the globalised world has given rise to a process of de-territorialisation, one without limits or borders, of the universal over the personal, of the appearance of standards of behaviour on occasion superficial but that have been strong enough to take away vigour from different belief systems and cultures. As a result, the globalised world, at least in this regard, shows uprooting, loss of identity and a degree of coldness. The old identification between territory and traditional religion that forged the culture of a place grows blurry in the presence of new religions (some of which are already "part of the territory", such as second- and third-generation Islam in Europe) and the secularisation of society and the corresponding heterogeneity of beliefs.

Religions are thus presented as agglutinating elements of people independently from where on the planet they live. In a fast-moving and disperse world, religious confessions offer proposals and contents in which one can recognise oneself and find meaning and identity, and where ties of solidarity appear between members of a community even if they are far away from each other. Thus, within a globalised and secularist world, there are also calls for a space for religious-cultural identity.

One last point needs to be made. Religion sometimes ends up affecting the politics of countries, even on an international scale. It would be impossible to understand relevant phenomena such as the creation of the State of Israel without first understanding what

Judaism is along with one of its main political manifestations, which has been Zionism. In turn, the conflicts with the Palestinians and the situation of the Christians in these places have a clearly religious origin on which the international community continuously focuses its attention. Other phenomena such as the “Arab springs” of the North African countries also have religion-related causes (among others) that must be known in order to grasp the true dimension of these revolutions. Similarly, it would be impossible to understand the workings of some of the monarchies in the Islamic world (Morocco, the Gulf nations, and especially Saudi Arabia) without a good grasp of Islam, not to mention phenomena such as the persecution of Christians in some countries of Muslim majority, or in China, or in the extreme case of ISIS.

These and other similar situations reaching us daily through the mass media give rise to constant concern on the international stage. Proof of it is the resolutions of the United Nations and other international organisations that attempt to keep the world in balance. Another reflection of this situation is the intensity of the conversations held between the governments of different countries and the pacts they have sealed to prevent outrageous or terrorist behaviours that originate in religion, or to ensure that religious persecutions cease in other parts of the world. In addition, the wish to maintain relations with other countries that have undergone major political changes, due in part to religious reasons, among others, requires a sufficient knowledge of the culture and main religions in those societies.

In conclusion, far from the predictions of the disappearance of religion in the 21st century, religion has become the backdrop -causes or effect- of multiple relevant events on an international scale, and for that very reason they cannot be afforded correct treatment or stable solutions if the underlying religious or cultural factor is ignored or unknown.

## 7. ISLAMIC COUNTRIES FACED WITH SECULARISATION AND GLOBALISATION

All of what has been set forth so far shows the process of secularisation in the West and its social and legal effects, as well as the consequences it has had on rights regarding religion. It may be stated that in our globalised world, these concepts tend to spread out across the planet. The result of this, regardless of a country's own traditions, is that international demands can be made for an interpretation and application of the basic rights and the political institutions that answers to Western ideas (which are the result of the cultural legacy I have attempted to explain on these pages). In addition, it makes the various different countries -including the ones with Islamic tradition- try to take on political and legal ways of working that address these international schools of thought. The so-called “Arab springs” may, in some ways, be one of its reflections.

The question we must ask is whether the concept of Western secularisation and its different effects can find a parallel situation in Islamic countries. This task presents several difficulties. First and foremost is the system itself of how religion relates to civil matters in each context. The distinction between religious matters and all the other areas of life -namely, the political, has been made possible in the West due to its Christian tradition. Indeed, from the very start, Christianity declared that, although the world was one and only one God created it, there were two autonomous areas in life, which were the religious and the political. In contrast, in Islam this demarcation cannot be made quite so neatly. It may be claimed that Islam is both a religion and a temporal community. It gives rise to the appearance of a community, the *umma*, guided by a single religious faith, and that faith is projected directly onto the temporal structures. Thus, it may be said that the spiritual sphere in Islam has larger projection than in the West since it is conceived as an inseparable whole that encompasses all aspects of public and private life for the believer and the society.

On the other hand, it must be taken into account that by the time States began to take shape in the Christian West, there had already existed a perfectly organised and hierarchical Church that even had its own legal code (called canon law). Indeed, for centuries after the fall of the Roman Empire, there were only some kingdoms whose power was not very strong and whose organisation was much less than what the Church had. Consequently, it was in fact possible to differentiate political power from religious authority.



In contrast, in the Islamic world, it happened differently. In places where political power managed to impose its sovereignty, religion could not constitute itself into an organised society or create a hierarchical clergy. The spiritual authority continued to be fragmented, unable to effectively repress the expression of the different spiritual sensibilities where different legal schools and traditions coexisted. Lacking a clear separation between temporal power and spiritual power, it may be claimed that Muslim societies set up a model of cooperation between the two powers based on a distinction of competencies between the religious authorities and the political authorities. In the West, the two areas were separate, which made confrontations possible. However, the division of tasks inside the classical Muslim system made lay revolutions such as those in the West unlikely to happen. This favoured a more or less harmonious transition from a political order marked by religious values to a new order dominated by the values of rationalist modernity.

The result is that, while in the Christian West the secularisation process has prompted the appearance of laicism, in other societies secularisation has happened in discreet points and has only made superficial achievements in separating politics and religion.

The 19th century was a turning point in Islamic societies. Until then, the use made by the authority of being able to enact rules for society to operate smoothly had not particularly worried religious men, since it had been carried out within the limits of moderation. As of the 19th and 20th centuries, the speed of the social and economic changes led to an unusual development of rule-making by the ones governing, who questioned the existing order in Islamic law. Lay-inspired reforms were carried out based on the view that critical thinking and a rationalist interpretation of Islam could be the best means to renew the moral and spiritual bases of these societies. Furthermore, this stage coincided with the process of Western colonisation, which encouraged the adoption of European political and legal institutions and the strengthening of secularisation. Islam, which used to occupy all public space, became forced to withdraw from certain fields such as politics and legal institutions, especially public ones but much less so from private ones. That way, it once again became a common heritage where everyone could seek inspiration and everyone could make use of it.

Nevertheless, this entire process did not stop the public powers from appealing to religious principles, as continues to happen for example in the constitutions of these countries, or in international declarations of rights in Arabic or Islamic areas, to ensure political continuity and make society more cohesive and because, at the end of the day, the culture of these societies inevitably responded to centuries of Muslim tradition.

From here on, several different scenarios are imaginable, all predicated on the need to find the appropriate balance between Islam, law and politics. On one hand, the separation of politics and religion, along with the potential loss of identity that this may lead to, and the fact that religion is available to everyone, may give rise to it being misinterpreted and furthermore, to it acquiring a political connotation. This may lead to the Islamic fundamentalism intent on refashioning the political and the State on new Islamic bases, interpreted in a way that suits the fundamentalist school. Indeed, we have seen the proliferation of Islamic terrorist groups in recent years, especially in the Middle East, Asia and Africa, with a significant capacity for terrorist activity in Europe and America as well. It even includes the formation of the self-denominated "Islamic State".

On the other hand, current traditionally Islamic states shift between their cultural heritage and Islamic religious heritage, and their opening to international political and legal schools of thought that have increasingly greater weight in our globalised world. The balance between tradition and current trends needs a particular sensitivity to achieve success and stability. In this case, on one side we have Islamic tradition, which -as we have seen- tends to unite religion and politics more closely than the West does, and even that despite the secularising motions we have seen above. Similarly, an international current of a Western kind sweeps in, demanding for (among others) greater separation between the two spheres. Proof of this dichotomy can be found in the fact that religion is not always at the heart of political events. This was the case in the uprisings in Tunisia in late 2010. At least at its start, it responded to purely secular motives, without invoking religion -although this did not stop Islamic parties from being formed and demonstrating publicly, but later. These revolutions have had common elements, such as the following: a condemnation of authoritarianism, corruptions and economic and social inequalities, as well as a demand for democratisation, for more political participation, and a more equitable economic development that offers

better opportunities. On the other hand, at least at its start, the protagonists were not specific leaders or political parties, nor were they Islamic movements. It began as a civil mobilisation that later turned into different situations in each country.

In parallel, from the international sphere comes occasional criticism on the recognition of basic human rights in Muslim States. It is adduced that even though they recognise them formally, even in their constitutions, they are interpreted too narrowly and there are not enough guarantees of their compliance. The answer given on occasion is that they recognise those rights, but they interpret them in accordance with their cultural tradition (which is Islamic), which does not necessarily match up with Western culture. This is why their constitutions and the international declarations on rights in the Islamic or Arabic world invoke this religion and normally identify it as the source of inspiration for their contents.

Either way, the proximity still found between religion and politics in Islamic countries gives rise to a characteristic oscillation between the more or less visible presence of Islam in politics and law and the universal needs imposed by its insertion in the space of the temporal and the profane. The definition and establishment of a lasting, solid democracy, the achievement of a suitable balance of powers, of the important conjugation of cultural and religious tradition with current international schools of thought on the political and legal are necessary elements for laying the groundwork for the State. Nevertheless, these phenomena is always move slowly and require a great deal of reflection and prudence.



# SUBJECT 2.2.:

## OPERABILITY OF AN HRBA

**Hours: 10**

**Subject**

- 2.2.1. International human rights protection systems
- 2.2.2. Regional human rights protection systems: Monitoring Instruments and Systems
- 2.2.3. Islamic Declarations of Human Rights
- 2.2.4. Scope of the obligations of international law: acceptance, renunciation, derogation and reservations
- 2.2.5. International protection mechanisms: cooperation, commitment and supervision
- 2.2.6. Constitutional protection of human rights and national protection mechanisms
- 2.2.7. The human rights approach as a tool for social intervention and programming in development cooperation

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## SUMMARY OF THE TOPIC

This topic provides a general introduction to the main international instruments relating to human rights. The main new instruments presented here set international standards for the protection and promotion of human rights, which States can subscribe by becoming a party. These are:

- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- The International Covenant on Economic, Social and Cultural Rights;
- The International Covenant on Civil and Political Rights;
- Convention on the Elimination of All Forms of Discrimination Against Women;
- The United Nations Convention against Torture;
- The Convention on the Rights of the Child;
- The International Convention on the Rights of All Migrant Workers and Members of their Families;

- The Convention on the Rights of Disabled Persons;
- The International Convention for the Protection of All Persons against Enforced Disappearance.

These texts have evolved continuously over more than half a century since the adoption of the Universal Declaration of Human Rights by the United Nations General Assembly in 1948. The new international instruments on human rights constitute a comprehensive legal framework within which States can maintain this commitment, with the support of treaty bodies.

The topic also provides an introduction to regional systems for the protection of human rights, notably the African, American, European and Arab systems. The second section highlights the main features of each system, focusing in particular on the Arab human rights protection instruments.

Finally, certain expressions of State sovereignty are analysed when there is certain margin for appreciation in terms of the States' obligations to respect, protect and implement most human rights. In other words, the principle of the universality of human rights is especially applicable to the fundamental content of human rights, as governments, through reservations, opt-out and limitation clauses and the principle of progressive realisation, enjoy fairly broad powers to effectively implement human rights in line with their national interests.

A **glossary** of technical terms is proposed to help readers understand the terminology relating to instruments and treaty bodies.

## GENERAL AND SPECIFIC SKILLS

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for *this topic*, participants will develop efficiently the following general and specific competences:

### GENERAL:

- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.

- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.
- To identify and apply international and regional human rights protection mechanisms.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

UN website: [International law on human rights](#)

[The list of countries that have ratified the two Covenants and other major treaties on human rights can be found here:](#)

Office Of The United Nations High Commissioner For Human Rights (OHCHR), [The United Nations Human Rights Treaty System](#), Fact Sheet n° 30/Rev.1, New York and Geneva, 2012. Available in [Arabic](#).

Office Of The United Nations High Commissioner For Human Rights (OHCHR), [The Core International Human Rights Treaties](#), New York and Geneva, 2006 (ST/HR/3). Available in Arabic.

Other regional instruments for the defence of human rights. Basic information on human rights instruments and systems can be found at the following sites:

- [African Human Rights System](#)
- [Inter-American Human Rights System](#)
- [European System of Human Rights Protection and European Social Charter](#)
- [Arab Charter on Human Rights](#)

[Cairo Declaration on Human Rights in Islam](#), adopted by the Conference of Foreign Ministers of the OIC (Organization of the Islamic Conference), 2 August 1990, and by Resolution No. 49/19-P.

[Arab Charter on Human Rights](#), 1994.

[Statutes of the Arab Court of Human Rights](#), adopted by the Council of the League of Arab States at the Ministries of Foreign Affairs, at its 142 meeting on 7 September 2014, by Resolution No. 7790

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

AFIFI ABDELRAHMAN, *Monde arabe et droits de l'homme : vers l'émergence d'un système régional de protection des droits de l'homme*, thèse de droit, université Aix-Marseille - Paul Cézanne, 2004.

ALDEEB ABU SAHLIEH, SAMI A. *Les Musulmans face aux droits de l'homme—religion & droit & politique* (Bochum Dr. Dieter Winkler Verlag, 1994), 610 pp.

AMIN AL-MIDANI, MOHAMMAD, « Présentation de la déclaration du Caire sur les Droits de l'homme en islam », Strasbourg, Le Courrier du Geri, oct. 1997, vol. I, p. 9 sq.

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AMIN AL-MIDANI, MOHAMMAD, Les droits de l'homme et l'Islam. Textes des organisations arabes et islamiques. 2ème édition revue et dotée de nouveau textes, publié par l'Association Orient-Occident et le Centre Arabe pour l'Education au Droit International Humanitaire et aux Droits Humains, Université de Strasbourg, 2010, 327 pages.

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ARKOUN MOHAMMED, « Les droits de l'homme en Islam », en MARTÍN MUÑOZ Gema (ed.) *Democracia y Derechos Humanos en el Mundo Árabe*, Madrid, Ed. Cultura Hispánica, 1993.

ARZT D., "I diritti religiosi dell'uomo negli Stati musulmani del Medio Oriente e dell'Africa del Norte", *Coscienza e Libertà* , n° 27, (1996).

BEN ACHOUR RAFAA ET ZANGHI CLAUDIO (éds.), *La Nouvelle Charte arabe des Droits de l'homme*, Turin, Giappichelli Editore, 2005.

BEN ACHOUR YADH, [La civilisation islamique et le droit international](#)

BEN ACHOUR YADH, [Le Rôle des civilisations dans le système international](#), Bruxelles, Université de Bruxelles, Bruylant, 2003.

BORMANS, MAURICE, "Convergence and divergence between the Universal Declaration of Rights of 1948 of man and the recent statements of Human Rights in Islam" in "Conscience and Freedom", No. 60, (2000) number 60, pp. 31-44.

Combalía ZOILA, *Los ordenamientos europeos ante las minorías musulmanas: aproximación al estudio de los derechos humanos en las declaraciones islámicas*, en "Anuario de Derecho Eclesiástico del Estado", vol. XII, 1996, pp. 481-511.

Combalía ZOILA, *Nuevos desafíos sociales y jurídicos derivados de la presencia del islam en las sociedades occidentales del s. XXI* in "The ALBOLAFIA: Revista de Humanidades y Cultura", n° 4, 2015, pp. 101-119.

Combalía ZOILA, *Secularisation, human rights and women in Islamic societies*, en VVAA. (J. Contreras y Rosa M. Martínez de Codes eds.) "Trends of Secularism in a Pluralistic World", Ed. Vervuert, Frankfurt-Madrid, 2013, pp. 224-255 (\* Aunque la parte final se centra en la mujer, las páginas 224-240 se ocupan en general de los derechos humanos).

GASPAR ROBERT, « Les déclarations des Droits de l'homme en islam depuis dix ans », *Islamochristiana*, 1983 p. 59 sq.

Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, Handbook for Parliamentarians N° 26, Geneva, 2016, pp. 41-46, 79-86.

PRUVOST LUCIE, Déclaration universelle des droits de l'homme dans l'islam et Charte internationale des droits de l'homme : convergences – divergences, in *Islamochristiana*, Volume 9 (1983), pp. 141-159.

## LEARNING OUTCOMES

By the end of the topic, the participants in training should be able to:

- Understand the logic and value of applying human rights standards and principles to strengthen the analysis of problems and programming and social intervention processes.

- Have a common understanding of the centrality of human rights in the work of the UN and the UN reform process, as well as in the commitment of the UN system and agency to integrate human rights in the work of the UN.
- Be able to describe the main human rights protection systems at international, regional and national level and know how they can be applied in country analyses.
- Know and identify the foundations, characteristics and limitations of human rights in Islamic declarations and be able to compare the similarities and differences between these texts and those of the United Nations.
- Identify strengths and weaknesses for dialogue between Islam and the West on human rights in the light of the aforementioned similarities and differences.

## METHODOLOGY

Methodology	Educational tools
Exposition method	Reading of the guide and subject.
Problem-solving	Activity described in the corresponding point: reading of the declarations and resolution of the question formulated.

## SCHEDULING OF LEARNING ACTIVITIES

### 1) Activity 1: Individual reflection

For reference purposes, read the following documents:

- The presentation of the topic.** The presentation of the topic provides students with a general - albeit summarized - overview of the most important international and regional instruments, their similarities and differences, and the scope for action of States in relation to their obligations to respect, protect and guarantee human rights.
  - UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, [The United Nations treaty system on human rights](#). Fact Sheet no. 30/Rev.1, New York and Geneva, 2012, pp. 1-20. Available in [Arabic](#).
  - Glossary
- 2) **Activity 2: Individual work:** read the 1990 Cairo Declaration on Human Rights in Islam of the OIC and the 1948 UN Universal Declaration of Human Rights (UDHR). Highlight differences and similarities identified in relation to:
- The basis of human rights and methods for their protection. Characteristics.
  - Directory of recognized rights.
  - Limitations on recognized rights.
- 3) **Activity 3: Individual work:** Students must determine the ratification status of their country with respect to the nine (9) main international instruments on human rights. Specifically, they must identify:
- The date of entry into force of the treaty in question.
  - The date of signature of each convention by their country.

- The type of act through which the State can demonstrate its consent to be bound by the treaty: ratification, accession, acceptance or approval.
- If their State has issued a reservation or a declaration on the content of one of the nine treaties.

The information must be sent to Professor Vega using the e-mail for the virtual classroom. Students are recommended to keep this information as it may be very useful for working on the rest of module 2.

To carry out this research, the most reliable source is the [UN Treaty Section](#), which contains a register of [multilateral treaties deposited with the Secretary-General](#). Its

**4) Activity 4: Individual work:** Consult the links on the different international texts

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1 - Lecture presenting the topic. Part I	1 h 30 min.	Self-assessment test
Activity 1 - Lecture presenting the topic. Part II	1 h.	Self-assessment test
Activity 1 - Lecture presenting the topic. Part III	1 h.	Self-assessment test
Activity 1 - Lecture presenting the topic. Part IV	1 h 30 min.	Self-assessment test
Activity 1 - Reading of the Glossary	1 h	
Activity 1 - Reading of the international texts of Islamic declarations	1 h	
Activity 2 - Comparative analysis	2 h.	
Activity 3 - Analysis of international texts	2 h.	
Activity 4 - Consultation links	1 h.	
	12 h.	

## SUBJECT 2.2.:

# 2.2.1. INTERNATIONAL HUMAN RIGHTS PROTECTION SYSTEMS

## 1. INTRODUCTION

### What are human rights?

- Universal legal guarantees
- Civil, cultural, economic, political and social
- Protect human values (freedom, equality, dignity)
- Inherent to individuals and, to some extent, groups
- Grounded in international norms and standards
- Legally binding on States

After examining the origin of human rights, we will now look at the international system for the protection of human rights.

Human rights are the most fundamental rights of human beings. They define relationships between individuals and power structures, especially the State. Human rights delimit State power and, at the same time, require States to take positive measures ensuring an environment that enables all people to enjoy their human rights. History in the last 250 years has been shaped by the struggle to create such an environment. Starting with the French and American revolutions in the late eighteenth century, the idea of human rights has driven many a revolutionary movement for empowerment and for control over the wielders of power, Governments in particular.

Governments and other duty bearers are under an obligation to respect, protect and fulfil human rights, which form the basis for legal entitlements and remedies in case of non-fulfilment (see Chapter 2). In fact, the possibility to press claims and demand redress differentiates human rights from the precepts of ethical or religious value systems. From a legal standpoint, human rights can be defined as the sum of individual and collective rights recognized by sovereign States and enshrined in their constitutions and in international law.

Since the Second World War, the United Nations has played a leading role in defining and advancing human rights, which until then had developed mainly within the nation State.

As a result, human rights have been codified in various international and regional treaties and instruments that have been ratified by most countries, and represent today the only universally recognized value system.

In the past, when human rights were still regarded as a country's internal affair, other States and the international community were prevented from interfering, even in the most serious cases of human rights violations, such as genocide. That approach, based on national sovereignty, was challenged in the twentieth century, especially by the actions of Nazi Germany and the atrocities committed during the Second World War. Today, human rights promotion and protection are considered a legitimate concern and responsibility of the international community. However, discrepancies between *universal legal obligations* and *State sovereignty* can be resolved only on a case-by-case basis, in accordance with the *principle of proportionality*, a principle according to which any action taken by an authority pursuant to the concept of universality must not go beyond what is necessary to achieve compliance with human rights.

"The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these



purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community.”

World Conference on Human Rights, Vienna 1993, Vienna Declaration and Programme of Action, paragraph 4.

## 2. PROTECTION OF HUMAN RIGHTS SYSTEMS: DEFINITION AND CLASSIFICATION

### Protection systems

“Legal frameworks, institutions, procedures and actors to ensure that international human rights norms and standards are promoted, respected, protected and fulfilled”

The protection systems (international, regional and national) should be seen as a whole body of legal mechanisms that should be used for the purpose of respecting, protecting and fulfilling human rights.

An **international system** is deemed to include a set of laws or standards and monitoring mechanisms established in the United Nations to protect human rights. **UN Charter** (San Francisco 1945) and **Universal Declaration of Human Rights (UDHR 1948)** are the foundation upon which the main bulk of the international human rights normative framework

has been built. They have also being the inspiration of subsequent **regional human rights regimes** and national laws. The Human Rights Council (HRC) is the main UN organ in charge of promoting and protecting human rights. It is the successor of the Commission on Human Rights form.

This normative framework currently consists of Nine Core International Human Rights Treaties:

- International Covenant on Civil and Political Rights (ICCPR) 1966 and its two Optional Protocols on the Right of Individual Communications and on the Death Penalty
- International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966
- Convention on the Elimination of all forms of Racial Discrimination (CERD) 1966
- Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) 1979 and its Optional Protocol on the Right of Individual or Group Communications
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984
- Convention on the Rights of the Child (CRC) 1989 and its two Optional Protocols on Sale of Children, Child Prostitution and Child Pornography and on Involvement of Children in Armed Conflicts
- Convention on the Protection of All Migrant Workers and Members of their Families (CMW) 1990
- Convention on Rights of People with Disabilities (CRPD) 2006
- International Convention for the Protection of All Persons from Enforced Disappearances (CPED) 2006

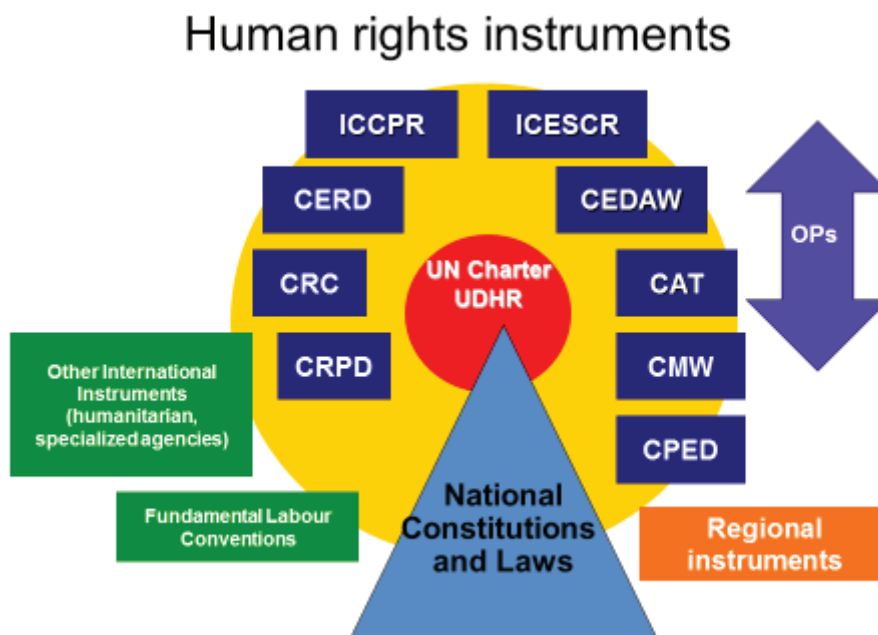
Other international instruments may contain additional human rights standards such as international humanitarian law and law on refugees, as well as the ILO, UNESCO, FAO conventions and declarations and others. Many humanitarian law instruments are prior to the UN charter and the UDHR. However they share common values and principles of human dignity, freedoms and entitlements. Eight ILO Conventions are recognized as fundamental human rights Conventions, covering child labour, forced labour, non-discrimination and freedom of association. Human rights are also addressed in a number of other ILO Conventions addressing particular groups, including migrant workers, disabled workers, agricultural workers, seafarers, and indigenous peoples. [e.g. The ILO Indigenous and Tribal

Peoples Convention, 1989 (No. 169) is the only international Convention dealing specifically with the human rights of these peoples on a comprehensive basis. The ILO applies a rights-based approach for its own work in this area, in addition of course to a legal instrument to protect the rights of workers.]

In order to provide a simplified representation of the international system for the protection of human rights, consideration must also be given to the functioning of a democratic state. Indeed, the international human rights protection system works in a similar way.

Democratic states understand the so-called separation of legislative, executive and judicial powers. In these states, the legislature (Parliament) makes the laws that govern life in the country. The executive (the government) ensures, through its administrations and their services, the enforcement of and compliance with laws. The judiciary (magistrates, judges) acts in disputes or offences committed by citizens or to resolve disputes between citizens and authorities.

Likewise, at international level, international instruments (declarations and conventions) are adopted or executed by the international community which acts as Parliament. International institutions are then responsible for verifying their enforcement by States or for acting as an international judiciary, which is, to a certain extent, comparable to the systems in place in democratic states. This “judicial” system, which is entrusted with monitoring the implementation of conventions and dealing with individual complaints from citizens (violations of human rights), is composed of various “bodies” (generic term) that we will study later.



Thus, the international human rights protection system includes:

1. a set of “laws” or standards that are generically referred to as **international instruments** (international declarations and conventions) that represent a set of more than 60 international instruments (the human rights corpus)
2. protection bodies responsible for monitoring the implementation of conventions and with the authority to deal with individual complaints.

These bodies fall into two main groups:

- those linked to the Human Rights Council;

- those created by international treaties or conventions (called treaties bodies or treaty mechanisms).

It should nevertheless be noted that all bodies refer to the same human rights corpus. Why are there two groups of bodies? Historical reasons are the cause of this division, the ultimate aim being to strengthen the protection of rights by various means.

In the following pages we will first study the main international and regional instruments and then, in the following topic, examine the human rights protection bodies attached to the Human Rights Council, and finally the bodies established by international conventions.

Some regions of the world have adopted their own **regional human rights systems**. These systems do not replace but reinforce the international regime. The relation between these two systems is therefore not hierarchical but complementary.

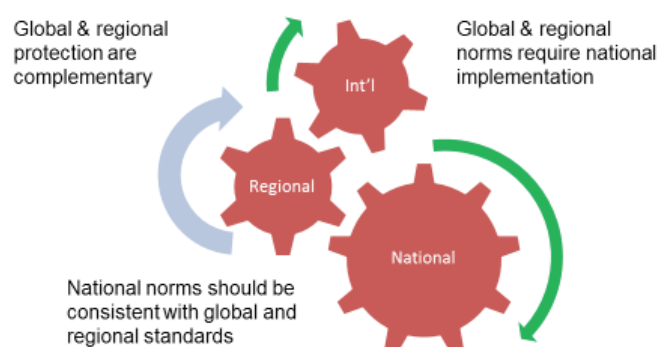
Regional human rights protection systems, which vary in terms of their capacity and impact, have also been established in Africa, the Americas and Europe, and complement international human rights mechanisms. Asia has yet to establish a viable human rights protection system. Regional human rights mechanisms can be important instruments for fostering close cooperation with the UN on activities of common interest. Regional human rights protection systems strengthen international standards and their mechanisms, providing the means to address human rights issues in the social, historical and political context of each region.

**National Protection systems:** The international human rights treaty system may seem focused on the international level, yet, clearly, it is at the national level that the promotion and protection of human rights matters most. The internationally agreed standards set out in the treaties require effective national level implementation in order to ensure that they are enjoyed by all men, women and children in each country.

States should make sure that their national constitutions and laws are consistent with the international and regional human rights regimes they are party to. The World Conference on Human Rights' request to Governments "to incorporate standards as contained in international human rights instruments in domestic legislation and to strengthen national structures, institutions and organs of society which play a role in promoting and safeguarding human rights".

The outputs of international treaty bodies and other international human rights mechanisms can provide useful guidance on where States must do more to strengthen the protection of human rights at national level.

### Links between national, regional and international protection systems



International and regional human rights mechanisms have an important role in supporting efforts to strengthen human rights protection at national level. Firstly, the process of reporting to treaty bodies and other international human rights mechanisms, including the ILO Committee of Experts, is in itself an important part of the development of a national human rights protection system. Secondly, the outputs of treaty bodies and ILO supervisory bodies provide States with practical advice and assistance on how best to implement the treaties.

The outputs of the treaty bodies and other international human rights mechanisms can provide states, as well as UN country teams and donors on useful guidance on where more action is required to strengthen national protection of human rights.

Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards as contained in international human rights instruments and their protection. The 1993 world conference on human rights endorses efforts under way to strengthen these arrangements and increase their effectiveness, while at the same time stressing the importance of cooperation with the UN human rights activities. The World Conference on Human Rights reiterates the need to consider the possibility of establishing regional and sub-regional arrangements for the promotion and protection of human rights where they do not already exist.

The international and regional human rights regimes can provide international protection of human rights. For example, some Treaty Bodies act as a quasi-judicial body examining individual cases of alleged violations. The Optional Protocols to CCPR and CEDAW, and optional clauses in CERD, CAT and the CMW provide for such procedures. The committees examine Such complaints culminating in a final, non-binding decision That declared the complaint inadmissible Either eligible or, and - in the case lathing - from an opinion on the Merits (Determining whether the plaignant's human rights-have-been violated). As established in the CCPR Optional Protocol, the individual must have exhausted all available domestic remedies before recurring to the committee. This shall not be the rule where the application of the remedies is unreasonably prolonged. The ILO supervisory system allows complaints to be submitted by trade unions or employers' organizations, and domestic remedies do not need to be exhausted in order to bring a complaint.

International and regional judicial and quasi-judicial protections are complimentary. This means that there is no hierarchy between both systems. When domestic remedies are exhausted, the individual has to chose whether to appeal to the Human Rights Committee or the Inter-American Commission, for example, but not to both of them.

### 3. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

International human rights law emerged in the nineteenth century when international law developed a doctrine under which "humanitarian intervention" was considered legitimate in cases in which a State committed against its own subjects atrocities that "shocked the conscience of mankind". Later, the influence of the Red Cross Movement and the establishment in 1919 of the International Labour Organization (ILO) led to the conclusion of, respectively, the Geneva Conventions and the first international conventions designed to protect industrial workers from gross exploitation and to improve their working conditions. The minority treaties concluded after the First World War sought to protect the rights of ethnic and linguistic minorities, and are therefore sometimes seen as precursors of modern international human rights instruments. Strictly speaking, however, the first international human rights treaty — the Slavery Convention — was adopted in 1926 and entered into force the following year.

As is known, the UN Charter was adopted at the Conference of San Francisco on 26 June 1945. This Charter contains seven references to human rights. The Charter proclaims the faith of the United Nations "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women" (preamble) and is committed to promoting

“universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion<sup>147</sup>”.

In early 1946, the UN set up a Human Rights Commission. At its first session, the General Assembly presented the Human Rights Commission with a draft declaration on human rights and fundamental freedoms “for consideration when developing an international declaration human rights”. A committee chaired by Eleanor Roosevelt and formed by representatives from eight states, including most notably René Cassin from France, Peng Chun-Chang from China and Charles Malik from Lebanon, set about drafting the Declaration. The composition of this Commission clearly shows the cultural diversity of the sources that served as inspiration for the Declaration.

The Commission set itself the task of drawing up an international human rights Charter including a Declaration of Human Rights (the general principles of human rights) and a Convention (the specific rights and their limitations), which was soon renamed a Covenant on human rights.

During the two-year period of development of the Universal Declaration, the members of the Drafting Committee always tried to find common ground and maintain a common goal: respect for fundamental freedoms and rights. Despite their differences on certain issues, they decided to include the principles of non-discrimination, civil and political rights and economic and social rights in the document. They also decided that the Declaration had to be universal.

The Declaration adopted the following year was inspired by the 1789 (French) Declaration of the Rights of Man and of the Citizen but also by Arab and Asian cultural traditions. The proposed text was inspired by the 1789 principles on civil and political rights and introduced economic, social and cultural rights - the small number of articles on human rights (5 out of 30) prompted the abstention, at the time of voting, of the Soviet Union and its allies.

The Universal Declaration of Human Rights, submitted to the UN General Assembly meeting in Paris, at the Palais de Chaillot, was adopted on 10 December 1948. Forty-eight countries voted [in favour of] the Declaration<sup>148</sup> Eight countries abstained<sup>149</sup> The Universal Declaration of Human Rights (1948) provides the first authoritative interpretation of the term “human rights” used in the Charter and, although it was neither designed nor voted on as a binding instrument, it can now be considered, more than 50 years later, as a general standard on human rights.

Eighteen years later, on 16 December 1966, the UN General Assembly simultaneously adopted two Covenants and two protocols:

- The International Covenant on Economic, Social and Cultural Rights, 1966
- The Optional Protocol provides a mechanism for responding to individual complaints,
- the International Covenant on Civil and Political Rights, 1966
- Optional Protocol II, which sought to abolish the death penalty.

What was later called the “**International Bill of Human Rights**” thus consists of six instruments: the Universal Declaration of Human Rights, the two Covenants and the three Optional Protocols.

147. United Nations Charter, Chapter I, Article 1.3.

148. Afghanistan, Argentina, Australia, Belgium, Burma, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iraq, Iran, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Siam, Sweden, Syria, Turkey, United Kingdom, United States of America, Uruguay, Venezuela.

149. Belarus, Czechoslovakia, Poland, Saudi Arabia, Ukraine, Union of South Africa, the Soviet Union and Yugoslavia (two countries were not present for the vote).

The International Bill of Human Rights has been supplemented with a number of more specific binding instruments. Some treaties are subject to supervision by monitoring bodies and form, with the two Covenants, a set of instruments usually referred to as the core human rights treaties. These additional instruments are:

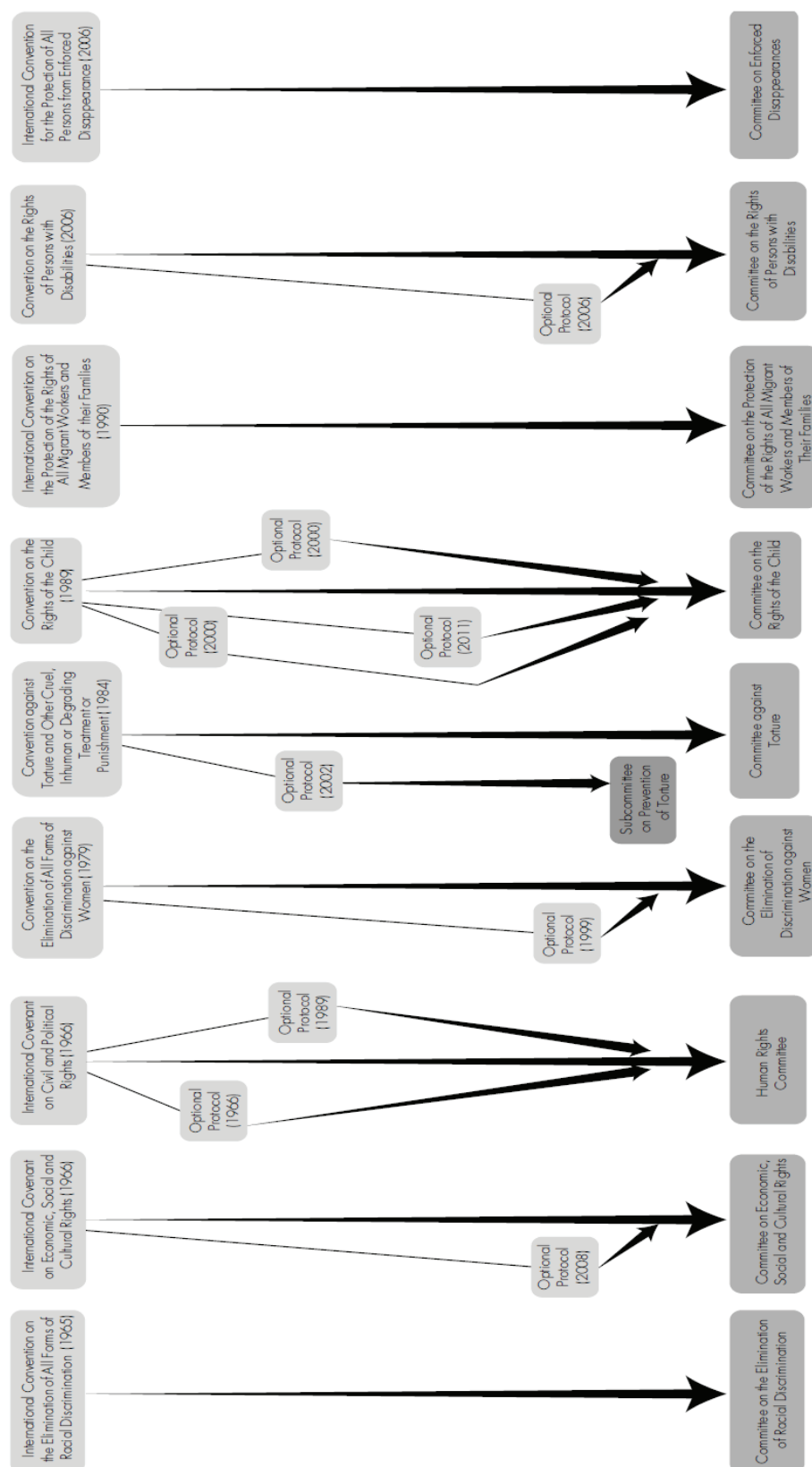
- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD; adoption in 1965; entry into force in 1969);
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW; adoption in 1979; entry into force in 1981);
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT; adoption in 1984; entry into force in 1987);
- The Convention on the Rights of the Child (CRC; adoption in 1989; entry into force in 1990);
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (known as the Migrant Workers Convention, or CMW; adoption in 1990; entry into force in 2003).
- The International Convention for the Protection of All Persons against Enforced Disappearance, adopted in 2006, entered into force in 2010.
- The Convention on the Rights of Persons with Disabilities, adopted in 2006, which came into force in 2008.

The United Nations and its specialized agencies have adopted many **other human rights instruments devoted to specific groups**, including women, refugees, aliens and stateless persons, minorities and indigenous peoples, prisoners, persons with disabilities, children and adolescents, and victims of crime. Further universal instruments deal with major human rights violations, such as slavery, torture, enforced disappearance, genocide, forced labour and religious intolerance, or focus on other specific human rights issues in the areas of education, employment, development, administration of justice, marriage, and the freedoms of association and of information.

At present, the international human rights protection system consists of 60 instruments (declarations and conventions). To see the list, [download this document](#)<sup>150</sup>

150. Source of the image below: OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR), The United Nations Human Rights Treaty System Fact Sheet n° 30/Rev.1, New York and Geneva, 2012, p. 4.

## The United Nations human rights treaty system





### 3.1. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)<sup>151</sup>

The Universal Declaration of Human Rights (UDHR), which presents itself as “a common standard of achievement for all peoples and all nations”, despite being merely a Declaration is far from predictable in terms of its scope. It is the cornerstone of all existing international standards (over 60), it enabled the emergence of dissident movements in Eastern European countries, and is the basis of the Dayton Agreement (former Yugoslavia) and the International Criminal Court.

#### The keys aspects in brief

**Reasons for development: Preamble.** Whereas recognition of the inherent dignity and of the equal and inalienable rights all members of the human family is the foundation of freedom, justice and peace in the world.

**Basic idea:** “All human are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” (Article 1).

**Fundamental principles:** “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2).

#### Freedom and fundamental human rights: Articles 3-21

- Rights: Rights to life, liberty and security of person / Effective remedy by law / Fair trial / Protection of privacy and family / Nationality / Marriage / Property
- Freedoms: Freedom of thought, conscience and religion / Freedom of opinion and expression / Freedom of assembly and peaceful association
- Defence mechanisms: Against slavery, torture and inhuman treatment.

#### Economic, Social and Cultural Rights: Articles 22-27

The right to social security / work / equal pay for equal work / education / rest and leisure / an adequate standard of living.

#### General provisions: Articles 28-30

- Social and international order,
- Individual duties to the community
- Defence against abusive interpretation.

### 3.2. THE INTERNATIONAL COVENANTS (1966)

The Universal Declaration of Human Rights is a text with evident moral value, but that does not imply any specific legal commitment on the part of signatory states, except for States that specifically make reference to it in their constitutions. The cornerstone of a future Human Rights Charter, which would become legally binding, the Declaration has nevertheless inspired more than sixty international instruments, which together constitute the international standards of human rights.

The day of the adoption of the Declaration on 10 December 1948, the General Assembly asked the Human Rights Commission to prepare a draft covenant on human rights, given that “the enjoyment of civil and political freedoms and of economic, social and cultural rights [are] linked and are mutually dependent” (1950). The General Assembly also supported the

.....  
151. Consult the text of the declaration and its history on the website.

inclusion of an explicit reference recognising the equality of men and women with regard to all the rights mentioned in the Covenant.

In 1951-52, the Assembly requested the Commission to draft two covenants, with similar provisions - one on civil and political rights, and one on economic, social and cultural rights - and to include in it an article stating that “all peoples have the right to self-determination.” It would still take fifteen years for the completed draft covenants to be reviewed, accompanied by a first optional protocol, which was adopted on 16 December 1966 by the United Nations General Assembly.

And it was not until 1976, twenty-eight years after the adoption of the Declaration, that the International Bill of Human Rights became a reality with the entry into force of the two Covenants and the Protocol adopted in 1966 - 35 States having acceded to the two covenants. As Guy Lagelée and Gilles Manceron stated in their “World Conquest of Human Rights” (UNESCO, 1998): “The content of the two Covenants bears traces of the ideological debates of the era of the Cold War, when Western States insisted on freedom (the first object), and those in the East on economic and social rights (the subject of second). The simultaneous adoption of the two texts is the result of an agreement between the Member States of the United Nations that takes account of both approaches. The fact that these two texts are the result of long and complex negotiations explains a number of repetitions, especially in the preambles.

“Some rights have been omitted in the two covenants to achieve consensus on the texts, such as the right to property (Article 17 of the Declaration), asylum (Article 14, paragraph 1) or the right not to be deprived of his nationality (Article 15). It is important to remember that the right to self-determination is contained in Article I of the adopted texts, at a time when Third World States were gaining their independence (this right is a right of peoples and not individuals; hence, the delicate matter of the definition of a “people” within the scope of international law).”

The two Covenants are similar in structure and some of their articles are denominated in the same or similar terms. The interdependence of all human rights is recognized in the preamble, in which it is stated that the ideal of human rights can only be achieved if conditions allowing everyone to enjoy his economic, social and cultural as well as civil and political rights are created. The first part of the two Covenants, which states that all peoples have the right of self-determination and to freely dispose of their wealth and natural resources, is identical. In both, the second part contains general provisions prohibiting discrimination and affirming the equality between men and women in the exercise of their rights under each Covenant, as well as permissible restrictions. The third part contains the substantive provisions, which specify the rights enshrined in the Universal Declaration of Human Rights.

The **International Covenant on Civil and Political Rights**, adopted on 16 December 1966 by the General Assembly, entered into force (after ratification by 35 States) on 23 March 1976. The Covenant guarantees the right to life (Article 6), liberty and security (Article 9-1) and respect for private life (Article 17). It prohibits torture and cruel, inhuman or degrading treatment (Article 7). In addition, it recognizes the freedoms of thought, conscience and religion (Article 18), peaceful assembly (Article 21), association, including the right to form trade unions (Article 22), and circulation. Finally, it proclaims the cultural rights of minorities (Article 27).

The Covenant also establishes specific implementation measures: the creation of a Human Rights Committee (Article 28), composed of eighteen independent experts [nationals of States Parties to the Covenant], with jurisdiction to receive communications issued by either a State party [against another State party] or individuals claiming to be victims of a violation of the rights contained in the Covenant by a State party (Article 41 and Optional Protocol).

An Optional Protocol to the International Covenant on Civil and Political Rights, adopted on the same day [16 December 1966], entered into force on 23 March 1976. It provides an international mechanism to deal with complaints from individuals claiming to be victims of a violation of the rights in the Covenant on Civil and Political Rights.

A second optional protocol relating to the same pact, adopted by the General Assembly on 15 December 1989, entered into force on 11 July 1991. This protocol aims to abolish the death penalty.

The **International Covenant on Economic, Social and Cultural Rights**, adopted on 16 December 1966, entered into force (after ratification by 35 States) on 3 January 1975. The Covenant obliges States that ratify it to promote the general well-being of their inhabitants (Article 4) and establishes the right of all to work and training (Article 6), to participate in trade union activity (Article 8), to social security (Article 9), health (Article 12) and education (Article 13).

An Optional Protocol to the Covenant on Economic, Social and Cultural Rights was adopted by the General Assembly on 10 December 2008. It provides an international mechanism to deal with complaints from individuals claiming to be victims of a violation of the rights expressed in the Covenant.

For information on the current status of ratification of the Covenants and Protocols, refer to the [website of the OHCHR for Human Rights](#) :

## 4. SUMMARY: SYSTEMATIC DESCRIPTION OF HUMAN RIGHTS<sup>152</sup>

Coming up with a definitive list of X number of human rights is impossible. On the one hand, they can be presented in many ways; on the other hand, every law can be broken down into several [laws], and others can be combined into one. However, it is necessary to show that human rights are indivisible, in other words as a system which, while unfinished, is not indefinite.

Here we propose a simple list of human rights or a list of entries, compiled from existing instruments, based on equality between all human rights. This list must include the following: the founding principles, human rights themselves, the groups into which these rights may be divided, in order to apply the principle of indivisibility (structural groups) or to protect persons in more vulnerable situations (categorical rights).

### 4.1. THE FOUNDING PRINCIPLES

Human dignity has three dimensions: equal dignity, freedom, solidarity (these are obligations and two logical conditions: universality and indivisibility).

### 4.2. THE RIGHTS THEMSELVES

#### A. CIVIL RIGHTS: THE RIGHTS THAT PROTECT THE INDIVIDUAL:

1. right to non-discrimination.
2. right to life, liberty and security of person.
3. prohibition of slavery and forced labour.
4. prohibition of torture and inhuman, cruel and degrading treatment.
5. right to legal personality and to equal protection before the law.
6. litigant's rights: the right to appeal, the right not to be arbitrarily arrested, the right to an independent and impartial tribunal, the right to legal assistance, the right to be presumed innocent, the right to non-retroactivity of criminal law.
7. right to respect for private life.
8. right to seek asylum.
9. right to a nationality and freedom to change.
10. right to protection of the family.

152. Source: Analytical presentation of human rights, developed with the Network of Human Rights Institutes, the Interdisciplinary Institute for Ethics and Human Rights, Fribourg, Switzerland.

#### Civil and political liberties:

11. freedom of thought, conscience, religion.
12. freedom of opinion and expression.
13. freedom of assembly and association.
14. freedom of movement (including to leave their country and return).
15. freedom of political participation.

#### B. ECONOMIC AND SOCIAL RIGHTS: THE RIGHTS TO DIGNITY IN EXCHANGE AND SOCIAL RELATIONS:

16. right to an adequate standard of living (food, energy, housing).
17. right to health protection.
18. right to a balanced environment.
19. right to social security.
20. right to property.
21. right to work: access to the labour market and fair conditions (wages, rest).

#### C. CULTURAL RIGHTS: THE RIGHTS TO CULTURAL IDENTITY:

22. right to respect for their cultural identity (including their languages).
23. right to information.
24. right to education and training: basic schooling and vocational and continuing training.
25. right to participate in cultural life.
26. right of access to assets, including common heritage of humankind.

### 4.3. GROUPS OF RIGHTS

#### A. "STRUCTURAL" RIGHTS: RIGHTS TO PARTICIPATE IN THE STRUCTURES NECESSARY FOR ALL HUMAN RIGHTS

- right to peace and a democratic order
- right to development
- rights of future generations

#### B. THE RIGHTS OF PEOPLE IN VULNERABLE SITUATIONS OR CATEGORIES OF RIGHTS: THESE ARE NOT OTHER RIGHTS BUT SPECIAL MEASURES FOR CATEGORIES OF PEOPLE WHO MAY BE VULNERABLE:

- right of children.
- rights of the elderly and disabled.
- right of women to equality.
- right of foreigners, migrants and stateless persons.
- rights of persons belonging to minorities.
- rights of persons belonging to indigenous peoples.

#### 4.4. PRINCIPLES OF INTERPRETATION OF THE LIST.

The list is based on the equality of all human rights. The numbers do not reflect any hierarchy; the starting point is the order that appears in the Universal Declaration, but another order could be chosen.

The first article of the Universal Declaration is not mentioned; it mentions the three founding principles of all human rights, three expressions of human dignity: freedom, equal dignity, and brotherhood. This means that every human law must be interpreted according to these three dimensions. Each rights contains one element - freedom, and vice-versa; each right defines obligations.

Universality and indivisibility are logical principles of interpretation of each human right. Universality is the specific characteristic of a human right; indivisibility is the coherence clause in legitimacy: every human right serves as a principle for interpreting other human rights.

There is no reason to maintain a schematic justification for the classic division between civil rights and social rights: all human rights are individual and can be collective in nature, all involve positive (action) and negative (forbearance of the State) obligations.

##### A) CIVIL RIGHTS

Judicial guarantees (5 and 6) can be distinguished from other civil rights, but there does not seem to be a significant difference in their nature. Quite the opposite, freedoms have a very specific logic.

The freedom of political participation refers to a small aspect of this right (freedom to elect and to be elected), which actually encompasses all civil, economic and cultural liberties. The open question is: are all freedoms - both socio-economic and cultural rights - political rights?

##### B) ECONOMIC AND SOCIAL RIGHTS

The right to a balanced environment (18) is placed in this category, because its purpose is very specific, and its logic is similar to that of other economic and social rights.

##### C) CULTURAL RIGHTS

Cultural rights are sufficiently specific (their specific object is the respect of cultural identity) to constitute a particular category.

##### D) STRUCTURAL RIGHTS

Rights to participate in structures necessary for all other rights: these rights do not constitute new human rights but rather the units or structures grouping human rights. Therefore are certain degree of variation regarding the names is acceptable. It appears, for example, that the right to self-determination is today covered and better defined by the right to a democratic order which is actually more demanding. These structures are the "right to the right" in application of the principle of indivisibility. That does not diminish the fertile nature of these groups of rights because they clearly reveal this indivisibility, as evidenced in particular in their development. These groups of rights also enable the application of a key implementation principle, and which would still have to be contextualized in relation to the five principles of interpretation: that of "democratic security".

The rights of future generations are human rights, even if their subject has not yet been determined: this subject exists, and his or her dignity may currently be at stake. It reflects the application of the principles of universality and indivisibility. However, one could, perhaps more logically, organize them into the rights of people in vulnerable situations (categorical rights).

## E) THE RIGHTS OF PERSONS IN VULNERABLE SITUATIONS

All categories of human beings in vulnerable situations must receive, without discrimination, the same protection as all persons. However, a more or less clear distinction can be made between two conditions of vulnerabilities:

- certain [vulnerabilities] are related to nature (children, elderly or disabled people, and mothers to the extent that their responsibility for their children makes them vulnerable);
- some are related to political turmoil (discrimination based on sex, ethnicity, etc.) this category of rights is also contingent and should gradually disappear as discriminations disappear.

## SUBJECT 2.2.:

## 2.2.2. REGIONAL HUMAN RIGHTS PROTECTION SYSTEMS: MONITORING INSTRUMENTS AND SYSTEMS<sup>153</sup>

### 1. INTRODUCTION

In addition to the United Nations charter-based system of human rights protection, which applies to all States, and the United Nations treaty-based system, which applies only to States parties, many States in Africa, the Americas and Europe have also assumed binding human rights obligations at the regional level and have accepted international monitoring. No regional human rights treaty and monitoring mechanism has yet been adopted in the Asian and Pacific region.

#### Regional human rights systems

##### Instruments

- European Convention for the Protection of Human Rights and Fundamental Freedoms
- American Convention on Human Rights and San Jose Pact on Economic, Social and Cultural Rights
- African Charter on Human and People's Rights
- Arab Charter on Human Rights

##### Mechanisms

- European Court on Human Rights
- Inter-American Court on Human Rights
- African Commission on Human Rights
- African Court on Human and People's Rights
- Arab Committee of HR Experts
- ASEAN intergovernmental commission on HR (AICHR)

### 2. THE EUROPEAN SYSTEM OF HUMAN RIGHTS

The Council of Europe, the Organization for Security and Co-operation in Europe (OSCE) and the EU form the institutional backbone of the European system of human rights.

153. This topic has been transcribed almost word-for-word from the Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, Human rights: a handbook for parliamentarians, Geneva, 2016, pp. 79-88.



The primary goal of the Council of Europe is the protection of human rights and fundamental freedoms. As soon as it was established in 1949, the Council began to draw up the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed in 1950 and came into force in 1953. The European Convention and its Additional Protocols constitute a general human rights treaty focused on civil and political rights. Social, economic and cultural rights are enshrined in the European Social Charter (1961-65) and its Additional Protocols and revisions (the Revised European Social Charter, 1996-99). Furthermore, the Council of Europe has adopted special treaties in the areas of data protection, migrant workers, minorities, torture prevention and biomedicine.

Today, the European Convention provides for the most advanced system of human rights monitoring at the supranational level. Under article 34 of the European Convention, any person, NGO or group of individuals claiming to be a victim of a human rights violation, under the Convention and its protocols, committed by one of the currently 46 member States of the Council of Europe is entitled, once all domestically available possibilities of seeking remedy have been exhausted, to file a petition to the European Court of Human Rights, whose seat is in Strasbourg (France). If a violation is found, the Court may provide satisfaction to the injured party. Its decisions are final and legally binding on the States parties. Their implementation is monitored by the Committee of Ministers, the highest political body of the Council of Europe.

Under a Protocol to the European Social Charter that entered into force in 1998, some organizations may lodge complaints with the European Committee on Social Rights. Once a complaint has been declared admissible, a procedure is set in motion, leading to a decision on the merits by the Committee. The decision is transmitted to the parties concerned and the Committee of Ministers in a report, which is made public within four months. Lastly, the Committee of Ministers adopts a resolution, in which it may recommend that the State concerned take specific measures to ensure that the situation is brought into line with the Charter.

### 3. THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS

The Inter-American system for the protection of human rights comprises two distinct processes, based on the one hand on the Charter of the Organization of American States (OAS), and on the other hand on the Pact of San Jose, Costa Rica (the American Convention on Human Rights). While the charter-based process is applicable to all OAS member States, the American Convention on Human Rights is legally binding only on States parties.

The Convention, adopted in 1969 and in force since 1978, focuses on civil and political rights, but is supplemented with an Additional Protocol (1988-1999) addressing economic, social and cultural rights. Furthermore, OAS has adopted special treaties on enforced disappearances, torture, violence against women, international trafficking in minors and discrimination against persons with disabilities.

To preserve these rights on the American continent, the Convention established two bodies to promote respect and protection of human rights: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

**The Inter-American Commission on Human Rights** is a quasi-judicial technical organization that was established to promote awareness of human rights, make recommendations to States and respond to their questions, prepare studies and reports, request information from governments and carry out investigations with the consent of the latter. The Commission adopts decisions and resolutions, publishes country reports, and is also empowered to receive complaints from individuals or groups on violations of human rights. It also recommends that OAS Member States adopt measures to contribute to the protection of human rights. One of its main functions is to submit cases to the Inter-American Court and have them heard in court during legal proceedings.

The overwhelming majority of the thousands of complaints that are filed under this system are handled only by the Inter-American Commission, which either declares them inadmissible, facilitates an amicable settlement or publishes its conclusions on the merits of the cases in a report. Such reports contain non-binding recommendations that are in practice all too often ignored by the respective Governments. The applicants themselves are not entitled to bring

their cases before the Inter-American Court of Human Rights; only the States concerned and the Commission may do so. Although the Commission, in accordance with its recently revised rules of procedure, has begun to refer an increasing number of cases to the Court, only about 50 individual petitions have so far given rise to final and legally binding judgements of the Court. Those cases addressed human rights violations in certain South and Central American countries. In most of them, it was established that gross and systematic human rights violations (including torture, arbitrary executions and enforced disappearances) had taken place, and the Court granted far-reaching measures of reparation beyond monetary compensation to the victims and their families.

**The Inter-American Court of Human Rights** has not had as strong an impact as the European Court [of Human Rights] even if it may adopt other coercive measures, but its contentious jurisdiction is optional for States that ratify it. The Court has jurisdiction over cases involving alleged violations of the American Convention [on Human Rights] by the State Party. Complainants who submit complaints on human rights violations must first have exhausted all domestic legal remedies. These complaints concerned violations of human rights committed in some countries of Central America and South America. In most of these cases, the Court concluded that there had been gross and systematic violations of human rights (such as torture, arbitrary executions and forced disappearances) and awarded the victims and their families redress well and above the level of financial compensation.

In addition to its “contentious jurisdiction” (competence to hear cases between contending parties), the Court is also competent to render advisory opinions interpreting international human rights treaties (especially the American Convention on Human Rights) and assessing the compatibility of domestic laws with these treaties.

## 4. THE AFRICAN SYSTEM OF HUMAN RIGHTS

The African regional human rights system succeeded the **African Union**, which was created in 2001 and replaced **the Organization of African Unity** (OAU). Its objectives include the promotion of peace, security and stability on the continent, democratic principles and institutions, popular participation and good governance, promotion and protection of human rights in accordance with the **African Charter on Human and Peoples’ Rights** and other instruments on human rights. The African Charter was adopted by the OAU in 1981 and entered into force in 1986.

The Charter, the general instruments on human rights, was ratified by the 53 Member States of the African Union. As its name suggests, this regional treaty enshrines not only the number of civil, political, economic, social and cultural rights but also the collective rights of peoples to equality, self-determination, to freely dispose of their wealth and their natural resources, development, peace and national and international security and a “satisfactory and global environment.” Although these so-called “third generation” solidarity rights are of considerable political importance, the interest in devoting a binding treaty to same is disputed.

Today, there are several protocols to the Charter, including one that deals with women’s rights in Africa. The rights guaranteed are more limited and more subject to the State’s discretion than in other international human rights instruments.

The Charter provides for the submission of complaints to the African Commission on Human Rights and Peoples, which has its headquarters in Banjul (Gambia). Anyone can present a complaint (submit a “communication”), including States that can lodge complaints against other States, and any individual or collective entity such as NGOs, families, clans, communities or other groups, so the legal question of the status of the victim is not an issue, although its work is apparently hampered by a lack of resources. The African Commission does not deal with individual complaints, but only communications revealing the existence of a series of serious or massive violations of human rights or peoples. It can only undertake a comprehensive study of these cases at the request of the Assembly of Heads of State and Government, the highest political body of the African Union. Coupled with this complaints procedure, the Commission also examines reports from States following a procedure similar to that applied by the United Nations treaty bodies.

In 1998, a Protocol to the African Charter was adopted, providing for the creation of an African Court on Human Rights and Peoples. It entered into force on 25 January 2004. In addition to the Charter, the AU adopted the conventions on the protection of refugees and children's rights.

## 5. ASIA AND THE PACIFIC

There is no Asian and Pacific regional convention on human rights. Through OHCHR, however, the countries of the region have focused on strengthening regional cooperation to promote respect for human rights. In a series of Asian and Pacific regional workshops, notably a workshop held in Tehran in 1998, a framework of cooperation was established and a consensus was reached on principles and a "step-by-step", "building-block" approach that could lead to regional arrangements through extensive consultations among Governments. It has been agreed that the regional arrangements must address the needs and priorities defined by the Governments of the region. Roles, functions, tasks, outcomes and achievements are to be determined by consensus.

### REGIONAL HUMAN RIGHTS TREATIES

#### Council of Europe

- European Convention for the Protection of Human Rights and Fundamental Freedoms
- (1950-1953) and Additional Protocols
- European Social Charter (1961-1965), Additional Protocols and
- Revised European Social Charter (1996-1999)
- European Convention on the Legal Status of Migrant Workers (1977-1983)
- European Convention for the Prevention of Torture and Inhuman or Degrading
- Treatment or Punishment (1987-1989)
- European Charter for Regional or Minority Languages (1992-1998)
- Framework Convention for the Protection of National Minorities (1995-1998)
- European Convention on the Exercise of Children's Rights (1996-2000)
- Convention on Human Rights and Biomedicine (1997-1999)
- European Convention on Nationality (1997-2000)

#### Organization of American States

- American Convention on Human Rights (1969-1978) and Additional Protocols
- Inter-American Convention to Prevent and Punish Torture (1985-1987)
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994-1995)
- Inter-American Convention on the Forced Disappearance of Persons (1994-1996)
- Inter-American Convention on International Traffic in Minors (1994-1997)
- Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities (1999-2001)

### African Union (formerly Organization of African Unity)

- African Charter on Human and Peoples' Rights (1981-1986)
- Convention Governing the specific Aspects of Refugee Problems in Africa (1969-1974)
- Convention on the Rights and Welfare of the African Child (1990-1999)

### Arab region

- Arab Charter on Human Rights adopted by the Council of the League of Arab States in 1994.
- Universal Islamic Declaration of Human Rights, published by the Islamic Council of Europe (CIE), 1981.
- The Cairo Declaration of Human Rights in Islam of the Organization of the Islamic Conference (OIC), 1990.

## SUBJECT 2.2.:

### 2.2.3. ISLAMIC DECLARATIONS OF HUMAN RIGHTS

#### 1. INTRODUCTION

To prevent intercultural coexistence from transforming into something akin to the Tower of Babel, where any agreement would be impossible, respect for different identities and individualities is certainly necessary, but at the same time a consensus must be reached on common minimum core values: human rights. It is therefore worthwhile studying the connections and differences between Islam and the West regarding the way of understanding human rights.

Even if the UN was established as an international consensus forum on human rights, its role has been challenged in recent decades. Critical voices have been heard arguing that the UN is westernized and has ignored the contributions of other cultures. In this sense, the Resolution adopted by the OIC upon the 50th anniversary of the Universal Declaration of Human Rights, urges "1. (...) recognition and full respect of the principal legal systems of the world, including the Islamic model "as something" essential to promote a broader agreement and universality of the UDHR." 2. Stresses the need to persevere in the consultation and coordination between Member States in particular during international conferences and meetings on human rights. 3. Requests the Secretary General to mediate steps to convey OIC criteria on different aspects in the field of human rights (...). 4. Also requests the Secretary General to appoint a contact group in important international organizations (...) to maintain regular meetings to address and discuss issues related to human rights to forge a common position in all Member States on this subject (...) 6. It recommends the adoption of the necessary oversight and precautionary measures against attempts to disfigure and undermine the Sharia [Islamic Law] (Resolution No. 51/8-P (IS) on the coordination between Member States in the field of human rights, 1998).

Muslim societies that declare Islam as the "religion of state" had to rule on the compatibility of these human rights with their national "public order", giving rise to many diversified forms of integration of these rights in the constitutions and laws of Islamic states.

It is in this context that a movement has developed committed to showing the world that there is an Islamic identity of human rights, an authentic and different way of conceiving these rights that even predates the Western affirmation. To demonstrate this, certain Islamic organizations have promulgated a series of documents on human rights.

A **Universal Declaration of Human Rights in Islam** (Dudhi)<sup>154</sup> was proposed at UNESCO's headquarters in Paris in September 1981 by the **Islamic Council for Europe**.

The 1981 Declaration includes a long preamble regarding the merits of Islam that has successfully created for the first time in history, "a just and egalitarian society in accordance

154. The Arabic text of this Dudhi is reproduced verbatim in Islamochristiana, Roma, PISAI, 9 (1983), pp. 1-10, with literal translations in English (P. Johnstone) and French (Mr. Borrmans) in the same edition (respectively, pp. 101-120 and 121-140). An Italian translation, which is excessively literal, is proposed by Mr. Borrmans, in "Studi in onore di Francesco Gabrieli nel suo compleanno ottantesimo" (Roma, Università "La Sapienza", 1984, pp. 95-117). As regards the "simplified" French text, reported in the press, and which contains no references to either the Quran or the Sunnah, it was published in "La Documentation Catholique", Paris, no. 1949, 3 April 1983, pp. 374-377; the corresponding Italian translation was published in "Il Regno", 5/82, pp. 174-177.

with God's plan." Consisting of 23 articles, it closely follows the 1948 Declaration, but when presented to the general public in Paris, a French text and an English text were provided to Western journalists containing no reference to the Qur'an or the Sunnah, while these two sources were being widely quoted in the Arabic version of the Declaration.

Later, the Conferences of Ministers of Foreign Affairs of **the Organization of the Islamic Conference (OIC)** adopted two statements on human rights in Islam: "The Dhaka Declaration on Human Rights [DDHR] in Islam" in 1983 and "The Cairo Declaration on Human Rights in Islam" in 1990<sup>155</sup>

The Dhaka Declaration on Human Rights in Islam was adopted by the fourth conference of OIC Foreign Ministers, held in Dhaka, Bangladesh, in December 1983. The intention was for the aforementioned Declaration to be proclaimed at several Islamic summits of this Organization, but none have yet issued a proclamation.

The **Cairo Declaration on Human Rights in Islam (DDHI)**<sup>156</sup> was adopted by the Nineteenth Conference of OIC Foreign Ministers, on 2 August 1990, by Resolution No. 49/19-P. It contains a preamble and twenty-five articles. The OIC Declaration - the most important - also takes into account the 1948 Declaration, but is evidently much more "confessional" in nature. After a very traditional preamble, its 25 Articles contain no reference to the Koran, although Article 10 states that "Islam is the natural religion of human beings" and that nothing can justify a "change of religion".

The preamble to the Declaration states that the OIC Member States are convinced that fundamental rights and public freedoms in Islam are part "of the Islamic Faith" because these are the rights and freedoms dictated by God "in his revealed books" and are the object of the message of the last Prophet Muhammad. Thus, this Declaration confirms the divine and, at the same time, sacred nature of human rights which find their inspiration in all books revealed to the prophets. Furthermore, the Cairo Declaration emphasizes, first, the role of the Ummah, the community of believers. After the preamble, it was expected to fulfil its function and "light the way for humanity" and "provide solutions for all the chronic problems of this materialistic civilization". Finally, it is clear that no reference can be found in this preamble to either the Charter of the United Nations or the Universal Declaration of Human Rights.

The Cairo Declaration makes reference to civil and political rights, economic, social and cultural rights and some principles of international humanitarian law. It contains sixteen articles on civil and political rights, namely articles 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 18, 19, 20, 21, 22 and 23. Thus, it successively refers to the right to life (Article 2), the prohibition of slavery, humiliation and exploitation of human beings who are born free (Article 11), the right to respect for private and family life and home (Article 18), equality before the law and judicial guarantees (Articles 19 and 20) and freedom of expression and information (Article 22).

Moreover, the Declaration devotes six articles to economic, social and cultural rights. These are the following articles: 9, 13, 14, 15 and 16. Firstly, it outlines cultural rights: "The seeking of knowledge is an obligation" and the provision of education is the "duty" of the society and the State (Article 9). And "Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical labour of which he is the author" (Article 16). Article 13 mentions the right to work, social guarantees for workers and the duties of the State in this area.

155. For more information about the specifics of the Cairo Declaration and the controversy regarding certain articles of the Declaration, see: Mohammad Amin Al-Midani, [Les Déclarations islamiques des droits de l'homme, dans The Arab Center for International Humanitarian Law and Human Rights Education \(ACIHL\)](#).

156. The Arabic text of the Dhaka Declaration on Human Rights in Islam was published in Huquq al-insan al-'Arabi, No. 24, in December 1990, pp. 160-166. An English translation has been proposed in "Kaylan International" [30.12.1989] and a French translation was published in "Conscience et liberté" (Bern, Switzerland), No. 41, 1991, pp. 110-115, and reviewed by Sami A. Abu-Aldeeb Sahlieh, in "Muslims faceaux droits de l'homme: religion, droit et politique (études et documents)" Bochum, Verlag Dr. Dieter Winkler 1994, pp. 468-471.



The right to property “acquired in a legitimate way” is guaranteed (Article 15.a) and usury is prohibited (Article 14)<sup>157</sup>

The **League of Arab States** adopted a first **Arab Charter on Human Rights**<sup>158</sup> by virtue of resolution 5437 of the League of Arab States at its 102nd regular session on 15/09/1994. With the sole signature of Iraq and without ever being ratified by any state, it never entered into force. The monitoring mechanism, consisting of a Committee of Experts, has therefore not been implemented.

A new version was written in January 2004 and adopted at the Tunis Summit in May 2004. The Arab Charter, as amended in 2004, came into force on 15 March 2008. The Permanent Arab Commission for Human Rights (PAHRC) led the revision of the current Charter, assisted by the UN High Commissioner for Human Rights (UNHCHR). In addition, regional and international human rights organizations have been integrated and have been able to make recommendations. The Charter was adapted to international conventions on human rights and many recommendations have been incorporated into the revised Charter. Ten Member States of the Arab League have so far ratified it. These are Jordan, Bahrain, Algeria, Syria, Palestine, Libya, Qatar, Saudi Arabia, Yemen and the United Arab Emirates. For monitoring purposes, the Charter requires Member States to submit, one year after ratification, a report on the implementation of the Charter to the Supervisory Committee. After that, it requires periodic reports to be submitted every three years. The Arab Commission for Human Rights was created in 2009 to review the implementation of the Charter.

The Arab Charter refers in its preamble to the “eternal principles established by the Islamic Shari’a and the other divinely-revealed religions”. Comprising 43 articles, which subsequently increased to 53 in the amended version of January 2004, it is more legal in nature than previous Declarations and is readily aligned with the text of 1948. The main achievements of the revised version are the recognition of equality between women and men (Article 3 paragraph 3; Article 34 paragraph 4), the new right of the child (Article 34) and the rights of persons with disabilities (Article 40). However, this version still has major shortcomings and no enforcement mechanism is provided. The International Commission of Jurists (ICJ) noted with satisfaction the overall improvements to the Arab Charter on Human Rights. Nevertheless, it urged the authors of the Arab Charter to continue their efforts and complete a process to bring the Arab Charter on Human Rights into line with international human rights protection standards. Criticisms of the ICJ include the problematic wording of the exercise of the right of peoples to self-determination, [the inadequate protection of minorities](#), and [the possible retention of the death penalty for minors](#).

Therefore, although there are undoubtedly “convergences that reflect common values” (liberty, equality, fraternity, justice, etc. ...), there are also “differences” which suggests that the Sharia [Islamic Law] always limits the application of Human Rights. Indeed, the second Declaration contains two important articles on this subject: according to Article 24, “all the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari’ah” and, according to Article 25, “the Islamic Shari’ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.” The fact is that, with regard to women’s rights, the status of the latter is always defined in terms of Koranic texts that remain absolutes in this regard. A careful analysis of the texts reveals that they continue to contain a subtle distinction, if not a discrimination, between men and women, between Muslims and non-Muslims, and finally between civil law (qânûn) and Islamic law (Sharf’a). Moreover, the new version of the Arab Charter stipulates in Article 3, § c, that “men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shari’ah and other divine laws.”

With the entry into force of the Arab Charter of Fundamental Rights, the High Commissioner for Human Rights, Louise Arbour, stressed that this text was incompatible with international standards, both with respect to the death penalty for children and the rights of women and

157. Ibid.

158. The Arabic text (not definitive) was published in “Huqûq al-insan” (Beirut, vol. 1), pp. 387-390, and its French translation (also not definitive) in “S.A.A. Abu Sahlieh, Muslims ...”, cit., pp. 505-508.



non-citizens, and that it continued to equate Zionism with racism. “OHCHR does not endorse these inconsistencies,” stated Louise Arbour, indicating that it “OHCHR continues to work with all stakeholders in the region to ensure the implementation of universal human rights norms.” Louise Arbour also noted that “regional arrangements play a fundamental role in promoting and protecting human rights”, but that “[t]hey should reinforce universal human rights standards<sup>159</sup>”

It has been argued that these declarations “were primarily intended to reassert an Islamic identity that had not been taken into consideration in UN debates since 1948. Thus, they recalled that all law comes from God, as the sole holder of sovereignty, and therefore any human right can only be assessed with respect to the Law (i.e. the Sharia). However, they try not to break completely with the “universal” declarations. They recalled that long before the Enlightenment Islam guaranteed the individual rights upheld by the French Revolution... <sup>160</sup>”

## 2. SIMILARITIES AND DIFFERENCES BETWEEN ISLAMIC AND WESTERN DOCUMENTS ON HUMAN RIGHTS

These documents allow us to study the similarities and differences between Islam and the West regarding their understanding of human rights. We have already highlighted the importance of such a study for the feasibility of intercultural coexistence.

### 2.1. THE FOUNDATIONS OF [HUMAN] RIGHTS

More than in recognized rights, the particularity of Islamic declarations lies in the foundation and articulation of rights established therein.

A comparative analysis focuses first on the different foundations on which Islamic and Western texts are based. Compared with the secular nature of the latter, the Islamic declarations are frankly confessional. “They are not a simple formal confessionality - they begin by invoking God and the Prophet - but rather substantial nature; in other words, they establish that “the rights and freedoms in the Islamic regime are not natural rights but rather the divine gifts founded on the provisions of the Shari’a and Islamic faith” (Kuwait Symposium, no. 10, chapter 1). This is explicitly illustrated in certain declarations where each of the rights and freedoms recognized depart from a literal quotation from the Koran or *hadiz*<sup>161</sup>”

The idea that gave birth to the development of human rights based on the liberal individualism of the Enlightenment, as areas of freedom or guarantee against a threat of oppression, is foreign to Islamic culture. In Islam, the rights arise from the actual concept of the human being, a religious being, accountable to God for his actions and who, in order to fulfil his obligations, receives from the Creator the rights and freedoms that allow him to respect the

159. See: “Throughout the development of the Arab Charter, my office shared concerns with the drafters about the incompatibility of some of its provisions with international norms and standards,” said Louise Arbour, the United Nations High Commissioner of Human Rights (OHCHR), in a statement issued in Geneva. “Moreover, to the extent that it equates Zionism with racism, we reiterated that the Arab Charter is not in conformity with General Assembly Resolution 46/86, which rejects that Zionism is a form of racism and racial discrimination,” said the High Commissioner. On 10 November 1975, the General Assembly adopted Resolution 3379 by 72 votes to 35 (with 32 abstentions), which determined that “Zionism is a form of racism and racial discrimination”. [This resolution, described by former Secretary-General Kofi Annan as a “lamentable” expression of anti-Semitism](#), was revoked by Resolution 46/86 of 16 December 1991.

160. BOUTEYAU Bernard, “Democratie et droits de l’homme: mises en perspective islamistes”, dans MARTÍN MUÑOZ Gema (ed.), *Democracia y Derechos Humanos en el Mundo Árabe*, Madrid, Ed. Cultura Hispánica, 1993, p. 78.

161. Combalá ZOLA, *Los ordenamientos europeos ante las minorías musulmanas: aproximación al estudio de los derechos humanos en las declaraciones islámicas*, in “Anuario de Derecho Eclesiástico del Estado”, vol. XII, 1996, pp. 481-511. Cfr. In this regard, the Declaration of the Islamic Council of Europe of 1981.

divine will. Some Muslim scholars state that the Islamic conception of rights, unlike the West, is not based on the idea of liberation but on the requirement for balance. This concept and this religious origin imbue the *Shari'a* or divine plan with a full set of rules on rights.

The affirmation of the *Shari'a* as the cornerstone of human rights does not imply limited recognition to Muslims; rights are attributed to all individuals, but for the reasons, with their scope and constraints, established by Islamic religious law. The 1981 Declaration of the Islamic Council of Europe is illustrative of this subject. *Universal Islamic Declaration on Human Rights*.

The reason why these rights are recognized at all is mentioned in Article 1 of the OIC Declaration as follows: *"All human beings form one family whose members are united by their subordination to Allah, and descent from Adam. All men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the basis of race, colour, language, sex, religion, political affiliation, social status or any other considerations. True faith guarantees the development of such dignity on the road towards human integrity."*

Arkoun presents the same argument, indicating that non-discrimination in the enjoyment of human rights is rooted in the *Shari'a* because the Qur'an proclaims "we received the dignity of the son of Adam" and of the words of the Prophet, the following are among the most significant: "An Arab has no merit strictly over a non-Arab, no more than a non-Arab has over an Arab or a Black over a White or White over a Black, if this is not in keeping with piety"; "Women are the sisters of men"<sup>162</sup>

## 2.2. RIGHTS OR RIGHTS AND OBLIGATIONS?

The first consequence of the above is that according to the Islamic conception rights and freedoms are not understood without a reference to the obligations of the individual: "We have", wrote Seyyed Hossein Nasr, "certain duties towards God, towards nature and towards men (...). Compliance with these obligations will bring the enjoyment of certain rights and freedoms defined by the law of God."

Al-Ansari states that respect for human rights is itself an obligation as part of the mandate to do good and to avoid evil, which is based in Islam on the following precepts of *Shari'a*: "And let there be [arising] from you a nation inviting to [all that is] good, enjoining what is right and forbidding what is wrong, and those will be the successful (Quran Chapter 3, verse 104).

Studies of the *Shari'a* coincide regarding the fact that adhering to good and forbidding evil - and therefore the rights of man - are not a recommendation but an obligation and an imposition which individuals cannot avoid<sup>163</sup>

The inseparability of the rights and obligations is reflected in the texts of all Islamic declarations. It can be found in the OIC Declaration, prior to the recognition of the right to education (9.2), which establishes that seeking knowledge is an obligation (Article 9.1).

For example, this approach to the protection of rights, inseparable from responsibilities, has appeared in one of the current conflicts where the Islamic and Western perspectives have collided, namely, the social and legal confrontations arising when the freedom of expression has been used to defame the religion or hurt religious sentiments. In such cases, the Western world prioritizes the protection of freedoms as something that it has fought hard to achieve, while the Islamic world can be seen to be particularly sensitive to the protection of religious sentiments inherent in its identity and rejects any aggression from what it considers a "frivolous" exercise of freedom, characteristic of a valueless society.

162. ARKOUN Mohammed, "Les droits de l'homme en Islam", in MARTÍN MUÑOZ Gema (ed.) *Democracia y Derechos Humanos en el Mundo Árabe*, Madrid, Ed. Cultura Hispánica, 1993, p. 33.

163. Intervention of Al-Ansari contained in the summary of the Seminar entitled, "Enriquecer the universalidad de los derechos humanos. Islámicas Perspectivas sobre la Declaración Universal de los Derechos Humanos" HR/IP/SEM/1999, part I, 15 march 1999, p. 17.

### 2.3. LIMITATIONS ON RIGHTS

The logical consequence of considering that the origin of rights can be traced to the divine plan expressed in *Shari'a* is to think that it also serves to limit the recognition and scope of rights granted thereunder.

For example, with respect to freedom of opinion, the OIC Declaration provides that “Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the *Sharia'h*”, and Article 16 declares that “Everyone shall have the right to enjoy the fruits of his scientific, literary, artistic or technical labour of which he is the author; and he shall have the right to the protection of his moral and material interests stemming therefrom, provided it is not contrary to the principles of the *Sharia'ah*.”

The compatibility of rights with Islamic law is not just a limitation, but also a point of reference for interpreting or clarifying rights. The OIC Declaration concludes that “All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah” and Article 25 states that “the Islamic Sharia'ah is the only source of reference for the explanation or clarification of any of the articles of this Declaration.”

The quality of limitation attributed to the *Shari'ah* [Islamic Law] has been highly contested in international forums of the United Nations. Islamic States usually ratify conventions and treaties on human rights but they sometimes introduce reservations such as “to the extent that they are compatible with Islamic Law”, thus diluting the scope of the commitment undertaken.

## SUBJECT 2.2.:

# 2.2.4. SCOPE OF OBLIGATIONS OF INTERNATIONAL LAW: ACCEPTANCE TERMS, LIMITATION CLAUSES, RESERVATIONS AND DEROGATION<sup>164</sup>

## 1. THE DRAFTING AND ADOPTION OF INTERNATIONAL INSTRUMENTS ON HUMAN RIGHTS

All instruments on human rights and grand declarations are adopted by the General Assembly of the United Nations, which is the only body where all Member States - currently 191 - are represented and each has one vote. The development process often begins with the adoption of a non-binding declaration, which allows an agreement to be reached on a common definition. Then comes a more difficult task, which is the development of legally binding norms or standards.

The text of human rights instruments is generally first drafted by the Human Rights Commission. Ordinarily, the Commission entrusts its Sub-Commission on the Promotion and Protection of Human Rights to draft a first version or delegates this task to a working group specially set up by it for this purpose (such as the one that is currently drafting such a treaty on enforced disappearances) and which works in between sessions. The process of preparing the aforementioned report for submission to the Commission and its subsidiary bodies usually takes several years and may even take more than 20 years.

After the adoption of a text by the Commission on Human Rights, the development process usually continues at a faster pace. The Economic and Social Council (ECOSOC) must approve the text, which it normally does during a single session. Finally, the General Assembly and in particular its Third Committee, the Committee on Social, Humanitarian and Cultural Affairs, has to discuss and formally adopt the draft. In the early years, it was not rare for the Third Committee to start the drafting work more or less from scratch. In recent years, however, major political decisions are made by the Commission; the General Assembly is content to resolve certain outstanding issues in one or two sessions.

When an instrument has been adopted by the General Assembly, usually by consensus, it is open for signature and ratification by Member States. It comes into force as soon as the required number of ratification or adhesion instruments have been deposited.

Some treaties, such as human rights instruments, are open only to States, while others are open to other entities empowered to conclude treaties. The two Covenants and the International Convention on the Elimination of All Forms of Racial Discrimination are open

164. This topic has been transcribed almost word-for-word from Inter-Parliamentary Union (IPU), *Human rights: a handbook for parliamentarians*, Geneva, 2016, pp. 47-51 and Office Of The United Nations High Commissioner For Human Rights (OHCHR), United Nations Human Rights Treaty System Fact Sheet No. 30/Rev.1, New York and Geneva, 2012, pp. 60-63.

for signature and ratification by “any State Member of the United Nations or member of any of its specialized agencies, of any State party to the Statute of the International Court of Justice and any other State invited by the United Nations General Assembly” that wishes to become a party. Other fundamental instruments on human rights are open to all States. Optional protocols can only be ratified by States parties to the basic instrument, except the Optional Protocol to the Convention on the Rights of the Child, concerning the involvement of children in armed conflict, to which any State may adhere.

## 2. THE PARTICIPATION OF A STATE IN MULTILATERAL TREATIES ON HUMAN RIGHTS

Where a State definitively signs or ratifies, accepts or approves a treaty or accedes to a treaty that has already entered into force, the treaty enters into force for the State in accordance with the relevant treaty provisions.

### 2.1. CONSENT TO BE BOUND

To become a party to a multilateral treaty, a State must demonstrate, through concrete actions, its intention to respect the rights and obligations created by that treaty. In other words, it must express its consent to be bound by the treaty. A State may express its consent to be bound in different ways, according to the final clauses of the treaty in question. The most common channels used are as follows<sup>165</sup>

- a) Final signature;
- b) Ratification;
- c) Acceptance or approval;
- d) Adhesion; and
- e) in some cases, a State may also be linked by succession.

The act by which a State expresses its consent to be bound by a treaty and the entry into force of the treaty are two different things. Consent to be bound is the act whereby a State demonstrates its intention to respect the rights and duties established by the treaty on a legal level, through final signature or deposition of an instrument of ratification, acceptance, approval or accession. The entry into force of a treaty is the moment when the treaty becomes legally binding on the State, i.e. when the State becomes party to the treaty. Normally, each treaty contains specific provisions on these two aspects.

#### A) SIGNATURE

Multilateral treaties, like the human rights treaties, usually provide for signature subject to ratification, acceptance or approval. In such cases, the act of signing does not impose legal obligations on the State. However, signature does indicate the State's intention to take steps to be bound by the treaty at a later date. In other words, signature is a preparatory step on the way to ratification. Signature also creates an obligation to refrain in good faith from acts that would defeat the object and purpose of the treaty.

Providing for signature subject to ratification gives States time to seek domestic approval for the treaty and enact any legislation necessary to implement the treaty domestically, before undertaking the international obligations under the treaty.

.....  
165. The meaning and scope of each of these terms are described in the attached glossary.

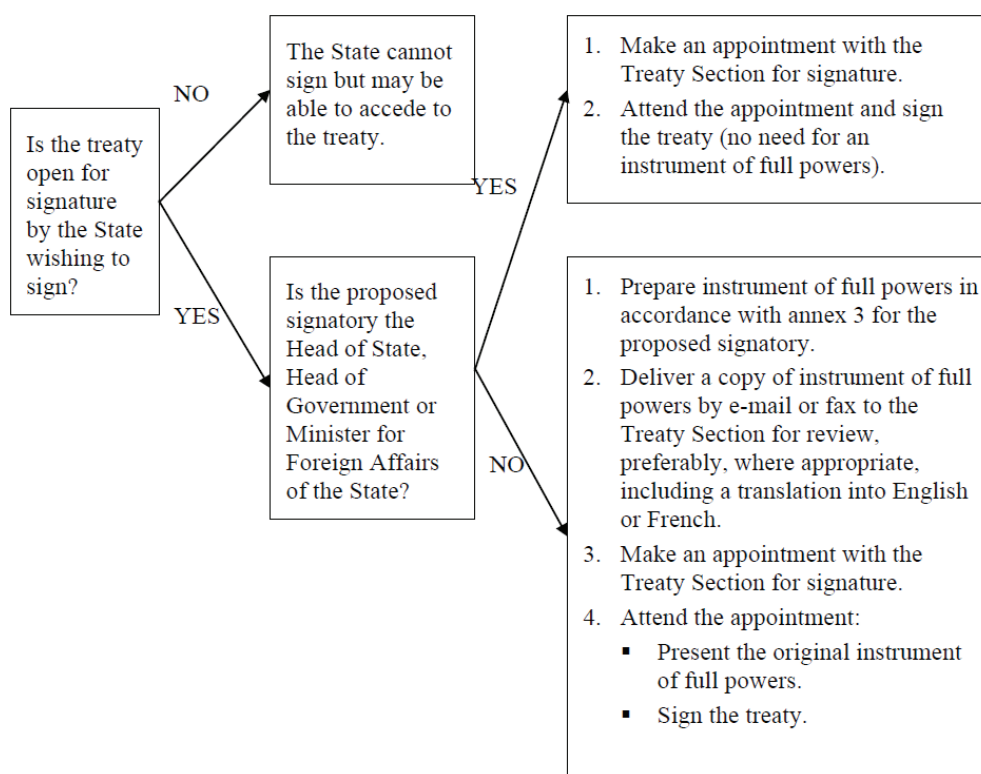
## B) RATIFICATION, ACCEPTANCE OR APPROVAL

Definitive acts, undertaken at the international level, whereby a State establishes its consent to be bound by a treaty *which it has already signed*. It does this by depositing an “instrument of ratification” with the Secretary- General of the United Nations. To ratify a treaty, the State must have signed the treaty first; if a State expresses its consent to be bound without first having signed the treaty, the process is called accession (see below). Upon ratification, the State becomes legally bound by the treaty as one of its State parties.

Generally, there is no time limit within which a State is requested to ratify a treaty which it has signed. Once a State has ratified a treaty at the international level, it must give effect to it domestically.

Ratification at the international level, which indicates to the international community a State’s commitment to undertake the obligations under a treaty, should not be confused with ratification at the national level, which a State may be required to undertake in accordance with its own constitutional provisions before it expresses consent to be bound internationally. Ratification at the national level is insufficient to establish a State’s intention to be legally bound at the international level.

### Signing a multilateral treaty



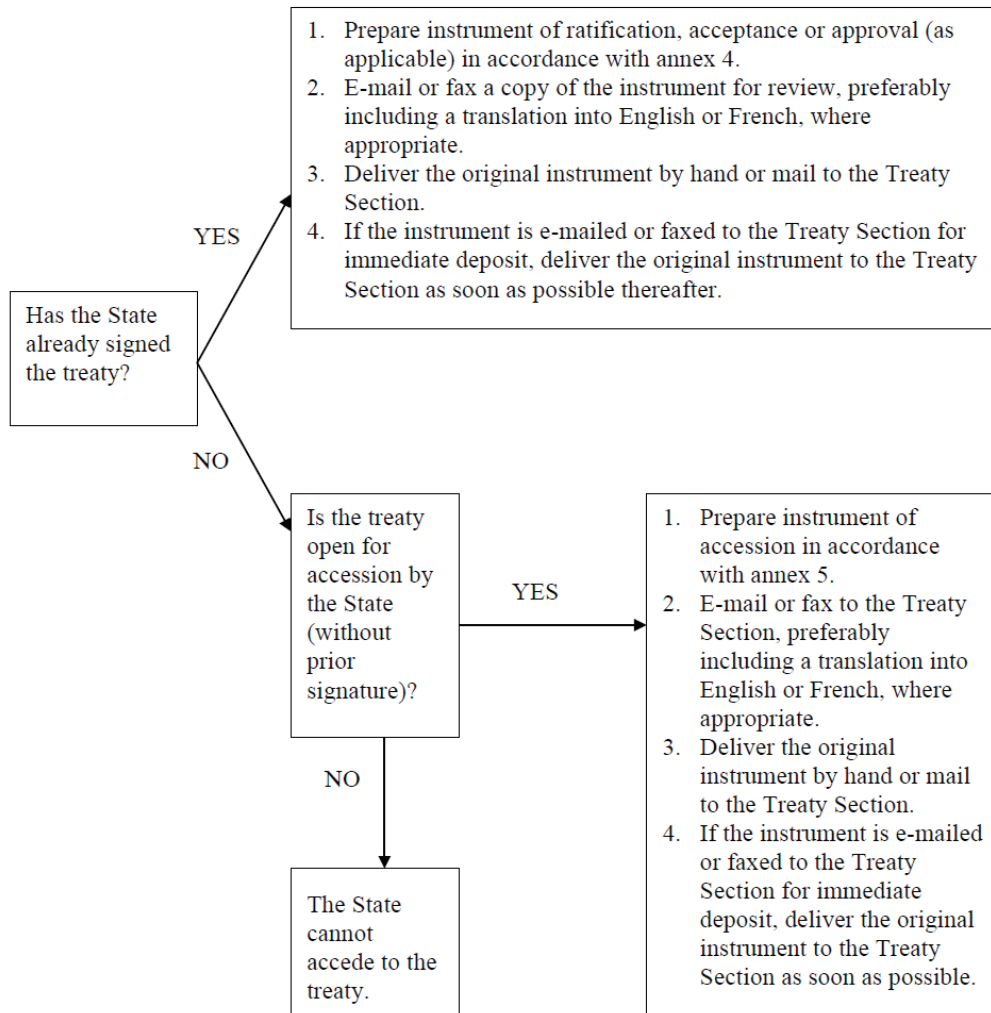
Source: United Nations - Treaty Section of the Office of Legal Affairs. *Treaty Handbook*, Revised edition of 2012, p. 42.

## C) ACCESSION

Accession is the act whereby a State that has not signed a treaty expresses its consent to become a party to that treaty by depositing an “instrument of accession” with the Secretary-General of the United Nations. Accession has the same legal effect as ratification, acceptance or approval. However, unlike ratification, which must be preceded by signature to create binding legal obligations under international law, accession requires only one step, namely, the deposit of an instrument of accession.

The conditions under which accession may occur and the procedure involved depend on the provisions of the treaty. Accession is generally used by States wishing to express their consent to be bound by a treaty for which the deadline for signature has passed. However, many modern multilateral treaties provide for accession even when the treaty remains open for signature.

### Ratifying, accepting, approving or acceding to a multilateral treaty



Source: Nations Unies - Treaty Section of the Office of Legal Affairs. *Treaty Handbook*, Revised edition of 2012, p. 43.

### D) SUCCESSION

Succession takes place only if a State, which is a party to a treaty, has undergone a major constitutional transformation which raises some doubt as to whether the original expression of consent to be bound is still valid. Such circumstances may include independence (for example, through decolonization), dissolution of a federation or union, and secession of a State or entity from a State or federation. The successor State may ratify or accede to the treaty in its own capacity or, alternatively, it may express its consent to continue to be bound by the legal obligations assumed by the original State party with respect to the same territory through an act of succession. In such cases, the State will notify the United Nations Secretary-General of its intention to succeed to the legal obligations.



## E) ENTRY INTO FORCE

Entry into force of a treaty is the moment when a treaty becomes legally binding on its parties. The provisions of the treaty determine the moment of its entry into force, usually after a month or so. There are two types of entry into force: definitive entry into force of the treaty as an international legal instrument; and specific entry into force for a particular State.

- **Definitive entry into force**

Definitive entry into force is when a new treaty becomes a legally binding instrument for those States that have already expressed their consent to be bound by its provisions. Most treaties stipulate that they will enter into force after a specified number of instruments of ratification, approval, acceptance or accession have been deposited with the Secretary-General. Until that date, the treaty cannot legally bind any State, even those that have ratified or acceded to it (although they are obliged to refrain in good faith from acts that would defeat its object and purpose).

- **Entry into force for a State**

Once a treaty has entered into force generally, additional provisions determine when the treaty will enter into force for any other State (or regional integration organization) that wishes to be bound by it.

## F) DATES

Consequently, there may be several dates attached to a treaty in relation to a given State:

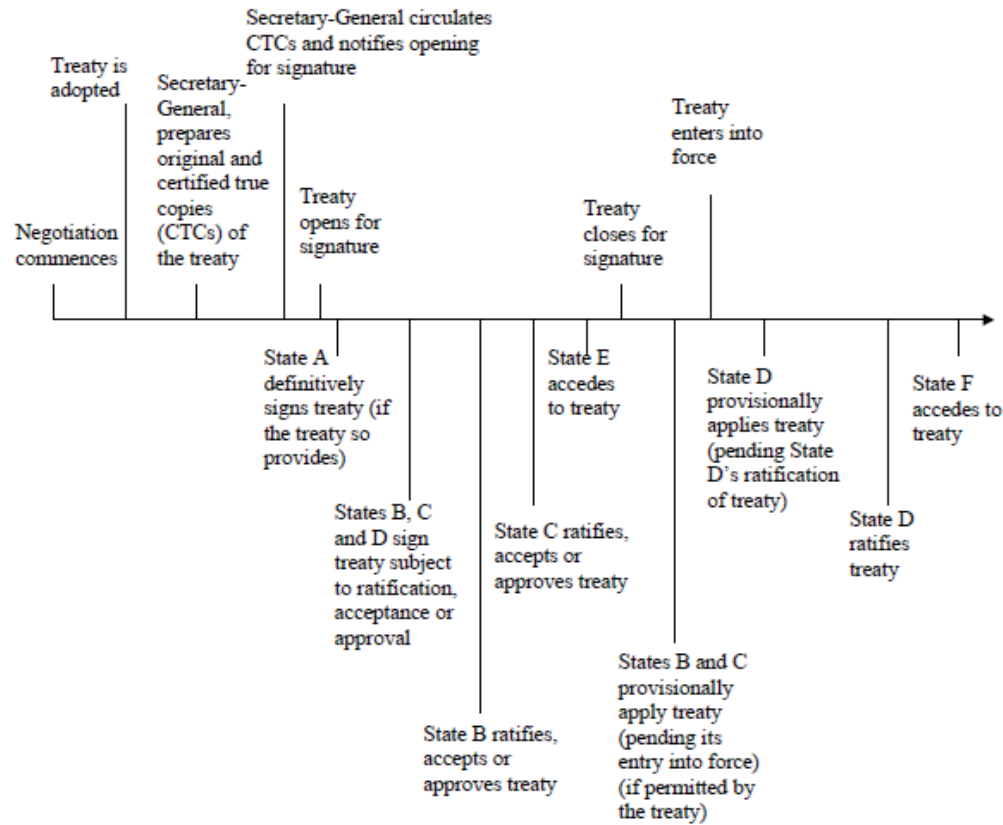
- **Date of definitive entry into force of the treaty:** the date, set in the treaty, at which the treaty enters generally into force in international law and becomes binding on States that have already taken the necessary measures.
- **Date of signature:** the date on which a State signs the treaty. This has no legal effect other than to oblige the State to refrain from actions that would defeat the object and purpose of the treaty.
- **Date of deposit of instrument of ratification or accession:** the date on which the United Nations treaty depositary receives the legal instrument that expresses the State's consent to be bound by the treaty.
- **Date of entry into force for a State:** the date, established in the treaty, on which the treaty becomes formally binding on the State in international law. Most treaties require a set period to elapse after the date of deposit of instrument before the treaty becomes binding. The precise period varies from treaty to treaty.

This section describes what happens after the adoption of a treaty. The figure below shows a possible sequence of events when a treaty enters into force and States become parties to it.

## G) HOW DO I FIND OUT WHETHER A TREATY IS IN FORCE FOR A PARTICULAR STATE?

The definitive source is the United Nations Treaty Section, which maintains a register of multilateral treaties deposited with the Secretary-General. Its website is <http://untreaty.un.org>.

## Key events in a multilateral treaty



Source: United Nations - Treaty Section of the Office of Legal Affairs. *Treaty Handbook*, Revised edition of 2012, p. 21.

## 2.2. STATE RESTRICTIONS ON HUMAN RIGHTS

### Legitimate restrictions

- Reservations;
- Derogation measures in cases of emergency;
- Prohibition of human rights misuse;

Limitation clauses must:

- comply with domestic law;
- serve a legitimate purpose;
- be proportionate.

Some human rights, such as the prohibition of torture and slavery, are *absolute*. The application of interrogation techniques amounting to torture as defined under article 1 of CAT — for instance electric shocks and other methods causing severe physical pain or mental suffering — is not justified on any grounds whatsoever, including — in the area of counter-terrorism — such circumstances as the need to extract from a detainee information about an imminent terrorist attack.

States are allowed a *margin of appreciation* in relation to their obligations to respect, protect and fulfil most human rights. Most of these obligations are subject to progressive realization, and the particular social, political, economic, religious and cultural circumstances of every society must therefore be taken into account in assessing whether a State has violated its human rights obligations. Accordingly, the principle of the universality of human rights primarily

applies to a core content of human rights, while Governments, by virtue of reservations, derogation and limitation clauses, and the principle of progressive realization, enjoy fairly broad powers to implement human rights in accordance with their national interests.

## Limitation clauses

Many obligations to respect human rights are subject to so-called limitation clauses. The exercise of political freedoms, such as freedom of expression, assembly and association, carries with it duties and responsibilities and may, therefore, be subject to certain formalities, conditions, restrictions and penalties in the interests of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of public health or morals, or the protection of the reputation or rights and freedoms of others. If people misuse their freedom of speech and of participation in a demonstration for incitement to racial or religious hatred, for war propaganda or for instigating others to commit crimes, Governments have an obligation to interfere with the exercise of these freedoms in order to protect the human rights of others.

*Any interference, restriction or penalty must, however, be carried out in accordance with domestic law and must be necessary for achieving the respective aims and national interests in a democratic society. States must in any case demonstrate the necessity of applying such limitations, and take only those measures which are proportionate to the pursuance of the legitimate aims.*

## 2.3. DEROGATION IN A STATE OF EMERGENCY

In times of war, rioting, natural disasters or other public emergencies (such as terrorist attacks) that pose a serious threat to the life of a nation, Governments may take measures derogating from their human rights obligations, provided the following conditions are met:

### A state of emergency must

- be declared;
- The specific measures derogating from an international treaty must be officially notified to the competent international organizations and other States parties;
- Derogation is permissible only to the extent strictly required by the situation;
- The derogation must be lifted as soon as the situation permits;
- The rights subject to derogation must not be among those that admit no derogation

## Rights, freedoms and prohibitions that are not subject to derogation even in times of war

### Under Article 4 of CCPR

- Right to life
- Prohibition of torture, or cruel, inhuman or degrading treatment or punishment
- Prohibition of slavery and servitude
- Prohibition of detention for debt
- Freedom from retroactive criminal laws
- Right to recognition as a person before the law
- Freedom of thought, conscience and religion

### Under article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms

- Right to life, except in respect of deaths resulting from lawful acts of war
- Prohibition of torture, cruel, inhuman and degrading treatment or punishment
- Prohibition of slavery and servitude
- Freedom from retroactive criminal laws

### Under article 27 of the American Convention on Human Rights

- Right to legal personality
- Right to life
- Right to humane treatment
- Prohibition of slavery
- Freedom from retroactive criminal laws
- Freedom of conscience and religion
- Right to nationality
- Right to participate in government
- Right to judicial remedy
- Right to a name
- Rights of the family
- Rights of the child

### 2.4. RESERVATIONS TO INTERNATIONAL OR REGIONAL HUMAN RIGHTS TREATIES

In certain cases, States issue statements upon signature, ratification, acceptance, approval of, or accession to, a treaty. Such statements may be entitled “reservation”, “declaration”, “understanding”, “interpretative declaration” or “interpretative statement”<sup>166</sup>.

Article 19 of the 1969 Vienna Convention on the Law of Treaties specifies that a State may, when signing, ratifying, accepting, approving or acceding to a treaty, make a reservation, unless:

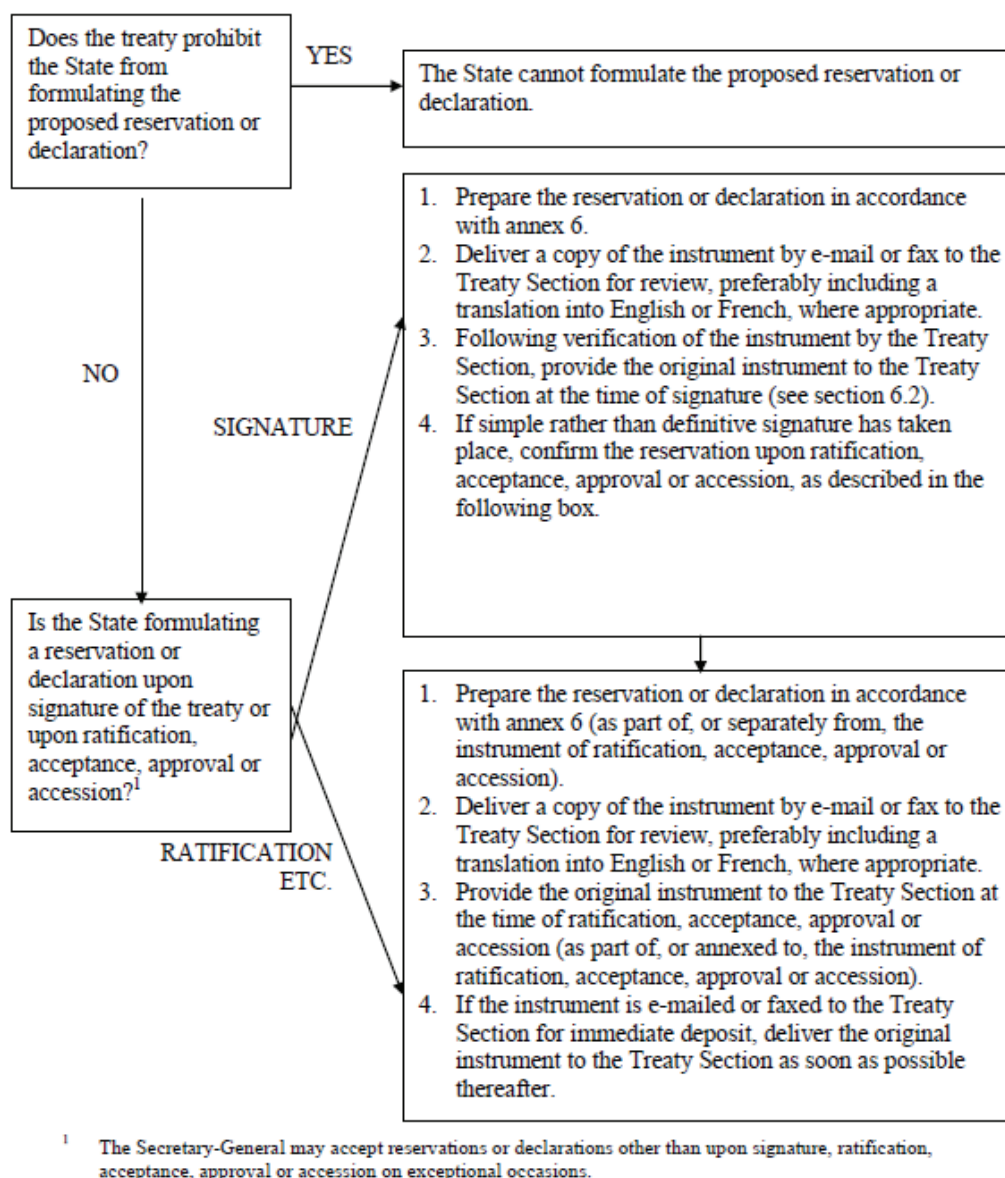
1. Reservation is prohibited by the treaty;
2. The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
3. In cases not falling under the above two categories, the reservation is incompatible with the object and purpose of the treaty.

Where a treaty is silent on reservations and a reservation is formulated and subsequently circulated, the States concerned have 12 months to object to the reservation, beginning on the date of the depositary notification or the date on which the State expressed its consent to be bound by the treaty, whichever is later (see article 20(5) of the Vienna Convention 1969).

A State may, unless the treaty stipulates otherwise, withdraw its reservation or objection to a reservation, either completely or partially, at any time.

Making a reservation or declaration to a multilateral treaty

166. See Glossary.



Source: Nations Unies - Treaty Section of the Office of Legal Affairs. *Treaty Handbook*, Revised edition of 2012, p. 43.

### 3. COUNTER-TERRORISM MEASURES AND HUMAN RIGHTS

The *Digest of Jurisprudence of the United Nations and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, published by the Office of the UN High Commissioner for Human Rights (OHCHR) in September 2003, presents a collection of excerpts from the jurisprudence of human rights bodies of the United Nations and other organizations (in particular, African, American and European regional organizations).

The *Digest* shows that during counter-terrorism activities, some issues have been found to be of particular relevance to the question of the protection of human rights and fundamental freedoms. One such issue is the definition of terrorism. Although the term has not yet been authoritatively defined, States have agreed on some key elements of its definition.

On 9 December 1994, the United Nations General Assembly adopted the Declaration on Measures to Eliminate International Terrorism (A/RES/49/60). It states that terrorism includes “criminal acts intended or calculated to provoke a state of terror in the general public,

*a group of persons or particular persons for political purposes” and further holds that such acts “are in any circumstances unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them.”*

The issue of terrorism and human rights has long been a matter of concern to the United Nations human rights programme, but dealing with it became more urgent after the attacks of 11 September 2001 and the worldwide surge in terrorist acts. At a special meeting of the Security Council’s Counter-Terrorism Committee with international, regional, and subregional organizations on 6 March 2003, Secretary-General Kofi Annan stated:

*“Our responses to terrorism, as well as our efforts to thwart it and prevent it, should uphold the human rights that terrorists aim to destroy. Respect for human rights, fundamental freedoms and the rule of law are essential tools in the effort to combat terrorism — not privileges to be sacrificed at a time of tension.”*

The United Nations Security Council, General Assembly and Human Rights Council have underscored that counter-terrorism and security policies, strategies and practices must be firmly grounded in the protection of human rights and respect for the rule of law to be effective and sustainable. This was explicitly set out in the United Nations Global Counter-Terrorism Strategy adopted by the United Nations General Assembly in 2006.

#### *The United Nations Global Counter-Terrorism Strategy*

In 2006, the General Assembly adopted its Global Counter-Terrorism Strategy in its Resolution 60/288. The strategy consists of four pillars:

- tackling the conditions conducive to the spread of terrorism;
- preventing and combating terrorism;
- building countries’ capacity to prevent and combat terrorism and to strengthen the role of the United Nations system in that regard;
- ensuring respect for human rights for all and the rule of law while countering terrorism.

The United Nations Global Counter-Terrorism Strategy reaffirms the inextricable links between human rights and security and places respect for the rule of law and human rights at the core of national and international counter-terrorism efforts.

In spite of these commitments, domestic counter-terrorism measures adopted by States have resulted in multiple human rights violations, impacting, for example, on the rights to life, liberty and security of person, the prohibition of torture, the rights to freedom of expression, association and assembly, and fair trial and due process rights, among others.

### 3.1. THE NOTION AND DEFINITION OF TERRORISM

Many of the human rights violations associated with counter-terrorism measures derive from vague or sweeping definitions of terrorism at the domestic level. Overly broad terrorism legislation across the globe has had a severely detrimental impact on human rights, leading to both deliberate misuse and unintended abuses, affecting due process and fair trial rights, diminishing the space in which civil society can operate and resulting in the criminalization of legitimate conduct, including the actions of human rights defenders.

Terrorism and related offences must be clearly and narrowly defined to be consistent with international human rights law and not open to abuse. This means that any given law must be sufficiently clear for a person to be able to foresee the consequences of their conduct and judge whether or not his/her “act” and/or action amounts to an infringement of the law. The principle of legality, as enshrined in Article 15 of the International Covenant on Civil and Political Rights and explained by the Human Rights Committee to mean “the requirement of both criminal liability and punishment being limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place, except in



cases where a later law imposes a lighter penalty”, is absolute and can never be limited or derogated from<sup>167</sup>.

The importance of ensuring that the notion of terrorism is carefully defined in domestic law cannot be understated. A clear, narrowly drawn and precise definition can help to ensure that human rights are respected. The former Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, offered the following as a model definition in his final report to the Human Rights Council: Terrorism means an action or attempted action where:

1. the action: (a) constituted the intentional taking of hostages; or (b) is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or (c) involved lethal or serious physical violence against one or more members of the general population or segments of it; and
2. the action is done or attempted with the intention of: (a) provoking a state of terror in the general public or a segment of it; or (b) compelling a government or international organization to do or abstain from doing something; and
3. the action corresponds to: (a) the definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or (b) all elements of a serious crime defined by national law<sup>168</sup>.

### 3.2. STATES OF EMERGENCY AND THE NORMAL OPERATION OF COUNTER-TERRORISM LAW AND PRACTICE

Some United Nations human rights bodies have expressed concern that counter-terrorism measures may infringe on human rights. For example, United Nations special rapporteurs and independent experts, at their tenth annual meeting, held in Geneva in June 2003, stated:

*“Although they [special rapporteurs and independent experts] share in the unequivocal condemnation of terrorism, they voice profound concern at the multiplication of policies, legislation and practices increasingly being adopted by many countries in the name of the fight against terrorism, which affect negatively the enjoyment of virtually all human rights — civil, cultural, economic, political and social.*

*“They draw attention to the dangers inherent in the indiscriminate use of the term ‘terrorism’, and the resulting new categories of discrimination. [They] deplore the fact that, under the pretext of combating terrorism, human rights defenders are threatened and vulnerable groups are targeted and discriminated against on the basis of origin and socio-economic status, in particular migrants, refugees and asylum-seekers, indigenous peoples and people fighting for their land rights or against the negative effects of economic globalization policies.”*

Under very specific conditions, terrorism may justify a state of emergency, in which some rights may be subject to derogation in accordance with CCPR and regional human rights instruments. Under the same provisions, however, certain human rights are not subject to suspension under any circumstances.

Under CCPR and regional human rights instruments, derogation from rights other than the above is permitted only in special circumstances; they must be exceptional, strictly limited in time and, to the extent required by the exigencies of the situation, subject to regular review, and consistent with other obligations under international law; and they must not entail discrimination. It is furthermore required that the State inform the Secretary-General of

167. Article 4(2), International Covenant on Civil and Political Rights; Human Rights Committee, general comment No. 29: States of Emergency (Article 4), 2001, UN Doc. CCPR/C/21/Rev.1/Add.11, paragraph 7.

168. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, 22 December 2010, A/HRC/16/51, paragraphs 26–28.



the United Nations or the relevant regional organization of the provisions from which it has derogated, and the grounds for the derogation.

Building on States' other obligations under international law, the Human Rights Committee has developed a list of elements that, in addition to the rights specified in article 4 of CCPR, cannot be subject to derogation. These elements include the following:

- All persons deprived of liberty must be treated with respect for their dignity; hostage-taking, abduction and unacknowledged detention are prohibited;
- Persons belonging to minorities are to be protected;
- Unlawful deportations or forcible transfers of population are prohibited; and
- "No declaration of a state of emergency ... may be invoked as justification for a State party to engage itself ... in propaganda for war, or in advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence".

Furthermore, as the right to a fair trial during armed conflict is explicitly guaranteed under international humanitarian law, the Human Rights Committee found that the principles of legality and the rule of law require that fundamental fair trial requirements be respected during a state of emergency. The Committee stressed that it is inherent in the protection of those rights that are explicitly recognized as not being subject to derogation that they be secured by procedural guarantees, including, often, judicial guarantees.

Under CCPR and the regional human rights instruments, the principles of necessity and proportionality apply when it is exceptionally permissible to limit some rights for specific, legitimate and well-defined purposes other than emergencies. The measures taken must be appropriate and must be the least intrusive possibility to achieve their objectives. The discretion given to authorities to act in that connection must not be unfettered. In all cases, the principle of non-discrimination must be respected and special efforts must be made to safeguard the rights of vulnerable groups. Counter-terrorism measures targeting specific ethnic or religious groups are contrary to human rights, and may kindle an upsurge in discrimination and racism.

# SUBJECT 2.2.:

## OPERABILITY OF AN HRBA

**Hours: 15**

**Subject**

**2.2.5.** International protection mechanisms: cooperation, commitment and supervision

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### SUMMARY OF THE TOPIC

After describing the different theories and stances on the fundamentals of human rights and their normative reflection in international and regional legal instruments, it is now time to look into the legal guarantees for protection articulated in the international system of the United Nations.

In this sense, it is important not to mistake the concept of rights for the concept of guarantees. Rights differ from guarantees in that the former relates to the legal expectation (positive or negative) while the latter refers to the mechanisms for reinforcing their compliance. Thus, rights exist independently of their guarantees, and do not stop existing without them; what happens in that case is that the effectiveness of their exercise becomes severely weakened. Therefore, the problem of the enforceability of the rights is not that they are not legally enforceable, but that they lack stipulations for their mechanisms of reinforcement.

Mainly, the States are responsible for producing these changes, given their obligation to respect, protect and guarantee human rights. However, at all levels of society, from individuals to the private sector, the international community and the actors of civil society, they all have a function to carry out in the realisation of human rights. In particular, civil society can play an essential role in the follow-up of recommendations on human rights.

The United Nations Organisation has become a mechanism for governments to find areas of agreement and settle problems together. As established in the Charter of the United Nations, signed in San Francisco in 1945, the United Nations is committed to "international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Since then, the international community of States has exclusively mandated the United Nations to promote and protect all human rights.

With this important purpose, the United Nations has created several different international organs and mechanisms to protect human rights established to monitor State Parties' compliance with international treaties on human rights, including by promoting both the ratification and universal enforcement of the main human rights treaties as well as respect for the state of law.

The aim of all those conclusions, recommendation and decisions from the protection mechanisms is to make positive changes in the life of the rights-holders.

Indeed, the United Nations system of human rights is aimed at: promoting equality and fighting against discrimination; combating impunity and reinforcing accountability and the State of law; incorporating human rights into development plans and the economic sphere; extending democracy; creating early warning and protection devices for human rights in situations of conflict, violence and insecurity.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for *this topic*, participants will develop efficiently the following general and specific competences:

### GENERAL:

- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.
- To identify and apply international and regional human rights protection mechanisms.
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

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### Links to bodies of the United Nations:

- [General Assembly Of The United Nations](#)
- [United Nations Economic And Social Council](#)
- [Human Rights Council](#)
- [Universal Periodic Review](#)
- [Special Procedures of the Human Rights Council:](#)
  - [Thematic Mandates](#)
  - [Country Mandates](#)
- [Human Rights Bodies](#)

### Links to tools for keeping track of international protection mechanisms:

#### [Universal Human Rights Index](#)

The database provides easy access to country-specific human rights information emanating from international [human rights mechanisms](#) in the United Nations system: the Treaty Bodies, the Special Procedures and the Universal Periodic Review (UPR).

This tool aims at raising awareness of the human rights recommendations coming from these mechanisms and assisting governments, civil society organizations, national human rights institutions, and United Nations partners with their implementation. The Index allows the user to find out about human rights issues worldwide, and to see how the legal interpretation of international human rights law has evolved over the past ten years.

The following documents are indexed:

**Concluding observations** of the ten UN human rights [Treaty Bodies](#) which are committees of independent experts that monitor, through a reporting procedure (except SPT, through country visits), implementation of the core international human rights [treaties](#) (indexed since 2000):

- Committee on the Elimination of Racial Discrimination ([CERD](#))
- Committee on Economic, Social and Cultural Rights ([CESCR](#))
- Human Rights Committee ([HRC](#))
- Committee on the Elimination of All Forms of Discrimination against Women ([CEDAW](#))
- Committee against Torture ([CAT](#))
- Committee on the Rights of the Child ([CRC](#))
- Committee on Migrant Workers ([CMW](#))
- [Committee on the Rights of Persons with Disabilities \(CRPD\)](#)
- Committee on Enforced Disappearance ([CED](#)) – has not yet adopted its first concluding observations

Country visits reports of the Subcommittee on Prevention of Torture ([SPT](#)) – when made public

Decisions and recommendations adopted by CERD under [early-warning and urgent action procedures](#)

[Country visits reports](#) of [Special Procedures](#)’ mandate-holders assessing the general human rights situation in a given country (indexed since 2006). Mandate holders are called on to report to the Human Rights Council:

- On human rights situations in specific countries or territories ( [country mandates](#));
- On major phenomena of human rights violations worldwide ( [thematic mandates](#))

**Recommendations** made under the [Universal Periodic Review](#) (indexed since the first session in 2008), which is a State-driven process under the auspices of the Human Rights Council involving a periodic review of the human rights records of all 193 UN Member States once every four years

Each conclusion and recommendation is isolated and separately classified; the result is called an annotation [‘About’].

In order to follow up on the implementation of a recommendation, related documents (follow-up reports, position of the State under Review, comments made by States) are directly available through a link placed at the top of the annotation.

#### [Jurisprudence database](#)

This database provides easy access to jurisprudence emanating from the United Nations Treaty Bodies which receive and consider complaints from individuals: the Human Rights Committee (CCPR), the Committee against Torture (CAT), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on the Rights of Persons with Disabilities (CRPD), the Committee on Enforced Disappearances (CED), the Committee on Economic, Social and Cultural Rights (CESCR), and the Committee on the Rights of the Child (CRC).

The jurisprudence database is intended to be a single source of the human rights recommendations and findings issued by all above committees in their work on individual cases. It enables the general public, governments, civil society organizations, United Nations partners and international regional mechanisms to research the vast body of legal interpretation of international human rights law as it has evolved over the past years.


It may also provide guidance to persons preparing complaints to be submitted to Committees by providing access to the views and decisions taken by the Committees on specific human rights issues regarding different countries.

#### [Treaty Body database - the search engine for treaty body documentation](#)

#### [Human Rights by Country](#)

#### [Meetings and briefings on human rights](#)

#### [Treaty body strengthening](#)

Treaty Bodies on YouTube:  [A | C | E | F | R | S](#)

#### [What is a human rights treaty body? - a short video](#)

### **Human Rights videos**

#### **What is it? Two Minute Introductory videos on human rights**

[For subtitles in more than 15 languages, click on “cc” in the YouTube viewer.]

#### **What is a Human Right?**

An introduction to human rights, and the UN’s work to promote and protect human rights. / [\[Transcript in txt\]](#)

#### **What is the Human Rights Council?**

An introduction to the UN Human Rights Council / [\[Transcript in txt\]](#)

## What is a Human Rights Treaty Body?

An introduction to the UN human rights treaty bodies. / [\[Transcript in txt\]](#)

[Special Procedures](#)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

For more information about the international law and treaties established in the treaty bodies, see the [following brochures](#) and series of practical guides to the OHCHR [civil society](#):

Nº 7 (Rev.1): [Individual Complaint Procedures under the United Nations Human Rights Treaties](#)

Nº 10: (Rev.1): [The Rights of the Child](#)

Nº 12: [The Committee on the Elimination of Racial Discrimination](#)

Nº 15 (Rev.1): [Civil and Political Rights: The Human Rights Committee](#)

Nº 16 (Rev.1): [The Committee on Economic, Social and Cultural Rights](#)

Nº 17: [The Committee against Torture](#)

Nº 22: [Discrimination against Women: The Convention and the Committee](#)

Nº 24 (Rev.1): [The International Convention on Migrant Workers and its Committee](#)

Nº 27 [Seventeen Frequently Asked Questions about United Nations Special Rapporteurs](#)

Nº 30: (Rev. 1) [The United Nations Human Rights Treaty System](#)

[Civil Society Space and the United Nations Human Rights System](#) - A Practical Guide for Civil Society

[How to Follow Up on United Nations Human Rights Recommendations](#) - A Practical Guide for Civil Society.

[United Nations Human Rights Council](#) - A Practical Guide for NGO Participants.

[Universal Periodic Review](#) - A Practical Guide for Civil Society.

[Social Forum of the Human Rights Council](#) - A Practical Guide for Civil Society.

[Human Rights Funds, Grants and Fellowships](#) - A Practical Guide for Civil Society.

[Working with the United Nations Human Rights Programme: A Handbook for Civil Society.](#)

REMIRO BROTONS, A., *et. al.*: "La protección internacional de los derechos humanos", en *Derecho Internacional. Curso General*, Tirant lo Blanch, Valencia, 2010, pp. 743-752.

DÍEZ DE VELASCO, M.: "La protección internacional de los derechos humanos (II)", en *Instituciones de Derecho Internacional Público*, 17ª ed., Tecnos, Madrid, 2009, en pp. 660-676.

Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, *Human Rights Handbook for Parliamentarians* Nº 26, Geneva, 2016, pp. 27-45.

## LEARNING OUTCOMES

By the end of the topic, the participants in training should be able to:

- Understands the logic and value of applying the norms and principles of human rights to strengthen the analytical work on problems as well as the processes of social intervention and programming.

- Understands the centrality of human rights in the work of the United Nations and in the UN reform process as well as the commitment of the system and the UN Agency to integrate human rights into the work of the United Nations.
- Can describe the main protection systems of human rights on the international, regional and national levels and how they can apply to an analysis of the country.
- Knows how to find sources of information to access each international human rights mechanism.
- Identifies the interpretations of human rights as made by the organs of the treaties (general comments) and knows how to use them to compare and contrast them with their national laws.
- Knows how to find and apply the “jurisprudence” of the organs of the treaties as a criterion for interpreting any national cases that may arise.
- Is able to follow up on the United Nations recommendations of the mechanisms, mandates or organs on human rights.
- Is able to contrast and appraise public policies and strategies as per the international standards and recommendations made to the States by the international mechanisms for protection.

## METHODOLOGY

As a suggestion, we propose the following:

Methodology:	Teaching tools
Expository method	Reading texts and/or viewing audiovisual material
Problem-solving	Reports Portfolio

## DESIGNING A SYLLABUS OF LEARNING ACTIVITIES

Detailed description of activities for the student to carry out, individually or in groups, with the specification of the expected results and, if applicable, the evaluation criteria.

The appendix features a list of activities from which to choose.

### Activity 1: Individual. Reading the guide and the topic

It is advisable to approach the study of this topic by reading it carefully.

It is likely that a thorough understanding of the concepts posed regarding international protection of human rights is not fully noticeable until the proposed activities and the self-test accompanying the topic are done. It may prove of great help to practice by working out the solutions to the questions posed. The student's individual work may be completed by using instruments such as the forum and the tutorials, where answers may be found to some of his questions.

### Activity 2: Individual. Watching introductory videos on the international protection mechanisms

This helps reinforce the readings by providing a summary of the most relevant information.



### Activity 3: Individual. Diagnostics on the degree of legal protection offered in the student's country on human rights

Imagine that you must write an official report or an article evaluating the level of commitment taken on in your country in the protection of a particular right, one related to your field and scientific speciality (law, social work, communication, pedagogy, etc.).

It must be well documented and precisely argued.

To that end, structure the report or the script of your oral report with the following elements:

- a) Identify some **problem of situation** in your country that affects some specific right (for example, health, participation in politics, housing, persons with disabilities, etc.).
- b) Identify the **international norms** that guarantee its protection and double-check that your State has ratified the international text.
- c) Make use of the tools and databases in the guide to build your argument:
  1. Check that the watchdog body (committee or subcommittee) that monitors compliance of that right has published a **general comment** in which it provides a clear interpretation of that right.
  2. Find any **jurisprudence** that may exist on that right issued by one of the committees that has competence to settle individual citizens' claims (the communications must preferably be from your country; should none exist, find some communication from a country whose profile is similar to your country's).
  3. Examine if the problem you have identified is mentioned in any of the **reports** your State periodically submits to the corresponding committee.
  4. Check if the problem you have identified appears in the report released by your State in the **Universal Periodic Review** or if any of the recommendations made by the rest of the States make any mention of it.

Write a 3-page text that includes the following sections:

- a) Description of the problem or situation that violates a human right.
- b) Write up a position statement that reveals the State's non-compliance with its duties, taking into account the information obtained from the various international protection mechanisms.
- c) A specific proposal for action

Send the report to Prof. Ana Vega by the email of the virtual classroom.

**Final product:** Assess the degree of commitment taken on by a State in protecting a human right, as per the information obtained by the follow-up from international mechanisms.

**Activity 4.** Watch the report called "Feminicidio, S.A." En Portada (TV programme) aired on 24 July 2011. Available on the website of Radio Televisión Española: <http://www.rtve.es/alacarta/videos/en-portada/portada-feminicidio-06-03-11/1038051/>

Point out what mechanisms exist to denounce all the Human Rights violations reported. Indicate who can file such claims and with whom. Argue your points.

The **portfolio** must include a personal learning note: what have I learned? What useful concepts have I discovered?

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Assessment criteria
Activity 1. Reading the guide and the topic	2.30h	Evaluation self-test
Activity 2. Watching the videos	1h	
Activity 3. Diagnostic of human rights protection	6h	<b>Writing a report:</b> precision in selecting sources and arguments <b>Portfolio</b>
Activity 4. Watching the report		<ul style="list-style-type: none"> <li>The student will be assessed on his ability to analyse a situation taken from real life in light of potential violations of Human Rights contemplated in the international regulations and to find mechanisms for claiming, with some assurance of success, the violation of such rights.</li> <li>In addition, the student will be assessed on his ability to discern critically the limitations in the international legal texts on matters of human rights protection</li> </ul>

## EVALUATION SELF-TEST

- The protection mechanism for Human Rights established in the Universal Declaration of Human Rights...
  - It was created by a Resolution of the United Nations Security Council
  - The Universal Declaration of Human Rights does not have a protection mechanism for the rights recognised in it.
  - It is based on the work carried out by the Human Rights Committee
  - It is based on the work carried out by the Human Rights Council
- The Human Rights Council, as the organism for protecting Human Rights, replaces...
  - the Committee on Economic, Social and Cultural Rights
  - The Human Rights Commission
  - The Civil and Political Rights Committee
  - the United Nations High Commissioner

3. The Committee on Economic, Social and Cultural Rights
  - a) Is an organ created by the International Covenant on Economic, Social and Cultural Rights
  - b) Is an organ created by the Optional Protocol to the Covenant on Economic, Social and Cultural Rights
  - c) Is an organ created by a Resolution of the United Nations Economic and Social Council
  - d) All the answers above are false
4. The Human Rights Commission ...
  - a) Is a main organ of the United Nations in charge of settling inter-State claims of violations of the International Covenant on Civil and Political Rights.
  - b) Is the organ in charge of settling the communications that private parties may submit on violations of the International Covenant on Civil and Political Rights
  - c) Is the organ in charge of settling the communications that private parties may submit on violations of the International Covenant on Economic, Social and Cultural Rights
  - d) Until the year 2006 it was the organ in charge of settling human rights violations by means of starting up protection procedures created outside the Treaties.
5. Depletion of internal resources is a requirement for admission of any claim or communication posed in the framework of an international human rights protection system...
  - a) True
  - b) False
  - c) It only happens in the area of the Universal Declaration of Human Rights.
  - d) It only happens in the area of the Human Rights protection system established in the International Covenant on Civil and Political Rights.
6. The Rights protection mechanism foreseen in the International Covenant on Economic, Social and Cultural Rights is configured around ...
  - a) Inter-State reports and claims
  - b) Answer a) is correct, but it should also be noted that private individuals may also submit communications as foreseen in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in force.
  - c) In truth, there is no protection mechanism as described in point a) in the framework of the International Covenant on Economic, Social and Cultural Rights.
  - d) All the answers above are false
7. The filing of claims and communications with the Human Rights Committee and the Committee on Economic, Social and Cultural Rights...
  - a) requires the accused States to have recognised the competence of the aforementioned Committees
  - b) does not require the defendant States to have recognised the competence of the aforementioned Committees
  - c) answer b) is correct if it refers only to the Human Rights Committee
  - d) answer b) is correct if it refers only to the Committee on Economic, Social and Cultural Rights

8. The Human Rights Committee ...
- a) is a conventional organ for protecting human rights
  - b) Is an organ created by a Resolution of the United Nations Economic Social Council
  - c) All the answers above are false
  - d) Is an organ created ad hoc by the International Covenant on Economic, Social and Cultural Rights
9. The States members of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Economic, Social and Cultural Rights are obligated to...
- a) Prepare and submit annual reports on Human Rights matters to the Human Rights Committee and the Economic and Social Committee
  - b) Recognise the competence of the Human Rights Committee and the Economic and Social Committee
  - c) Prepare and submit annual reports on Human Rights matters to the General Secretary of the United Nations
  - d) All the answers above are true
10. The Rights protection mechanism foreseen in the International Covenant on Civil and Political Rights is configured around ...
- a) Inter-State reports and claims
  - b) Answer a) is correct, but it should also be noted that private individuals may also submit communications as foreseen in the Optional Protocol to the International Covenant on Civil and Political Rights in force.
  - c) In truth, there is no Rights protection mechanism in the framework of the International Covenant on Economic, Social and Cultural Rights
  - d) All the answers above are false

## EVALUATION SELF-TEST

Question	Answers
Question 1	b
Question 2	b
Question 3	c
Question 4	d
Question 5	a
Question 6	d
Question 7	a
Question 8	d
Question 9	c
Question 10	b

## SUBJECT 2.2.:

# 2.2.5. INTERNATIONAL HUMAN RIGHTS PROTECTION MECHANISMS: COMMITMENTS, COOPERATION AND MONITORING<sup>169</sup>

## INTRODUCTION

### 1. THE ACTIONABILITY OF HUMAN RIGHTS: GUARANTEES AND PROTECTION MECHANISMS

As we have seen in previous topics, human rights are both ethical and legal instruments at the same time. They have an *ethical justification*, as they address basic human needs that turn into moral and legal requirements and are meant to be recognised and guaranteed by the right, thereby generating a duty. Human rights “constitute one of the most widely accepted frameworks of what may be a modern secular ethics that regulates peaceful coexistence among citizens in a democracy. At the same time, they play a *political function*, because many social causes are expressed in the form of human rights, which appear as an instrument of criticism against the behaviour of the political powers. And finally, human rights are a *legal category* of international public law, as they are values that have been transposed into numerous international instruments that define a State’s positive and negative obligations.”<sup>170</sup>

Therefore, human rights are truly subjective basic rights because they feature three characteristics: a) they are **legal rules** in that they are formulated in national and international legal codes; b) they have a direct or indirect **legal obligation** insofar as it is expressly stated in the normative code or can be deduced from it<sup>171</sup> and c) a **legal position or power** to require or demand the achievement of the subject’s recognised self-interests. This means that the individual is in a situation of being able to demand something from someone else, and at the same time, that individual takes a position within a normative order that must be recognised and protected, because it is justified with valid reasons. Therefore, the individual must be taken seriously: he is the subject of rights (a citizen) and not a simple object of the legal order (a subject or vassal).

169. This topic has been prepared using literal extracts from the following sources: Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, *Human Rights. Handbook for Parliamentarians n° 26*, Geneva, 2016; Office of the United Nations High Commissioner for Human Rights, *Working with the United Nations Human Rights Programme: A handbook for civil society*, New York and Geneva, 2008 and Office of the United Nations High Commissioner for Human Rights, *The United Nations Human Rights Treaty System: Introduction to the core international human rights treaties and the “treaty bodies”*, Fact Sheet No. 30 (Rev. 1), New York and Geneva, 2012.

170. Rodrigo Uprimny, *Algunas reflexiones sobre la responsabilidad por la violación de los derechos humanos en la Constitución*, Bogotá, Universidad Nacional de Colombia, s.f., p. 3.

171. It is worth noting, however, that the laws that generate legal obligation do not necessarily generate a subjective right. An example of this is the set of laws that impose duties upon the State vis-a-vis general interests, e.g., the rules for development or subsidy.

The legal or normative formulation of these obligations presents us with the problem of the actionability of these rights and the need to differentiate between two related but different legal institutions: rights vs. guarantees. A (subjective) right involves “the positive legal expectation (of benefits) or negative legal expectation (of no harm)”<sup>172</sup>, whereas a guarantee is “every obligation corresponding”<sup>173</sup> to that (subjective) right, or more specifically, “every mechanism for enforcing a right”<sup>174</sup>. Therefore, rights exist independently of their guarantees, and rights do not cease to exist if they do not have any; the problem then is the effectiveness of their exercise<sup>175</sup>. Indeed, the problem of the enforceability of the rights is not that they are not legally enforceable, but that they lack stipulations for their mechanisms of reinforcement. A clear example of this is the long time that passed (from 1966 to 2008) for the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights General Assembly Resolution A/RES/63/1117) by which to arbitrate the mechanisms for protecting these rights.

With the above premises in mind, in the following topics we will look into the guarantees or systems for protecting human rights, attending to their classification in national and international mechanisms. To that end, the table below features the outline proposed by Peces Barba,<sup>176</sup> who divides national mechanisms into two categories: (1) general guarantees, in reference to “the principles that define the State and permit keeping an integral vision of rights”<sup>177</sup>; and (2) specific guarantees, which are the legal protection mechanisms of rights in and of themselves.<sup>178</sup>

172. Luigi Ferrajoli, *Democracia y Garantismo*, Trotta, Madrid, 2008, p. 63.

173. Ibid.

174. Carolina Silva Portero, “Las garantías de los derechos ¿invención o reconstrucción?”, en Ávila, Ramiro (Comp.), *Neoconstitucionalismo y Sociedad*, Ministerio de Justicia y Derechos Humanos, Ecuador, 2008, p. 66. 66.

175. Ibid., p. 62.

176. Gregorio Peces-Barba, *Curso de derechos fundamentales. Teoría general*, Universidad Carlos III de Madrid, BOE, Madrid, 1999, pp. 501-568.

177. Ibid., p. 503.

178. Ibid., p. 505.

INTERNAL OR NATIONAL GUARANTEES	
<b>A. GENERAL:</b>	<ol style="list-style-type: none"> <li>1. The State of Law:               <ol style="list-style-type: none"> <li>a. Limitation of power by means of Law and basic rights</li> <li>b. Principle of separation of powers</li> <li>c. The principle of legality and the rule of law</li> <li>d. Existence of a legal obligation of obedience (binding public and private powers to the code of law.</li> </ol> </li> <li>2. The democratic State:               <ol style="list-style-type: none"> <li>a. Participation</li> <li>b. Political pluralism</li> </ol> </li> <li>3. The social State: positive State action to realise the basic rights (especially the social ones)</li> </ol>
<b>B. SPECIFIC</b>	
1. Regulation	<p>This refers to the principle of legality in the broad sense. It features two dimensions:</p> <ol style="list-style-type: none"> <li>1. Development and enforcement (of laws on basic rights)</li> <li>2. Reform (by qualified procedures different from the other laws)</li> </ol>
2. Auditing and control	Monitoring how the activity of the public agencies affects basic rights and public freedoms.
3. Interpretation	The various mechanisms present in law that make sure the laws are interpreted in favour of the exercise and enjoyment of basic rights.
4. Internal to Law	Regarding the essential content of each right.
5. Judicial	<p>Enforcement of rights through courts of justice. There are two kinds of guarantees: ordinary and constitutions. They are further differentiated into:</p> <ol style="list-style-type: none"> <li>1. Guarantees on regulating the rights:               <ol style="list-style-type: none"> <li>a. Abstract guarantees (suit for unconstitutionality)</li> <li>b. Specific (question of unconstitutionality)</li> </ol> </li> <li>2. Guarantees of exercise and enjoyment:               <ol style="list-style-type: none"> <li>a. Ordinary legal protection</li> <li>b. Constitutional protection</li> </ol> </li> </ol>



INTERNATIONAL GUARANTEES	
A. UNIVERSAL	<p>Through two basic mechanisms:</p> <ol style="list-style-type: none"> <li>1. Monitoring through reports: to the Human Rights Committee regarding the Covenant on civil rights and to the Economic and Social Council (delegated to the Committee on ESCR in 1987) regarding the ICESCR.</li> <li>2. Monitoring by means of claims: only the Covenant on Civil Rights and its protocol, as the optional protocol of ESCR is not yet in force. This monitoring consists of a claim with the Human Rights Committee filed for: claims between States and claims by individuals from the States Parties against them.</li> </ol>
B. INTERNATIONAL AGREEMENTS	<ol style="list-style-type: none"> <li>1. Organs based on the UN Charter:             <ol style="list-style-type: none"> <li>a) Human Rights Council (formerly, the Human Rights Commission):                 <ul style="list-style-type: none"> <li>• Universal Periodic Review</li> <li>• Special procedures</li> <li>• Procedure for claims</li> </ul> </li> <li>b) High Commissioner on Human Rights</li> </ol> </li> <li>2. Organs created from international treaties on human rights:                 <ul style="list-style-type: none"> <li>• Presentation of State party reports</li> <li>• Receiving claims and individual communications</li> <li>• Writing up general comments or recommendations</li> <li>• Carrying out research</li> </ul> </li> </ol>
B. REGIONAL AGREEMENTS <sup>152</sup>	<ol style="list-style-type: none"> <li>a. European System: its founding instruments are the European Convention on Human Rights (1950) and its Additional Protocols, which establish the existence and operation of the Council of Europe and the European Court of Human Rights.</li> <li>b. The Inter-American System: established by the American Convention on Human Rights (1969) or Covenant of San Jose and the additional Protocol on Economic, Social and Cultural Rights (1988) or Protocol of San Salvador. It is governed by two bodies:                 <ul style="list-style-type: none"> <li>• The Inter-American Human Rights Commission</li> <li>• the Inter-American Court of Human Rights.</li> </ul> </li> <li>c. African System: established in the African Charter of Human and Peoples' Rights (1986). It is governed by two bodies:                 <ul style="list-style-type: none"> <li>• the African Commission on Human and Peoples' Rights</li> <li>• the African Court of Human and Peoples' Rights, established in the Additional Protocol (1998).</li> </ul> </li> <li>d. Arabian System: established by the Arab Charter on Human Rights (1994), revised in 2004. It has an Arab Court of Human Rights, whose statute was approved in 2014.</li> </ol>

Source: Adaptation of the text by Lina Victoria Parra Torres, El deber de progresividad como garantía de los derechos sociales, Universidad Carlos III, Getafe, 2012.

179. It will depend on the conditions negotiated to create each regional system. Furthermore, one must consider if the State is or is not part of any supranational agreements that contemplate a court that settles conflicts of fundamental rights and the extent to which that can be done by the European Union, for example, and the crossroads of competences currently found in the European Court of Human Rights.

## 2. THE INTERNATIONAL PROTECTION MECHANISMS OF THE UNITED NATIONS SYSTEM

The promotion and protection of human rights has been one of the main concerns of the United Nations since 1945. As the General Assembly stated in the Universal Declaration of Human Rights, respect for human rights and dignity “is the foundation for freedom, justice and world peace”. Over the years, an entire set of instruments and mechanisms in defence of human rights has been developed to ensure the primacy of human rights and confront violations accordingly.

The United Nations system has various different mechanisms for monitoring human rights: a) the bodies based on the UN Charter, including the Human Rights Council, and b) bodies created from international human rights treaties, composed of independent experts with a mandate to monitor that the States parties to the treaties meet their obligations. Most of these bodies receive secretariat support from the Human Rights Council and Treaties Division of the Office of the High Commissioner for Human Rights (OHCHR).

### Charter-based bodies

- [Commission on Human Rights \(replaced by the Human Rights Council\)](#)
- [Human Rights Council](#)
- [Universal Periodic Review](#)
- [Special Procedures of the Human Rights Council](#)
- [Human Rights Council Complaint Procedure](#)
- [The Social Forum of the Human Rights Council](#)
- [Forum on Minority Issues](#)
- [Expert Mechanism on the Rights of Indigenous Peoples](#)
- [Forum on Business and Human Rights](#)

### Treaty-based bodies

There are ten human rights treaty bodies that monitor implementation of the [core international human rights treaties](#):

- [Human Rights Committee \(CCPR\)](#)
- [Committee on Economic, Social and Cultural Rights \(CESCR\)](#)
- [Committee on the Elimination of Racial Discrimination \(CERD\)](#)
- [Committee on the Elimination of Discrimination against Women \(CEDAW\)](#)
- [Committee against Torture \(CAT\)](#)
- [Subcommittee on Prevention of Torture \(SPT\)](#)
- [Committee on the Rights of the Child \(CRC\)](#)
- [Committee on Migrant Workers \(CMW\)](#)
- [Committee on the Rights of Persons with Disabilities \(CRPD\)](#)
- [Committee on Enforced Disappearances \(CED\)](#)

The United Nations works hard to promote and protect human rights, especially through three basic channels:

1. The **Office of the United Nations High Commissioner for Human Rights (OHCHR)** is the main body of the United Nations responsible for promoting and protecting human rights. It works closely with funds and programmes and specialised agencies of the United Nations (such as the World Health Organisation, the Office of the United Nations High Commissioner for Refugees, UNICEF, The International Labour Organisation, UNESCO, etc.) to make sure the work of defending human rights has the greatest impact.
2. On account of international human rights treaties (covenants and conventions), **groups of independent experts are set up (committees and bodies for monitoring the treaties)** that periodically report on the states' compliance with their human rights obligations.
3. Inter-governmental bodies or assemblies have been created, composed of States Members of the United Nations, to look into human rights-related issues and situations. The main one is the **Human Rights Council**, which carries out its task with the support of (among others) independent experts making up the so-called *special procedures*, and the mechanism known as the *Universal Periodic Review*.

The three elements are independent but complementary.

## 3. THE OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR)

The Office of the United Nations High Commissioner for Human Rights (OHCHR) represents the world's commitment to universal ideals of human dignity. We have a unique mandate from the international community to promote and protect all human rights stated in the Charter of the United Nations and the international treaties on human rights. The High Commissioner for Human Rights is the principal human rights official of the United Nations.

The High Commissioner heads OHCHR and spearheads the United Nations' human rights efforts. We offer leadership, work objectively, educate and take action to empower individuals and assist States in upholding human rights. We are a part of the United Nations Secretariat with our headquarters in Geneva. The High Commissioner is assisted by a Deputy High Commissioner and an Assistant Secretary-General, who heads OHCHR's New York Office. The New York Office represents the High Commissioner in New York and works for the effective integration of human rights standards into the work of the New York-based UN organs and agencies, policy development processes and public information initiatives.

On 20 December 1993 the General Assembly adopted resolution 48/141, creating the post of the High Commissioner for Human Rights, with the rank of Under-Secretary-General, as the "United Nations official with principal responsibility for United Nations human rights activities". In the same resolution, the General Assembly listed the High Commissioner's specific responsibilities, which inter alia are:

- To promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights, including the right to development;
- To provide advisory services, technical and financial assistance in the field of human rights to States that request them;
- To coordinate United Nations education and public information programmes in the field of human rights;
- To play an active role in removing the obstacles to the full realization of human rights and in preventing the continuation of human rights violations throughout the world;
- To engage in a dialogue with Governments in order to secure respect for human rights;
- To enhance international cooperation for the promotion and protection of human rights;
- To coordinate human rights promotion and protection activities throughout the United Nations system;
- To rationalize, adapt, strengthen and streamline the United Nations machinery in the field of human rights in order to improve its efficiency and effectiveness.

Accordingly, OHCHR's mission consists in protecting and promoting all human rights, for all. It aims to strengthen the United Nations human rights programme and provide the United Nations treaty-monitoring bodies and special mechanisms established by the United Nations Commission on Human Rights with quality support. OHCHR cooperates with other United Nations bodies to integrate human rights standards into the work of the United Nations system as a whole.

The OHCHR is not only in charge of lending support to the Human Rights Council; it is also responsible for assisting the secretariats of the treaty bodies to harmonise their work methods and information systems and to facilitate the task of rapporteurs, representatives and work groups.

In addition to these responsibilities inherent to their mandate, the Office also leads the efforts at incorporating the human rights perspective in all the activities of all the United Nations organisations.

# PART 1:

## THE HUMAN RIGHTS TREATY BODIES

### 1. DEFINITION

The human rights treaty bodies are the committees of independent experts that monitor the implementation of the United Nations human rights treaties by States parties. They do this by reviewing reports submitted periodically by States parties on steps taken to implement treaty provisions. Most human rights treaty bodies are competent to receive and consider individual complaints, while several may conduct inquiries.

The international human rights treaties described in chapter I create legal obligations on State parties to promote and protect human rights at the national level. When a country accepts a treaty through ratification, accession or succession, it assumes a legal obligation to implement the rights set out in it. But this is only the first step, because recognizing rights on paper does not guarantee that they will be enjoyed in practice. When the first treaty was adopted, it was recognized that State parties would require encouragement and assistance in meeting their international obligations to put in place the necessary measures to ensure the enjoyment of the rights provided in the treaty by everyone under their jurisdiction. Each treaty therefore creates an international committee of independent experts to monitor, by various means, the implementation of its provisions.

The United Nations treaty body system plays a pivotal role in strengthening the protection of human rights nationally. The primary mandate, common to all human rights treaty bodies, is to monitor the implementation of the relevant treaty by reviewing the reports submitted periodically by States parties.

As indicated above, some treaties are supplemented by optional protocols, which States parties to the treaty may ratify.<sup>11</sup> Optional protocols provide further substantive rights or include further monitoring procedures. There are seven optional protocols to international human rights treaties.

Committees consist of 10 to 23 independent experts with recognized competence in the field of human rights. They are nominated and elected by States parties for fixed, renewable terms of four years. The more recent treaties limit the number of terms a treaty body member may have to two.

All human rights treaty bodies are serviced by the Treaties and Follow-up Unit of the Human Rights Treaties Branch of the Office of the United Nations High Commissioner for Human Rights (OHCHR), which receives submissions, reports and correspondence for the treaty bodies, prepares reports, carries out research, provides technical cooperation, guidance and advice to States parties, organizes meetings and undertakes any other logistical work required by the treaty bodies.

The sessions of all of the treaty bodies are held in Geneva or New York<sup>14</sup> (in Geneva, usually at the main OHCHR building—Palais Wilson—but also on occasion at Palais des Nations). OHCHR is working to ensure the accessibility of its meeting rooms, documents and technology so that experts, delegates, and civil society representatives with disabilities are able to engage in the work of the treaty bodies.

The treaty bodies listed below take care of monitoring enforcement of the human rights treaties listed in the topic above.

THE HUMAN RIGHTS TREATY BODY SYSTEM		
Human rights treaty body	Founding treaty	Optional protocol(s) to founding treaty
Human Rights Committee, established in 1977	International Covenant on Civil and Political Rights (ICCPR), adopted in 1966	Optional Protocol to the International Covenant on Civil and Political Rights (which allows for individual complaints), adopted in 1966 Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted in 1989
Committee on Economic, Social and Cultural Rights, established in 1985	International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966	The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was adopted by the Human Rights Council in June 2008. Expected to be adopted by the General Assembly in 2008, the Optional Protocol will allow for individual complaints once it has entered into force.
Committee on the Elimination of Racial Discrimination, established in 1970	International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), adopted in 1965	No optional protocol
Committee on the Elimination of Discrimination against Women, established in 1982	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (which allows for individual complaints and inquiries), adopted in 1999

Human rights treaty body	Founding treaty	Optional protocol(s) to founding treaty
Committee against Torture, established in 1987	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), adopted in 1984	See next box
Subcommittee on Prevention of Torture, established in 2006	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) (which establishes national and international monitoring mechanisms), adopted in 2002	
Committee on the Rights of the Child, established in 1991	Convention on the Rights of the Child (CRC), adopted in 1989	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted in 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, adopted in 2000
Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, established in 2004	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), adopted in 1990	No optional protocol
Committee on the Rights of Persons with Disabilities, established in 2008	Convention on the Rights of Persons with Disabilities, adopted in 2006	Optional Protocol to the Convention on the Rights of Persons with Disabilities (which allows for individual complaints), adopted in 2006
Committee on Enforced Disappearances, established in 2011	International Convention for the Protection of All Persons from Enforced Disappearance, adopted in 2006	No optional protocol.

Source: Office of the United Nations High Commissioner for Human Rights, Working with the United Nations Human Rights Programme: A Handbook for Civil Society, New York and Geneva, 2008.



## 2. ¿HOW DO THE HUMAN RIGHTS TREATY BODIES WORK?

The human rights treaty bodies perform a number of functions to monitor how States parties implement treaties. Although they coordinate their activities, their procedures and practices differ.

### 2.1. CONSIDERATION OF STATE PARTIES' REPORTS

The primary mandate of all the committees, except the Subcommittee on Prevention of Torture, is to review the reports submitted periodically by State parties in accordance with the treaties' provisions. Within this basic mandate, the treaty bodies have developed practices and procedures that have proved remarkably effective in scrutinizing the extent to which States have met their obligations under the human rights treaties to which they are a party and encouraging further implementation. The following presents the essential common features of the consideration of State reports by the treaty bodies:

#### TREATY BODIES

Treaty bodies monitor and facilitate the implementation of the treaties through:

- Reviewing State Party reports and additional sources of information
- Adopting observations and recommendations
- Adopting General Comments on HR Standards contained in the treaty
- Examining individual complaints (some of them)
- Making confidential inquiries (some of them)

#### A) STATE PARTY REPORTING OBLIGATIONS

Once a State has ratified or acceded to a treaty, in addition to its obligation to implement the substantive provisions of the treaty, it assumes the obligation to submit periodic reports to the relevant committee concerning the measures taken towards implementation. The reports must set out the legal, administrative, judicial and other measures that the State has adopted to implement the treaty provisions and provide information on the difficulties it has encountered.

In order to ensure that reports contain adequate information to allow the committees to do their work, each committee issues guidelines on the form and content of State reports. These guidelines are issued in a compilation document (HRI/GEN/2), which is updated regularly<sup>15</sup>. These reports are ultimately examined by the relevant committee in the presence of a delegation representing the State.

#### B) THE PURPOSE OF REPORTING

State parties are encouraged to see the process of preparing their reports for the treaty bodies not only as the fulfilment of an international obligation, but also as an opportunity to take stock of the state of human rights protection within their jurisdiction for the purpose of policy planning and implementation. The preparation offers an occasion for each State party to:

- a) Conduct a comprehensive review of the measures it has taken to harmonize domestic law and policy with the provisions of the international human rights treaties to which it is a party;
- b) Monitor progress made in promoting the enjoyment of the rights set forth in the treaties in the context of the promotion of human rights in general;;
- c) Identify problems and shortcomings in its approach to the implementation of the treaties;

- d) Assess future needs and goals for more effective implementation of the treaties; and
- e) Plan and develop appropriate policies to achieve these goals.

Seen in this way, the reporting system is an important tool for a State to assess what it has achieved and what more it needs to do to promote and protect human rights in the country. The reporting process should encourage and facilitate, at the national level, public participation, public scrutiny of State policies, laws and programmes, and constructive engagement with civil society in a spirit of cooperation and mutual respect, with the aim of advancing the enjoyment by all of the rights protected by the relevant treaty. Some States incorporate comments and criticism from NGOs in their reports; others submit their reports to parliamentary scrutiny before submitting them to the Secretary-General of the United Nations for consideration by the relevant treaty body.

### C) ¿ HOW DOES EACH TREATY BODY EXAMINE A STATE PARTY'S REPORT?

Although there are variations in the procedures adopted by each committee in considering a State party's report, the following basic stages are common to all treaty bodies.

#### ¿What is a common core document?

State reports consist of the common core document and a treaty-specific document.

The common core document contains general and factual information relating to the implementation of the treaties which may be of relevance to all or several treaty bodies (see HRI/MC/2006/3). A treaty body may request that the common core document be updated if it considers that the information it contains is out of date.

The treaty-specific document contains information relating to the implementation of the treaty which the relevant committee monitors.

#### c.1. Presentation of the initial report

An **initial report** is usually required one to two years after the entry into force of the treaty in the State concerned.

The report must be submitted to the Secretary-General (represented by OHCHR) in one of the six official languages of the United Nations. It is then processed by the Secretariat, and translated into the committee's working languages. Once processed, the report is scheduled for consideration by the committee at one of its regular sessions.

The periodicity of subsequent reports varies from two to five years depending on the treaty provisions and the decisions taken by the committees. Several committees accept combined reports, meaning that a State party may submit two or more of its periodic reports due to a given committee in one combined report. Most treaty bodies identify when the next report is due in their concluding observations.

States parties are encouraged to see the preparation of their reports for the treaty bodies not only as the fulfilment of an international obligation, but also as

an opportunity to assess the state of human rights protection within their countries for the purpose of policy planning

#### c.2 Lists of issues

In advance of the session at which a committee will consider a State party's report(s), the committee prepares a list of issues and questions, which is transmitted to the State party. A State party will usually submit its responses to this list in writing; these answers are posted on the OHCHR website.

The Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child each convene a one-week, pre-sessional working group to prepare lists of issues and questions with respect to the reports of the States parties that they will consider in the immediate future. The Human Rights Committee assigns this to its **country report task forces**, which meet during the session preceding the one at which the given State's report will be examined.

Most committees appoint one of their members **as country rapporteur** to take the lead in drawing up the list of issues for a specific country.

The Committee on the Elimination of Racial Discrimination has adopted the so-called list of themes, to which no responses are required. The country rapporteur will send a State party a short list of themes with a view to guiding and focusing the dialogue between its delegation and the Committee during the consideration of the State party's report.

### c.3. Written response to list of issues

The written responses to lists of issues supplement the State party's report and are especially important when there has been a long delay between the submission of the periodic report and its examination.

### c.4. List of issues prior to reporting

In 2007, the Committee against Torture adopted a new optional reporting procedure (the so-called list of issues prior to reporting) which consists in the adoption of lists of issues to help State parties to prepare their periodic reports.

The State party's response to this list of issues constitutes its periodic report under article 19 of the Convention against Torture.

The procedure does not apply to initial reports. The Committee is of the view that this procedure will assist State parties to prepare and submit more focused reports, guiding their content, facilitating the reporting process and strengthening State parties' capacity to fulfil their reporting obligations in a timely and effective manner.

During 2009, the Human Rights Committee also decided to use lists of issues prior to reporting as an optional reporting procedure for State parties.

### c.5. Other sources of information

In addition to the State party's report, human rights treaty bodies may receive information on the implementation of treaty provisions from United Nations agencies, funds and programmes and other intergovernmental organizations, national human rights institutions (NHRIs), as well as from civil society, particularly NGOs (both national and international), professional associations and academic institutions.

### c.6 Consideration of States parties' reports

States parties are invited to the committee's session to present their reports, to respond to committee members' questions, and to provide the committee with additional information. In the light of all the information available, the committee examines the report together with Government representatives. The aim is to engage in a constructive dialogue in order to assist a State in its efforts to implement a treaty as fully and effectively as possible. Treaty bodies are not judicial bodies; they monitor treaty implementation and provide encouragement and advice to States.

### c.7. Concluding observations and recommendations

Based on their dialogue with a State, and any other information they have received, human rights treaty bodies adopt what are generally known as concluding observations, which refer to both positive aspects of a State's implementation of a treaty and areas where the treaty body recommends the State to take further action. In its concluding observations, a treaty body will acknowledge the positive steps taken by the State, but also identify areas of concern, where more needs to be done to give full effect to the treaty's provisions. The treaty bodies seek to make their recommendations as concrete and practicable as possible. States are required to publicize the concluding observations within the country so as to inform public debate on how to move forward.

### c.8. Implementation of concluding observations and submission of the next periodic report

The implementation of the rights contained in the treaties requires continuous effort on the part of States. After the submission of their initial reports, States are required to submit further reports to the treaty bodies at regular intervals. These are referred to as "periodic reports". Periodic reports are normally not as long as the more comprehensive initial report, but must contain all information necessary for a committee to continue its work of monitoring the ongoing implementation of a treaty in the country concerned.

An important element of any periodic report will be reporting back to the committee on concrete measures taken by a State party to implement the treaty body's recommendations in the concluding observations on the previous report, so as to close the reporting cycle.

### c.9. Follow-up to recommendations

In order to assist States in implementing their recommendations, the human rights treaty bodies have begun to introduce procedures to ensure effective follow-up to their concluding observations. Some committees request, in their concluding observations, that States report back to the country or follow-up rapporteur within an agreed time frame on the measures taken in response to specific recommendations or "priority concerns". The rapporteur then reports back to the committee.

Some members of treaty bodies have undertaken visits to countries, at the invitation of the State party, in order to follow up on the report and the implementation of concluding observations

### c.10. ¿ What happens if a State party does not report?

Reporting to the treaty bodies can be a considerable challenge so it is perhaps not surprising that States can fall behind in their reporting schedules or, in some cases, fail to report at all.

The treaty bodies recognize these difficulties and have been considering ways of facilitating the task of State parties. Nevertheless, the obligation to report, like the other obligations arising from the ratification of these treaties, is an international legal obligation, freely entered into by the State. The treaty bodies seek to encourage States to report in a timely manner. States may seek technical assistance from OHCHR if they face particular difficulties. But, if a State has failed to report over a long period and has not responded to a committee's requests to report, the committee considers the situation in the country without a report—sometimes referred to as the "review procedure".

According to this procedure, a committee may proceed with the examination of the state of implementation of the relevant treaty by the State party even though it has not received any State report. The committee may formulate a list of issues and questions for the State party, which is invited to send a delegation to attend the session. Information may be received from United Nations partners and NGOs and, on the basis of this information and the dialogue with the State party, the committee will issue its concluding observations including recommendations. The review may proceed even if the State party declines to send a delegation to the session. The review procedure is used only in exceptional cases; in very many cases, notification by the committee that it intends to consider the situation in a country in the absence of a report is sufficient to persuade the State party to produce a report within a short period of time.

## 2.2 INDIVIDUAL COMPLAINTS PROCEDURE

The Optional Protocols to ICCPR, CEDAW, CRPD, ICESCR and CRC, and specific articles in CERD, CAT, International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) and ICRMW, provide for optional individual complaints (called "communications") procedures for consideration by the relevant treaty bodies. Under those provisions, which are accepted by an ever greater number of States Parties, any individual subject to the jurisdiction of a State Party who: (a) claims to be a victim of a human rights violation and (b) has exhausted all available domestic remedies, is entitled to file a complaint with the competent treaty-monitoring body. The committees examine such complaints under a quasi-judicial, confidential procedure culminating in a final, non-binding decision (called "final views", "suggestions" or "recommendations") that declares the complaint either inadmissible (if formal requirements are not met) or admissible, and – in the latter case – issues an opinion on the merits (determining whether the complainant's human rights have been violated). These views are subsequently made public. The procedure is optional for State parties: A treaty body cannot consider complaints relating to a State party unless that State has expressly recognized its competence to do so, either by making a declaration under the relevant treaty article or by accepting the relevant optional protocol.

Under Article 30 of ICPPED, the CED-Committee is competent to receive and consider requests that a disappeared person should be sought and found as a matter of urgency. Such

requests for urgent action are only admissible if the enforced disappearance has occurred in a country that is a State Party to the Convention.

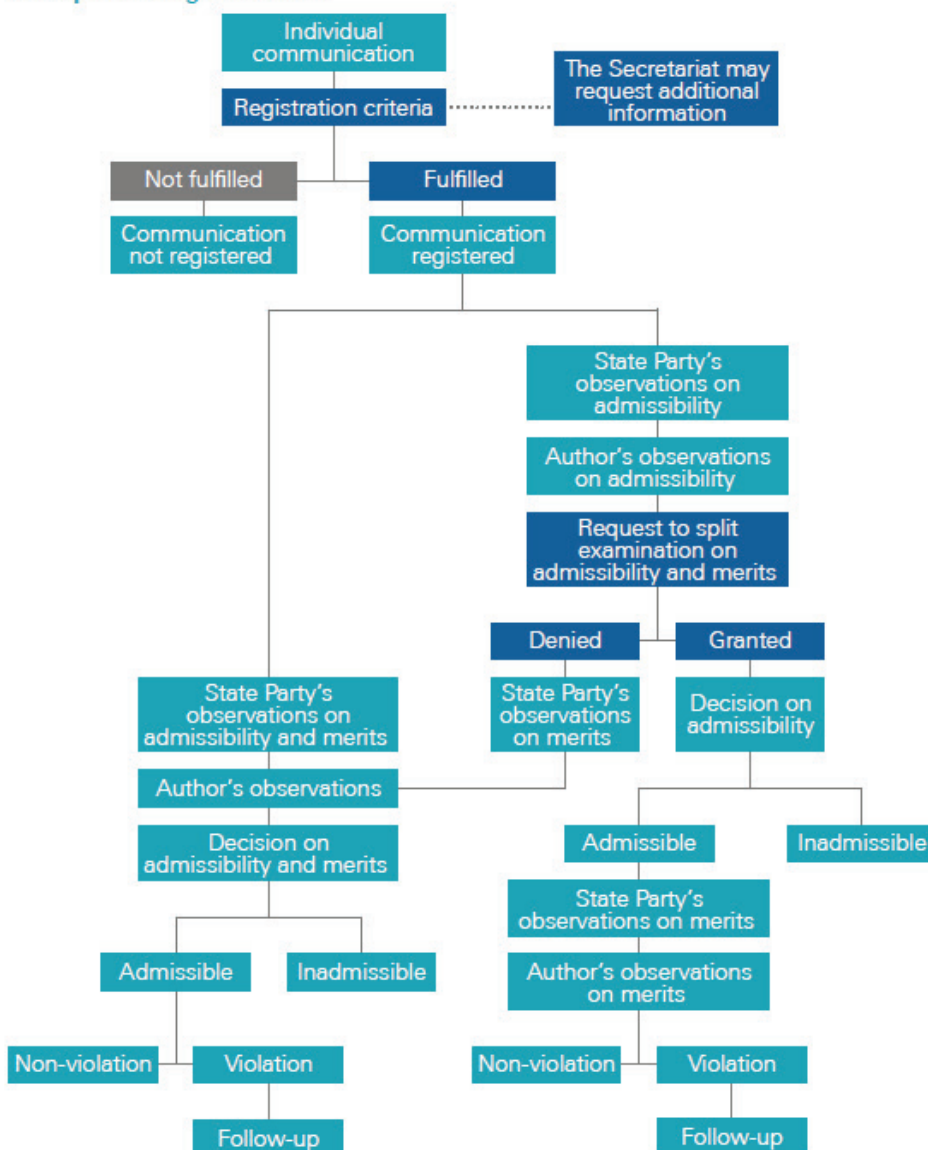
### ¿Who can complain?

Any individual who claims that her or his rights under a treaty have been violated by a State party to that treaty may bring a communication before the relevant committee, provided that the State has recognized the competence of the committee to receive such complaints. Complaints may also be brought by third parties if the individuals themselves have given their written consent or are incapable of giving such consent

### ¿How do I lodge a complaint?

Detailed information about the treaty bodies' individual complaints procedures, including advice and instructions on how to complain, can be found in Fact Sheet N°. 7 and on the OHCHR website.

Case processing flow chart



Source: [Individual Complaint Procedures under the United Nations Human Rights Treaties](#), Fact Sheet No. 7 Rev. 2, New York and Geneva, OHCHR, United Nations, 2013.

### 2.3. INTER-STATE COMPLAINTS PROCEDURE

Several human rights treaties contain provisions to allow for States parties to complain to the relevant treaty body about alleged violations of the treaty by another State party. However, domestic remedies need to be exhausted first and the procedure applies only to State parties that have made a declaration accepting the competence of the relevant committee in this regard.

By September 2008, these procedures had never been used.

### 2.4. INQUIRY PROCEDURES

Six's treaty bodies—the Committee against Torture, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities and the Committee on Enforced Disappearances, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child, may initiate confidential inquiries if they receive reliable information containing well-founded indications of serious, grave or systematic violations of their respective conventions in a State party<sup>180</sup>.

Where warranted and with the consent of the State party, inquiries may also include a visit to a State. After examining the findings of such an inquiry, the committee transmits them to the State party concerned, together with any comments and recommendations.

The inquiry procedure is confidential and the cooperation of the State party must be sought throughout the proceedings.

The international texts that contemplate this mechanism set out the following basic procedure for their committees to undertake urgent inquiries:

1. The procedure may be initiated if a committee receives reliable information indicating that the rights contained in the treaty are being systematically violated by a State party.
2. A committee first invites the State party to cooperate in the examination of the information by submitting observations.
3. A committee may, on the basis of the State party's observations and other relevant information available to it, decide to designate one or more of its members to make a confidential inquiry and report to the committee urgently.
4. The findings of the member(s) are then examined by the committee and transmitted to the State party together with any appropriate comments or suggestions/recommendations;
5. The procedures under the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities set a six-month deadline for the State party to respond with its own observations on the Committee's findings, comments and recommendations and to inform the Committee of the measures taken in response to the inquiry if the Committee invites it to do so
6. A committee may decide, in consultation with the State party, to include a summary account of the results of the proceedings in its annual report. If the State party agrees, the full inquiry and the State party's response may be made public.
7. The cooperation of the State party must be sought throughout the proceedings.

180. The State parties of the Convention against Torture may opt out at the time of ratification or endorsement, formulating a statement as per article 28: the States that are part of the Optional Protocol of the CEDAW may similarly exclude the Committee's competence, formulating a statement as per article 10. Any State that decides to opt out of this procedure may endorse it at some later stage.



## 2.5. URGENT ACTION AND URGENT APPEALS TO THE GENERAL ASSEMBLY UNDER THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE

As briefly mentioned in chapter I, the International Convention for the Protection of All Persons from Enforced Disappearance enables its Committee to take urgent action. Under article 30, the Committee may receive urgent requests from relatives of a disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest, that a disappeared person should be sought and found. The Committee will transmit the communication to the State party concerned, requesting it to provide observations and comments within a time limit set by the Committee.

Moreover, if the violations amount to widespread or systematic acts (i.e., crimes against humanity), the Committee may, after seeking from the State party concerned all relevant information on the situation, bring the matter to the urgent attention of the United Nations General Assembly through the Secretary-General under article 34.

## 2.6. EARLY WARNING AND URGENT ACTION BY THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION

Since 1993, the Committee on the Elimination of Racial Discrimination has developed procedures relating to early warning and urgent action. Early warning procedures aim to prevent existing problems in States parties from escalating into new conflicts, or to prevent a resumption of conflicts. Urgent action procedures aim to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the International Convention on the Elimination of All Forms of Racial Discrimination. In practice, these procedures are used simultaneously. They may be invoked by the Committee itself or by interested parties, including civil society actors, such as indigenous groups.

Under this procedure, the Committee may seek information from State parties and may adopt a decision expressing specific concerns, addressed not only to the States in question, but also to the Human Rights Council and its special procedures, the Special Adviser of the Secretary-General on the Prevention of Genocide, as well as the High Commissioner for Human Rights and the Secretary-General, with a recommendation that the matter should be brought to the attention of the Security Council. The Committee can take action under the procedure on its own initiative or on the basis of information submitted by third parties.

## 2.7. OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND THE SUBCOMMITTEE ON PREVENTION OF TORTURE

The Optional Protocol to the Convention against Torture provides a practical means to assist State parties in meeting their obligations to prevent and combat torture and other forms of ill-treatment by establishing a global system of regular visits to all places where persons are, or may be, deprived of their liberty. Its innovative two-pronged approach relies on an international body, the Subcommittee on Prevention of Torture, as well as on national preventive mechanisms which must be established or designated by each State party. In order for the Subcommittee to fulfil its mandate, it is granted considerable powers under article 14 of the Optional Protocol. Each State party is required to allow visits by the Subcommittee to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent and acquiescence. The Subcommittee has unrestricted access to all places of detention, their installations and facilities, and to all relevant information relating to the treatment and conditions of detention of persons deprived of their liberty. The Subcommittee conducts private interviews without witnesses. Similar powers are to be granted to the national preventive mechanisms. After a visit, the Subcommittee issues a confidential report with a series of recommendations to the relevant State authorities, with a view to improving the treatment of detainees, including their conditions of detention. The report on a visit is part of the dialogue between the Subcommittee and the authorities of the State party concerned, aimed at preventing torture. The Subcommittee will publish the report whenever it is requested to do so by the State party concerned. Furthermore, the Subcommittee's mandate includes advising and assisting States in the establishment of



national preventive mechanisms. The Subcommittee also provides these mechanisms with advice on and assistance in reinforcing their independence and capacities and strengthening domestic safeguards against ill-treatment of persons deprived of their liberty.

## 2.8. GENERAL COMMENTS

Each of the human rights treaty bodies publishes its interpretation of the provisions of the human rights treaty it monitors in the form of general comments or general recommendations.

These cover a wide range of subjects, from the comprehensive interpretation of substantive provisions, such as the right to life or the right to adequate food, to general guidance on the information that should be submitted in State reports relating to specific articles of the treaties. General comments have also dealt with wider, cross-cutting issues, such as the role of national human rights institutions, the rights of persons with disabilities, violence against women and the rights of minorities.

All are available from the OHCHR website ([www.ohchr.org](http://www.ohchr.org)).

## 2.9. DAYS OF GENERAL DISCUSSION/THEMATIC DEBATES

A number of human rights treaty bodies hold days of general discussion on a particular theme or issue of concern. These thematic discussions are usually open to external participants, such as United Nations partners, delegations from States parties and civil society actors, particularly NGOs, academic institutions, professional associations and individual experts. Their outcome may assist the human rights treaty body in the drafting of a new general comment. It can also help States and other stakeholders understand the treaty's requirements.

## 2.10. ANNUAL MEETING OF CHAIRPERSONS OF HUMAN RIGHTS TREATY BODIES AND INTER COMMITTEE MEETING

The Annual Meeting of Chairpersons of the human rights treaty bodies takes place in Geneva and provides a forum for members of the human rights treaty bodies to discuss their work and consider ways to make the treaty body system as a whole more effective. Issues addressed at these meetings have included the streamlining and overall improvement of human rights reporting procedures, harmonization of the committees' methods of work, follow-up to world conferences and financial issues. Informal consultations with States parties as well as United Nations partners and NGOs have also been a feature of the meeting of chairpersons.

Inter-committee meetings include the chairpersons of each of the human rights treaty bodies and two additional members from each committee. The larger committee representation at inter-committee meetings allows for more detailed discussion of recommendations on issues relating to working methods and other issues than is possible at the annual meetings of chairpersons.

A summary of procedures								
Treaty	Date of adoption/ entry into force	Body	Membership	Members elected by	State reporting	Inter-State complaints	Individual Complaints	Suo moto inquiry
CAT	12-12-1984 26-6-1987	Committee against Torture (1987)	10	State Parties	Mandatory Art. 19	Optional Art. 21	Optional Art. 22	Arts. 20 and 28 (possibility to opt out articles)
ICCPR	16-12-1966 23-3-1976	Human Rights Committee (1977)	18	State Parties	Mandatory Art. 40	Optional Arts. 41 and 42s	First Optional Protocol	
CEDAW	18-12-1979 3-9-1981	Committee on the Elimination of Discrimination against Women (1982)	23	State Parties	Mandatory Art. 18		Optional Protocol Art. 2	Optional Protocol Arts. 8-and 10 (possibility to opt out)
CERD	21-12-1965 4-6-1969	Committee on the Elimination of Racial Discrimination (1970)	18	State Parties	Mandatory Art. 9	Mandatory Arts. 11, 12 and 13	Optional Arts. 14	
ICESCR	16-12-1966 3-1-1976	Committee on Economic, Social and Cultural Rights (1985)	18	Economic and Social Council (1985)	Mandatory Art. 16 and 17	Optional Art. 10 Optional Protocol (2013)	Optional Protocol (2013) Art. 1	Art. 11 Optional Protocol 2013
ICRMW	18-12-1990 1-7-2003	Committee on Migrant Workers (2004)	14	State Parties	Mandatory Art. 73	Optional Art. 76 (not yet in force)	Optional Art. 77 (not yet in force)	
CRC	21-11-1989 2-9-1990	Committee on the Rights of the Child (1991)	18	State Parties	Mandatory Art. 44	Art. 12 Optional Protocol (2014)	Art. 5 Optional Protocol s (2014)	Art. 13 Optional Protocol (2014)
CRPD	13-12-2006 3-5-2008	Committee on the Rights of Persons with Disabilities (2008)	18	State Parties	Mandatory Arts. 35		Art. 1 Optional Protocol 2006	Art. 6 Optional Protocol
ICPPED	20-12-2006 23-12-2010	Committee on Enforced Disappearances (2011)	10	State Parties	Mandatory Art. 29	Optional Art. 32	Optional Art. 31 Urgent request under Article 30	Mandatory Art. 33

Source: Inter-Parliamentary Union (UIP) / Office of the United Nations High Commissioner for Human Rights (OHCHR), Human Rights. Handbook For Parliamentarians, Geneva, 2016, pp. 60-61.

### 3. TREATY BODY REFORM

The procedures and working methods of the human rights treaty bodies have been under discussion as part of the system-wide reform that the United Nations has undertaken in recent years<sup>181</sup>.

Human rights treaty body reform has to date focused on the coordination and harmonization of working methods, including the adoption of “best practices” and the streamlining of State party reporting requirements through the use of a common core document and targeted treaty-specific reports<sup>182</sup>.

Additionally, the human rights treaty bodies are working to establish effective cooperation between themselves and the Human Rights Council, in particular with regard to the new universal periodic review, and to develop modalities for enhanced interaction with special procedures mandate-holders<sup>183</sup>. In the light of the proliferation of human rights treaty bodies and procedures, more structural reforms have also been discussed, including, as proposed in 2005 by the then High Commissioner for Human Rights, Ms. Louise Arbour, the creation of a unified standing treaty body.

### 4. THE ROLE OF THE HUMAN RIGHTS TREATY SYSTEM IN STRENGTHENING NATIONAL HUMAN RIGHTS PROTECTION SYSTEMS

The human rights treaties are legal instruments that set international standards for promoting and protecting human rights worldwide. By ratifying the treaties, States subscribe to these standards and commit themselves to implementing the rights at the national level. The treaty bodies encourage and support States in this effort. Such an approach may seem focused on the international level; yet, clearly, it is at the national level that the promotion and protection of human rights matter most so that they may be enjoyed by all men, women and children in each country.

The treaty bodies have an important role in supporting efforts to strengthen the protection of human rights at the national level. Firstly, reporting to the treaty bodies is itself an important part of the development of a national human rights protection system. Secondly, the output of the treaty bodies (including the mandate of the Subcommittee on Prevention of Torture on the ground) provides States with practical advice and assistance on how best to implement the treaties.

#### 4.1. IMPORTANCE OF THE REPORTING PROCESS AT THE NATIONAL LEVEL

Efforts to encourage States to take a holistic approach to reporting by looking at the complete range of obligations to which they have subscribed are not aimed solely at making it easier for States. Although the reports are required by an international body, the process to produce them is very important nationally. In meeting their reporting obligations under the treaties, States engage in a process of self-assessment to gauge the extent to which they

181. In his 2002 report, “Strengthening the United Nations: an agenda for further change” (A/57/387 and Corr.1), the then United Nations Secretary-General, Mr. Kofi Annan, called on the human rights treaty bodies to craft a more coordinated approach to their activities. In March 2005, in his report “In larger freedom: towards development, security and human rights for all”, the Secretary-General requested that “harmonized guidelines on reporting to all treaty bodies should be finalized and implemented so that these bodies can function as a unified system” (A/59/2005, para. 147).

182. See “Harmonized guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific targeted documents” (HRI/MC/2005/3).

183. See “Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights” (A/62/224).

effectively protect human rights. Gathering information on national implementation helps States plan and put in place human rights-based programmes. Many States are engaged in parallel processes of treaty reporting, formulating a national human rights action plan and implementing national development plans. Linking these processes can ensure that human rights are at the heart of national strategic planning, thereby guaranteeing more effective implementation of human rights standards nationally. The reporting process, from the preparation of the report, through the international process of its consideration, to the national response to the treaty body's recommendations, can also stimulate national debate on human rights within civil society and create new human rights constituencies.

#### 4.2. PRACTICAL ADVICE AND ASSISTANCE FROM THE TREATY BODIES

The output of the treaty bodies can provide States, as well as United Nations country teams and donors, with useful guidance on where more action is required to strengthen the protection of human rights. Once a State party's reports have been produced and considered by the treaty bodies, practical and targeted concluding observations and recommendations provide precise advice on specific areas which may require attention. The opinions expressed by the committees in response to individual complaints are another source of specific guidance, focused on particular problems that need action. The general comments of the treaty bodies provide additional information of a more elaborate nature on how the treaties should be implemented.

Such output can have a significant impact on a State, helping to ensure more effective implementation of the treaties through, for example, the proposal of new legislation or the provision of better human rights training to State officials. The impact depends not only on the Government, but also on parliament and the judiciary as well as on others that can influence the way in which human rights are protected and promoted within the country, such as national and regional parliaments, NHRIs, judges and lawyers, as well as civil society.

The impact of the treaty body system on strengthening the protection and promotion of human rights at the national level can further be illustrated by the preventive and operative mandate of the Subcommittee on Prevention of Torture, as well as the objectives of the Optional Protocol to the Convention against Torture. The Subcommittee's preventive field visits directly assist State parties, providing them with observations on the situation on the ground and recommendations for the protection of persons deprived of their liberty and the prevention of torture. Furthermore, the Subcommittee contributes to national institution-building, i.e., by advising and assisting State parties in the establishment of independent national preventive mechanisms. Such national mechanisms are themselves mandated to regularly examine the treatment of persons deprived of their liberty in the country, and to make recommendations to the State authorities to improve the conditions of detention.

### 5. THE ROLE AND INTERACTION OF CIVIL SOCIETY AND NATIONAL HUMAN RIGHTS INSTITUTIONS WITH THE TREATY BODY SYSTEM

Civil society is made up of organizations and individuals that voluntarily engage in public participation and action around shared interests, purposes or values that are compatible with the goals of the United Nations. A number of such civil society organizations concerned with the promotion and protection of universal human rights play an important role in providing the treaty bodies with reliable independent information about situations and developments in State parties, as well as in monitoring the implementation of treaty bodies' recommendations. Civil society actors involved and interacting with treaty bodies may be: human rights defenders; human rights organizations (NGOs, associations, victim groups); coalitions and networks (women's rights, children's rights, environmental rights); community-based groups (indigenous peoples, minorities); unions (trade unions as well as professional associations such as journalist associations, bar associations, magistrate associations, student unions); social movements (peace movements, student movements, pro-democracy movements); relatives of victims; and academic institutions.

National human rights institutions are institutions created by States to promote and protect human rights, and are an important part of any national human rights protection system. They act independently from government control. A set of international standards, known as the Paris Principles<sup>184</sup>, has been agreed to guide their independence and integrity.

Civil society as well as national human rights institutions contribute to the review of reports of State parties by submitting their own reports and briefing committees on the status of human rights protection in the State party whose report is under review. They contribute to the discussion of lists of issues, lists of issues prior to reporting, as well as to the constructive dialogue with the State party concerned, and to the adoption of recommendations. Their submissions enable committees to put the human rights situation in the State party in context. These organizations also follow up the national implementation of the recommendations of treaty bodies and can report on its success or failure. Their contributions to days of general discussions and general comments are also relevant.

*More information on the role of NGOs in the work of specific committees can be found in Working with the United Nations Human Rights Programme: A Handbook for Civil Society. Additional information on the interaction between NHRIs and treaty bodies is also available in National Human Rights Institutions: History, Principles, Roles and Responsibilities, Professional Training Series No. 4/Rev.1 (United Nations publication, Sales No. E.09.XIV.4) and on [the OHCHR website](#).*

184. Resolución 48/134 de la Asamblea General.

## PART 2:

# TREATY BODIES BASED ON THE CHARTER OF THE UNITED NATIONS

The treaty bodies based on the Charter include the former Human Rights Commission, the Human Rights Council and the Special Procedures.

## 1. THE COMMISSION ON HUMAN RIGHTS

The Commission on Human Rights (hereafter “The Commission”) is a subsidiary body of the Economic and Social Council. The Charter of the United Nations specifies that the Council “shall set up Commissions in the economic and social field and for the promotion of human rights”<sup>185</sup>. In its first meeting in 1946, the Economic and Social Council established two functional commissions, one on human rights and the other on the status of women. It was decided that these commissions would be composed of State representatives. The Commission on Human Rights is now composed of 53 States elected by the Economic and Social Council.

Immediately following its creation, the Commission established a subsidiary body that is now known as the Sub-Commission on the Promotion and Protection of Human Rights (hereafter “the Sub-Commission”). The Sub-Commission, which is composed of 26 experts who are elected by the States members of the Commission, has *inter alia* a mandate to undertake studies authorized by the Commission and to make recommendations.

The Commission meets annually for six weeks in Geneva in March-April. The Sub-Commission meets for three weeks in August, also in Geneva. The Office of the High Commissioner for Human Rights acts as secretariat to the Commission and the Sub-Commission.

Over the years, the work of the Commission has changed substantially. Very early on the Commission focused on elaborating various human rights standards. It drafted the Universal Declaration of Human Rights and the two Covenants, on civil and political rights, and on economic, social and cultural rights. Soon, the main challenge before the Commission came to be how to respond to human rights violations. In 1947, the Economic and Social Council passed a resolution stating that the Commission had “no power to take any action in regard to any complaints concerning human rights”<sup>186</sup>.

In 1980, the Commission established the Working Group on Disappearances to deal with the question of enforced disappearances throughout the world. Since then, there has been less reluctance to establish expert mechanisms to deal with human rights challenges in various parts of the world. Such mechanisms were progressively applied in a more innovative manner and adapted to an increasing range of violations.

The Commission solicits the help of human rights experts to assist it in the task of examining specific situations. Over the years, the work of these experts has provided a much needed analysis on how human rights principles are applied in reality. It has formed the basis for an informed and substantive debate at the intergovernmental level. It has given a voice to the often silenced victims and offered a basis for dialogue with Governments on the concrete measures to be taken to enhance protection. The work of the experts is debated during the

185. Article 68 of the Charter of the United Nations.

186. The Economic and Social Council resolution 75(V) (1947) and decision of the Commission on Human Rights at its first session, in January 1947.

annual session of the Commission on Human Rights. About one third of the experts also reports to the United Nations General Assembly in New York. Some experts have informally briefed the United Nations Security Council.

Over the years since they were first created, the United Nations human rights mechanisms have been expanded considerably. As of November 2000, 43 men and women are serving as United Nations experts in the field of human rights. They cover 36 mandates on a wide range of issues relating to civil, cultural, economic, political and social rights. All the mandates, except one, were created by the Commission on Human Rights. The General Assembly created the mandate on children in armed conflict.

## 2. THE HUMAN RIGHTS COUNCIL

The Human Rights Council, established by General Assembly resolution 60/251 of 15 March 2006, is the principal United Nations intergovernmental body responsible for human rights. It replaced the Commission on Human Rights, which, for over 60 years, was at the center of the United Nations human rights system. Mientras la Comisión era un órgano subsidiario del Consejo Económico y Social (ECOSOC), el Consejo de Derechos Humanos es un órgano subsidiario de la Asamblea General. La elevación del Consejo de Derechos Humanos evidencia que los derechos humanos son uno de los tres pilares fundamentales de las Naciones Unidas, junto con el desarrollo, la paz y la seguridad. La institución del Consejo de Derechos Humanos consolida también el compromiso de la Asamblea General para fortalecer el sistema de derechos humanos de las Naciones Unidas, con miras a velar por el disfrute efectivo de todos los derechos humanos (civiles, políticos, económicos, sociales y culturales, así como el derecho al desarrollo) por parte de todos.

In its resolution 60/251, the General Assembly tasked the Human Rights Council with reviewing and, where necessary, improving and rationalizing all mandates, mechanisms, functions and responsibilities that it assumed from the Commission. The Council was required to complete this task within one year of holding its first session. The Council's methods of work were also required to:

- Be transparent, fair and impartial;
- Be results-oriented;
- Enable genuine dialogue;
- Allow for follow-up discussions to its recommendations and their implementation;
- Allow for substantive interaction with its mechanisms.

The General Assembly will review the Council's status within five years.

### 2.1. MEMBERSHIP

Membership of the Council consists of 47 States elected directly and individually by secret ballot by the majority of the members of the General Assembly. The human rights records and voluntary human rights pledges and commitments of candidate States are to be taken into account when electing member States. The Council's member States serve for three years and are not eligible for immediate re-election after two consecutive terms. If a member State of the Council commits gross and systematic violations of human rights, the General Assembly, by a two-thirds majority of the members present and voting, may suspend its rights of membership in the Council.

### 2.2. MEETINGS

The Council meets at the Palais des Nations in Geneva, Switzerland, for at least three regular sessions a year, for a total duration of no less than 10 weeks. The Council's main (four-week) session is normally held in March.



## Human Rights Council (Charter-based bodies)

- Promotes universal protection
- Addresses and prevents violations
- Develops international law
- Reviews compliance of Member States
- Respond to emergencies
- International forum for dialogue

Universal  
Periodic  
Review

Special  
Procedures

Advisory  
Committee

Complaint  
Procedures

The Council may also hold special sessions at the request of a member State, where such a request is supported by at least one third of its member States.

The Council also organizes panel discussions and special events to enhance dialogue and mutual understanding on specific issues.

The Human Rights Council is a separate entity from the Office of the United Nations High Commissioner on Human Rights (OHCHR).

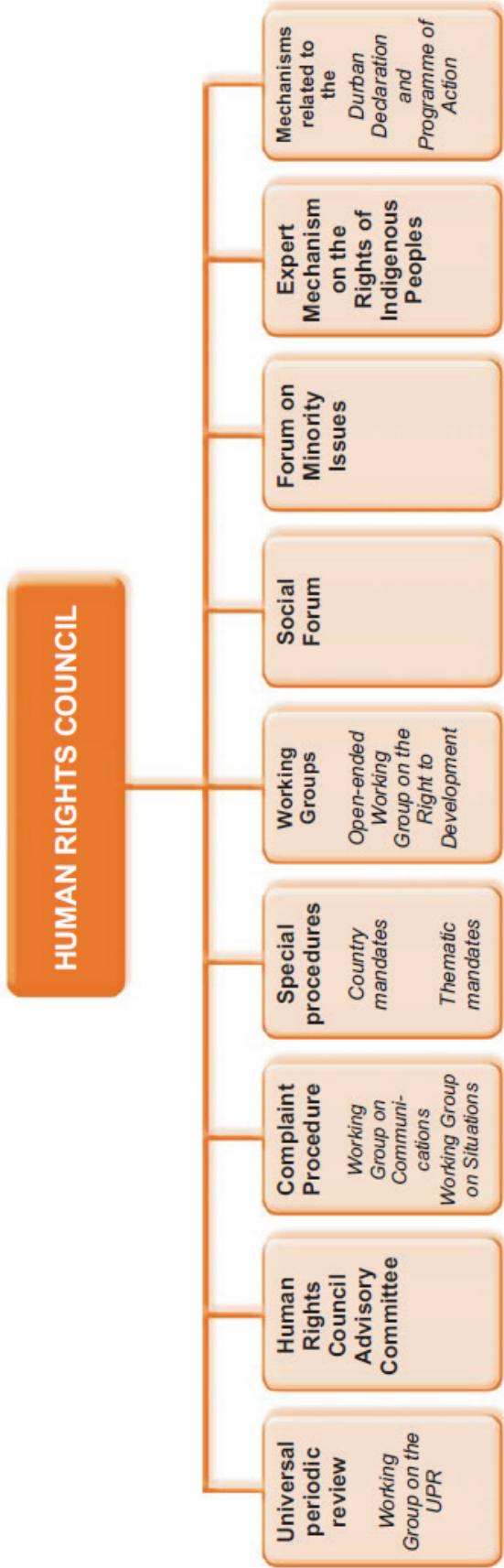
This distinction is derived

from the different mandates assigned by the General Assembly. However, the OHCHR provides substantial support at meetings of the Human Rights Council, and follows up on the deliberations that take place there; therefore, it acts as a secretariat for the Human Rights Council.

### 2.3. MANDATES AND MECHANISMS

Its first session took place from 19 to 30 June 2006. One year later, the Council adopted its "[Institution-building package](#)" to guide its work and set up its procedures and mechanisms:

- The new Universal Periodic Review Mechanism, which examines the human rights situation in the 193 Member States of the United Nations.
- The [Advisory Committee](#) which serves as the Council's "think tank" providing it with expertise and advice on thematic human rights issues.
- The [Complaint Procedure](#) which allows individuals and organizations to bring human rights violations to the attention of the Council.
- The Human Rights Council also works with the UN [Special Procedures](#) established by the former Commission on Human Rights and now assumed by the Council.



Source: Office of the United Nations High Commissioner for Human Rights, Working with the United Nations Human Rights Programme: A Handbook for Civil Society, New York and Geneva, 2008, p. 102.

## Annex: Accessing and working with the Human Rights Council and its mandates and mechanisms

MEETING/MECHANISM	Which civil society actors (CSAs) can attend meetings of the mechanism?	How can these CSAs participate in meetings they attend?	Which CSAs can contribute to the work of the mechanism (other than by attending meetings)?	What forms can these contributions take?
Human Rights Council's regular and special sessions	NGOs in consultative status with ECOSOC, once accredited	<ul style="list-style-type: none"> <li>• Submission of written statements</li> <li>• Oral statements</li> <li>• Hosting of parallel events</li> </ul>	Only NGOs in consultative status with ECOSOC can submit written statements to regular/special sessions	NGOs in consultative status with ECOSOC should consult the guidelines for written statements
Universal periodic review	NGOs in consultative status with ECOSOC, once accredited	<ul style="list-style-type: none"> <li>• Hosting of information sessions</li> <li>• Brief general comments can be made before the adoption of outcome documents at regular sessions of the Human Rights Council</li> </ul>	Relevant CSAs	<ul style="list-style-type: none"> <li>• Working with Governments towards the preparation of national reports</li> <li>• Contributing stakeholders' submissions for potential inclusion in the OHCHR summary</li> <li>• Work on follow-up to UPR outcomes (conclusions, recommendations, voluntary pledges/commitments)</li> </ul>
Human Rights Council Advisory Committee	NGOs in consultative status with ECOSOC, once accredited	<ul style="list-style-type: none"> <li>• Submission of written statements</li> <li>• Oral statements</li> </ul>	Relevant CSAs	<ul style="list-style-type: none"> <li>• Nominating candidates for appointment to the Advisory Committee</li> </ul>
Complaint procedure	CSAs cannot participate in meetings of the complaint procedure or its working groups; these meetings are private	N/A	Relevant CSAs	<ul style="list-style-type: none"> <li>• Submission of complaints under the complaint procedure</li> </ul>

MEETING/MECHANISM	Which civil society actors (CSAs) can attend meetings of the mechanism?	How can these CSAs participate in meetings they attend?	Which CSAs can contribute to the work of the mechanism (other than by attending meetings)?	What forms can these contributions take?
Special procedures	NGOs and other CSAs may arrange to meet with mandate-holders during select segments of the annual meeting of special procedures	<ul style="list-style-type: none"> <li>Interactive dialogue with mandate-holders during select segments of the annual meeting of special procedures</li> <li>NGOs in consultative status with ECOSOC can participate in interactive dialogues with mandate-holders at regular sessions of the Human Rights Council</li> </ul>	Relevant CSAs	<ul style="list-style-type: none"> <li>Submission of urgent appeals/individual cases</li> <li>Providing support for country visits</li> <li>Working to advocate, disseminate, follow up and implement the work of the special procedures</li> <li>Meeting with mandate-holders</li> <li>Nominating candidates as mandate-holders</li> </ul>
Open-ended Working Group on the Right to Development	NGOs in consultative status with ECOSOC, once accredited, can attend public segments of the Working Group's meetings A wide range of CSAs can attend public sessions of the high-level task force	NGOs attending meetings of the high-level task force have the opportunity to make opening statements. This opportunity does not apply, however, to the Working Group's meetings.	Relevant CSAs	<ul style="list-style-type: none"> <li>Submission of statements to the Working Group</li> <li>Engagement with the task force</li> <li>Working to implement Working Group recommendations</li> </ul>
Social Forum	A wide range of CSAs can attend meetings	<ul style="list-style-type: none"> <li>Providing feedback on the human rights work of international mechanisms at meetings</li> <li>Exchanging best practices at meetings</li> <li>Grass-roots presentations at meetings</li> </ul>	Relevant CSAs	<ul style="list-style-type: none"> <li>Submission of information to the Social Forum</li> </ul>

MEETING/MECHANISM	Which civil society actors (CSAs) can attend meetings of the mechanism?	How can these CSAs participate in meetings they attend?	Which CSAs can contribute to the work of the mechanism (other than by attending meetings)?	What forms can these contributions take?
Forum on Minority Issues	A wide range of CSAs, including NGOs, academics and experts on minority issues	<ul style="list-style-type: none"> <li>• Oral presentations/statements</li> <li>• Written statements</li> </ul>	Relevant CSAs	<ul style="list-style-type: none"> <li>• Submission of information to the Forum</li> <li>• NGOs in consultative status with ECOSOC can nominate candidates for appointment as chairperson of the Forum</li> </ul>
Expert Mechanism on the Rights of Indigenous Peoples	A wide range of CSAs, including NGOs and indigenous peoples and organizations	<ul style="list-style-type: none"> <li>• Oral presentations/statements</li> <li>• Written statements</li> </ul>	Relevant CSAs	<ul style="list-style-type: none"> <li>• Submission of information to the Expert Mechanism</li> <li>• Nomination of candidates for appointment as independent experts</li> </ul>
Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action	NGOs in consultative status with ECOSOC NGOs accredited to the Durban World Conference	<ul style="list-style-type: none"> <li>• Oral presentations</li> <li>• Written statements</li> </ul>	Only CSAs falling into the categories provided at left may contribute information to the Intergovernmental Working Group	<ul style="list-style-type: none"> <li>• Submission of information to the Working Group</li> </ul>
Group of independent eminent experts	Meetings are, in principle, closed. However, the Group may invite CSAs to exchange views with it	<ul style="list-style-type: none"> <li>• Exchange of views at the invitation of the Group</li> </ul>	Relevant CSAs	<ul style="list-style-type: none"> <li>• Submission of information to the Group</li> </ul>

MEETING/MECHANISM	Which civil society actors (CSAs) can attend meetings of the mechanism?	How can these CSAs participate in meetings they attend?	Which CSAs can contribute to the work of the mechanism [other than by attending meetings]?	What forms can these contributions take?
Working Group of Experts on People of African Descent	NGOs in consultative status with ECOSOC NGOs accredited to the Durban World Conference	<ul style="list-style-type: none"> <li>• Oral presentations</li> <li>• Submissions of written statements</li> </ul>	Relevant CSAs	<ul style="list-style-type: none"> <li>• Submission of information to the Working Group</li> <li>• Providing information in situ during country missions of the Working Group</li> <li>• Meeting with its members during country visits</li> </ul>
Preparatory Committee for the Durban Review Conference Intersessional open-ended intergovernmental working group to follow up the work of the Preparatory Committee for the Durban Review Conference	<ul style="list-style-type: none"> <li>• NGOs in consultative status with ECOSOC</li> <li>• NGOs accredited to the Durban World Conference</li> <li>• NGOs (without consultative status and that did not attend the World Conference) can submit applications to participate</li> <li>• Indigenous peoples' representatives</li> </ul>	<ul style="list-style-type: none"> <li>• Oral statements</li> <li>• Submission of written statements</li> </ul>	Only CSAs falling into the categories provided to the left may contribute information to the Preparatory Committee and the Intersessional open-ended working group	<ul style="list-style-type: none"> <li>• Submission of written statements to the Preparatory Committee and the Intersessional open-ended working group</li> </ul>
Ad Hoc Committee on the elaboration of complementary standards	NGOs in consultative status with ECOSOC NGOs accredited to the Durban World Conference	<ul style="list-style-type: none"> <li>• Oral presentations</li> <li>• Submission of written statements</li> </ul>	Relevant CSAs	<ul style="list-style-type: none"> <li>• Submission of information and studies to the Ad Hoc Committee</li> </ul>

Office of the United Nations High Commissioner for Human Rights, Working with the United Nations Human Rights Programme: A Handbook for Civil Society, New York and Geneva, 2008, pp. 103-106.

### 2.3.1 THE UNIVERSAL PERIODIC REVIEW

The universal periodic review (UPR) is a new human rights mechanism. Through it the Human Rights Council is tasked to review, on a periodic basis, the fulfilment by each of the 193 United Nations Member States of their human rights obligations and commitments. The UPR is a cooperative mechanism and is based on an interactive dialogue between each State under review and the member and observer States of the Council. It is intended to complement, not duplicate, the work of the human rights treaty bodies. Operating on a four-year cycle, the UPR is composed of several stages.

#### UNIVERSAL PERIODIC REVIEW

- Review the fulfillment of the human rights obligations of all countries
- All Member States will be reviewed within 4 years (48 States per year)
- Review will be carried out by “peers” (groups of three Member States)

The UPR was established when the Human Rights Council was created on 15 March 2006 by the UN General Assembly in resolution [60/251](#). This mandated the Council to “undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States”.

It is a cooperative process which, by October 2011, has reviewed the human rights records of all 193 UN Member States.

The basis of the review, its principles and objectives, its process and procedures as well as the final document that will be responsible for the UPR are presented in resolution 5/1 of the Human Rights Council approved on June 18, 2007. This resolution allows NGOs to participate actively in the UPR mechanism<sup>187</sup>.

#### a) The UPR’s objectives are<sup>188</sup>:

The improvement of the human rights situation on the ground;

- The fulfilment of the State’s human rights obligations and commitments, and an assessment of the positive developments and challenges it faces;
- The enhancement of the State’s capacity and the provision of technical assistance, in consultation with, and with the consent of, the State concerned;
- The sharing of best practice among States and other stakeholders;
- Support for cooperation in the promotion and protection of human rights; and
- The encouragement of full cooperation and engagement with the Human Rights Council, other human rights bodies and the Office of the United Nations High Commissioner for Human Rights (OHCHR).

#### b) Principles

- **Universality:** The 193 Member States of the United Nations undergo the review of their record on all matters regarding human rights.
- **Periodicity:** The reviews are carried out regularly and are not exceptional acts.
- **Equality:** The review process is carried out in accordance with a previously accorded framework of work to ensure that each State is treated equally.

187. Vid. par. 3 (m).

188. Resolution 5/1, párr. 4.



- **Cooperation:** The review is based on objective, reliable information and interactive dialogue. The State's full participation is considered vital.
- **Peer reviewers:** The UPR is a process whereby a State is reviewed by an inter-governmental body.
- **Action-oriented:** The recommendations formulated to the States are aimed at promoting positive actions.

### c) Frequency

- The first UPR lasted four years; the second one and all thereafter lasted four and a half years.
- The UPR consists of three periods of sessions per year; each period takes two weeks.
- There are 14 States reviewed in each period; per year, 42 States are reviewed.

### d) The process

#### i) Documentation for the review process

According to resolution 5/1 of the HRC, review of a State is based on three documents:

- a national report providing the information collected by that State, including information on achievements and practical improvements, challenges and constraints as well as national priorities for overcoming possible failings. This report must fit the general guidelines adopted by the Council at its sixth period of sessions, and any other information considered relevant by the State concerned, which could be presented either orally or in writing, provided that the written presentation summarizing the information will not exceed 20 pages;
- additionally a compilation prepared by the Office of the High Commissioner for Human Rights of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents, which shall not exceed 10 pages;
- mentioning a credible and reliable report provided by other relevant stakeholders to the UPR. The Office will prepare a summary of such information which shall not exceed 10 pages. The term "stakeholders" here includes non governmental organisations and national human rights groups.

#### ii) The review of the State

Based on the documentation submitted, the human rights record of the State in question is reviewed in a three-and-a-half-hour session of the Working Group on the Universal Periodic Review of the Human Rights Council, which consists of 47 Member States.

The review takes the form of an "interactive dialogue" with the delegation from the State and only allows other Member States and observers from the Human Rights Council to attend. The review is facilitated by a group of three rapporteurs known as "the troika".

A different troika is set up for each State review. Its members are selected by the drawing of lots among the members of the Council and from different Regional Groups. The OHCHR provides the necessary assistance and expertise to the troika.

The States will have the opportunity to address issues or ask questions about a State prior to its review.<sup>189</sup> It is the troika's task to receive these questions or issues and group them<sup>190</sup> as it deems fit. Later on, the troika conveys the questions and issues to the Secretariat of

189. These questions or issues are sent to the troika and must be based fundamentally on the three documents in the Universal Periodic Review.

190. That said, the troika must not change the meaning of the questions and issues in any way and shall refrain from assessing the questions or issues on the status of human rights in the State under review.

the Universal Periodic Review, who in turn sends them to the State reviewed within 10 days following the review. Similarly, the questions and issues are circulated among the Member States and the States.

**Council Observers.** Each country review lasts three hours and consists of an interactive debate between the State reviewed and the Member States and the observer States from the Council. During the dialogue, the Member States and observer States have two hours to ask questions and give recommendations to the State under review. The State concerned has in turn one hour to present the Working Group with information prepared for the review, answer questions and recommendations made previously by the States and during the interactive dialogue, as well as making final comments at the end of the review.<sup>191</sup>

The State may avoid certain recommendations from being made if it voluntarily agrees to the topic concerned during its initial statement. In that statement, the State promises to take steps to improve compliance with the precepts of international human rights law.

The “A status” NHRIs and NGOs with advisory status to the ECOSOC may attend the interactive dialogue but are not permitted to speak.

At the end of the interactive dialogue, the troika prepares a report that is then subject to debate at a half-hour session of the Working Group on the Universal Periodic Review.

The Working Group’s report on the State concerned consisting of a summary of the proceedings of the review process; conclusions and/or recommendations by the participating States, and the voluntary commitments of the State under review.<sup>192</sup>

The Working Group does not debate the recommendations made by individual States and it does not adopt its own recommendations. Accordingly, the report simply includes all the recommendations put forward by individual States. Any recommendations that receive the support of the State appear as such in the final document and those that do not will be mentioned in it along with any comments the State may have made on it.

### iii) Plenary debate and approval of the report

The Working Group’s report on each State concerned is subject to debate and approved at an ordinary session of the Human Rights Council shortly after the Working Group session ends.

The State concerned is given the floor for one hour at the plenary session. The State concerned is expected to respond to the recommendations in the Working Group’s report, either before or during the plenary debate.<sup>193</sup>

In accordance with resolution 5/1, before each final document is adopted:

- The State concerned is offered the opportunity to present its points of view on the conclusions or recommendations on the voluntarily made commitments and pledges present replies to questions or issues that were not sufficiently addressed during the interactive dialogue.
- The State concerned and the member States of the Council, as well as observer States, will be given the opportunity to express their views on the outcome of the review before the plenary takes action on it.
- Other relevant stakeholders, including national human rights institutions and NGOs recognised as advisory bodies by the ECOSOC will have the opportunity to make general comments.
- In addition, upon approving the outcome of the review, the Council decides, as applicable, on the pertinence and date of follow-up on the review.

191. See the document on modalities and practices of the universal periodic review, in English only, “Modalities and practices for the universal periodic review process” (A/HCR/PRST/8/1).

192. Human Rights Council, Resolution 5/1, Part I. E. para. 26.

193. A list of the recommendations each State has accepted or rejected is available at [www.upr-info.org](http://www.upr-info.org).

The NHRI of the State concerned compliant with the Principles of Paris (NHRI 'A-status') "shall be entitled to intervene immediately after the State under review during the adoption of the outcome of the review by the Council plenary".<sup>194</sup>

Other 'A-status' NHRI are also authorised to make statements during the debate if time allows. However, the statements must be addressed to the draft report and are not part of the interactive dialogue with the State concerned.

#### iv) Application and follow-up

Implementation of recommendations is the principal objective of the UPR process. States are expected

to act on the recommendations they accept and to consider further those that they have not accepted.

In the second cycle of the UPR, States are required to report on their follow-up and implementation of recommendations accepted from the first cycle.<sup>268</sup> In subsequent cycles, they will be required to report on follow-up and implementation of recommendations in all past review reports.

The international community can assist States to implement recommendations through capacity building and technical assistance. NHRIs can also provide technical assistance.

The outcome of the Universal Periodic Review (including the conclusions and recommendations as well as any voluntary pledges and commitments) should mainly be applied by the State concerned, but as per resolution 5/1, its application also involves other stakeholders, among which are the member of civil society. Specifically, the NHRI and NGOs can:

- Lobby their State to ensure that action is taken on the UPR recommendations
- Undertake their own implementation initiatives
- Raise public awareness of the UPR process and recommendations
- Monitor the progress made in implementing UPR recommendations.

At the plenary session of the Human Rights Council a few months after the review, a final document on the outcome is adopted, containing the report from the Working Group and the position of the State under review with respect to the recommendations received. The adoption of said document lasts one hour; it is divided into equal parts between the State under review, the rest of the States and the other stakeholders, including national human rights institutions and observer representatives from the NGOs so as to present oral statements with their comments regarding the UPR.

In the ordinary periods of Human Rights Council sessions, adoption of the results of the UPR is followed by a general debate on topic 6 of the agenda, regarding the Universal Periodic Review. Occasionally, the States reviewed earlier in the UPR framework provide updated information on their progress in implementing the commitments they took on and the recommendations they accepted on account of their review.

194. Human Rights Council, Resolution 16/21, Part I. C.2, para. 13.

## The UPR process



Source: Office of the United Nations High Commissioner for Human Rights. A Practical Guide for Civil Society, Universal Periodic Review, Geneva, 2014, p. 3.

### Universal Periodic Review Website

For more updated information on the periods of the Working Group sessions, civil society agents are recommended to visit the section of the OHCHR website on the UPR.

### Live rebroadcasts

The periods of the Working Group sessions can be viewed live on the rebroadcasts page of the Human Rights Council. The Live Rebroadcasts site contains a video library of the periods from previous sessions. To see live rebroadcasts, you will need to download the corresponding software.

### 2.3.2. ADVISORY COMMITTEE

The Advisory Committee It replaced the former Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights. It meets twice a year,

for one week in February immediately before the March session of the Council and for one week in August. The scope of its advice should be limited to subject matters that are related to the Council's mandate, i.e., the promotion and protection of all human rights aimed at implementation. It should not adopt any resolutions or decisions.

While unable to adopt resolutions or decisions, or to establish subsidiary bodies without the Council's authorization, the Advisory Committee can make suggestions to the Council:

- To enhance its own procedural efficiency; and
- To further research proposals within the scope of its work.

The Advisory Committee consists of 18 experts drawn proportionally from the five United Nations regional groups (5 States of Africa, 5 States of Asia, 2 States of Eastern Europe, 3 States of Latin America and the Caribbean, and 3 Western Europe and others). Experts are nominated by Governments and elected by the Council. Elections normally take place at the September session of the Council.

### 2.3.3. COMPLAINT PROCEDURE

The complaint procedure addresses consistent patterns of gross and reliably attested violations of all human rights and fundamental freedoms occurring in any part of the world and under any circumstances. It is based on the former Commission's 1503 procedure, improved to ensure that the procedure is impartial, objective, efficient, victims-oriented and conducted in a timely manner<sup>195</sup>.

The complaint procedure is based on communications received from individuals, groups or organizations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations. Two distinct working groups—the Working Group on Communications and the Working Group on Situations—are responsible, respectively, for examining communications and bringing consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms to the Council's attention:

- The Working Group on Communications, composed of five independent experts, evaluates the admissibility and merits of the communications it receives. All communications and recommendations considered admissible are transmitted to the Working Group on Situations.
- The Working Group on Situations is made up of five members appointed by the regional groups of Member States of the Human Rights Council. The group submits to the Council a report on the persistent records of flagrant, factually proven violations of human right and puts forth recommendations on the steps that should be taken. It is then up to the Council to adopt a decision on each particular situation brought to its attention.

The NHRI and NGOs can raise awareness on the national plane toward the procedure for filing a claim, their way of work, the possible outcomes and the fact that it is a confidential process. Furthermore, the NHRI and NGOs may also present claims or communications in representation of the victims when there is evidence that situations of human rights violations persist.

The Council examines reports of the Working Group on Situations in a confidential manner (unless it decides otherwise) and may:

- Discontinue its consideration of a situation when further consideration or action is not warranted;

195. On June 16, 2000 the Economic and Social Council passed a draft resolution titled Procedure for examining communications on human rights, which was part of Commission decision 2000/109 (approved without vote on April 26, 2000), which became Resolution 2000/3. Nevertheless, and in accordance with that resolution, the modified procedure is still called 1503.

- Keep a situation under review and request the State concerned to provide further information within a reasonable time;
- Keep a situation under review and appoint an independent and highly qualified expert to monitor the situation and to report back to the Council;
- Recommend that OHCHR should provide technical cooperation, capacity-building assistance or advisory services to the State concerned.

### Confidentiality

All the initial steps in the process are confidential until a situation is turned over to the Economic and Social Council. However, since 1978, the President of the Human Rights Commission announces the names of the countries that have been subject to review. This way, if a pattern of abuses that took place in a particular country is not settled in the initial stages of the process, it may be brought to the attention of the international community by means of the Economic and Social Council, which is one of the main bodies of the United Nations.

### What are the acceptance criteria for a communication to be reviewed?

To decide which communications can be accepted for review, the Sub-commission on the Promotion and Protection of Human Rights drew up a set of rules [resolution 1 (XXIV) on Aug. 13, 1971 of the Sub-Commission]. In general terms, those rules can be summed up as follows:

- No communication shall be accepted that runs against the principles of the Charter of the United Nations or shows political motives.
- A complaint is only accepted if examination shows there are sufficient reasons for believing -also taking into consideration all the responses sent by the government concerned -that there is a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.
- The complaint procedure addresses communications submitted by individuals, groups, or non-governmental organizations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations. Anonymous communications are screened out, as are ones based solely on reports from the mass media.
- Each communication must give a factual description of the alleged violations and state the purpose of the request and the rights which are alleged to be violated. As a general rule, communications will not be examined if they contain offensive language or insulting comments on the State against which the complaint is filed.
- For a communication to be examined, all domestic remedies must have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.

### 2.3.4. SPECIAL PROCEDURES

"Special procedures" is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to examine, monitor, advise and publicly report on human rights situations in specific countries or territories (country mandates), or on major phenomena of human rights violations worldwide (thematic mandates). By November 2014 there were 39 thematic mandates and 14 country mandates in operation.

Special Procedures may be composed of an individual (a rapporteur or special representative) or a working group. They are noted independent experts who work voluntarily and are appointed by the Human Rights Council. . They all report to the Human Rights Council on their conclusions and recommendations and many also present their reports to the General Assembly. They are sometimes the only mechanism able to warn the international community



on certain problems regarding human rights, as they can take on these situations anywhere in the world even if the countries concerned have not ratified a human rights instrument.

Since June 2007, the Council began a process of revising, rationalising and improving the mandates regarding its special procedures. It removed or amended some mandates, instituted other new ones, drew up new procedures for selecting and appointing mandate-holders and wrote a Code of Conduct for the mandate-holders of special procedures (resolution 5/2).

#### *a) Functions*

Mandate-holders, special rapporteurs, special representatives, independent experts and members of working groups carry out their function voluntarily on their own behalf. Even though the special procedures mandates vary greatly, the work methods are relatively uniform. Most special procedures can perform the following activities:

Special procedures mandate-holders:

- Receive and analyse information on human rights situations provided by various sources on an ongoing basis;
- Network and share information with partners, both governmental and non-governmental, within and outside the United Nations;
- Seek—often urgently—clarification from Governments on alleged violations and, where required, request Governments to implement protection measures to guarantee or restore the enjoyment of human rights;
- Raise awareness about specific human rights situations and phenomena, and threats to and violations of human rights;
- When specific circumstances so warrant, communicate their concerns through the media and other public statements;
- Undertake country visits to assess human rights situations pertaining to their respective mandates, and make recommendations to Governments with a view to improving those situations;
- Report and make recommendations to the Human Rights Council and, where relevant to their mandates, to the General Assembly (and in some cases to the Security Council) on: regular activities under their mandate; field visits; and specific thematic trends and phenomena;
- Contribute thematic studies to the development of authoritative norms and standards for the subject area of the mandate, and may provide legal expertise on specific issues.

The OHCHR provides support services through its staff as well as logistics and research for mandate-holders in charge of special procedures to carry out the mandated work accordingly. The OHCHR facilitates the work of the rapporteurs, independent experts and working groups through its Special Procedures Board (SPB), which provides services to all thematic mandates except on and gives centralised support to all the Special Procedures. the Field Operations and Technical Cooperation Division (FOTCD) provides support to the country mandates.

#### *b) Work methods*

For country and thematic mechanisms, there is no formal procedure for the presentation and examination of complaints. The mechanisms are by thematic facts and by country on the basis of the communications received from different sources (the victims or their parents, non governmental organisations (NGO's) or international organisations, etc.) who report human rights violations. These communications may be presented in different forms (for example, by card, fax, telegram) and may refer to individual cases as well as to the alleged violation of human rights situations.



In addition to the written communications with the States, objective investigations and site visits, special procedures are sometimes requested for emergency situations when there is still hope of preventing violations of human rights to life, physical and mental integrity and the security of the person. Each procedure is derived from a mandate that in some cases has changed the circumstances and needs. Although the basic criteria and principles are common to all special procedures, the complexity and particulars of the different mandates sometimes made a specific approach necessary.

### c) Communications

One of the main activities of special procedures mandate-holders is taking action on individual cases, based on information that they receive from relevant and credible sources (mainly civil society actors). Interventions generally involve the sending of a letter to a Government (letter of allegation) requesting information on and responses to allegations and, where necessary, asking the Government to take preventive or investigatory action (urgent appeal). These interventions are known as “communications”

**Urgent appeals** are sent when the alleged violations are time-sensitive in terms of involving loss of life, life-threatening situations or either imminent or ongoing damage of a very grave nature to victims. **Letters of allegation** are sent when the urgent appeal procedure does not apply, to communicate information and request clarification about alleged human rights violations. Mandate-holders may send joint communications when a case falls within the scope of more than one mandate. The decision of whether or not to intervene with a Government is left to the discretion of special procedure mandate-holders and will depend on criteria established by them, as well as the criteria set out in the Code of Conduct. Mandate-holders are also required to take into account, in a comprehensive and timely manner, information provided by the State concerned on situations relevant to their mandate.

In their information-gathering activities, mandate-holders must:

- Be guided by the principles of discretion, transparency, impartiality and even-handedness;
- Preserve the confidentiality of sources of testimonies if divulging them could cause harm to the individuals involved;
- Rely on objective and dependable facts based on evidentiary standards that are appropriate to the non-judicial character of the reports and conclusions they are required to write; and
- Give representatives of the concerned State the opportunity to comment on their assessments and to respond to the allegations made against the State. The State's written summary responses are also to be annexed to the mandate-holder's report(s).

### d) Country visits

One of the most important functions of holders of special procedures is to conduct country visits. A visit cannot be carried out without the approval of the particular State. Terms of reference for country visits, adopted in 1998, provide that the SPs and UN staff assisting them should have:

- freedom of movement in the whole country, in particular to restricted areas
- freedom of inquiry, in particular as regards;
  - access to all prisons, detention centers and places of interrogation
  - contacts with central and local authorities of all branches of government
  - contacts with representatives of NGOs, other private institutions and the media
  - confidential and unsupervised contact with witnesses and other private persons, including persons deprived of their liberty
  - full access to all relevant documentary material

- assurance by the Government that persons who have been in contact with the SP will not be penalised or suffer retribution of any kind.
- appropriate security arrangements without, however, restricting the SP's freedom of movement and inquiry.

During a visit, the holder of the special procedure meets with the Government, government officials, the NHRI, local NGOs and local experts, including victims and others affected most by the situation, to hear their views on the issue.

A country visit by the holder of the special procedure is one of the most effective means of bringing a human rights situation to international attention. It can therefore be an important means by which an NHRI can build international support for its work and, in that way, increase its effectiveness. The holder of the special procedure making a country visit generally has limited knowledge of the country and needs access to local expertise. The NHRI can provide its expertise, knowledge and experience to support and advise the holder of the special procedure before, during and after the visit. After the visit, the holder finalizes and releases the visit report and participates in an interactive dialogue in the Human Right Commission regular session. The "A status" NHRI of the country visited can speak, in person or by video, in the HRC session immediately after the State concerned when the report is presented. Later, the NHRI can be the most influential advocate for the report's implementation<sup>196</sup>.

NHRIs have an important role in following up on the report issued by the special procedure. The institutions should widely disseminate the report. In addition, they can monitor the steps taken by the State to implement the recommendations from the report. NHRIs could also organise follow-up seminars or roundtable discussions on the report and its recommendations with key indigenous peoples' organizations and public officials.

#### *e) Submitting reports to the consideration of the Human Rights Council*

Special procedures mandate-holders are requested by the Human Rights Council to present annual reports in which they describe the activities undertaken during the previous year. In some circumstances, the Council may also request a mandate-holder to report on a specific theme or topic of interest to it. Reports are public and represent an authoritative tool for follow up or advocacy in the mandate's area.

Annual reports contain information on working methods, theoretical analysis, general trends and developments with regard to the mandate and may contain general recommendations. Reports may also contain summaries of communications transmitted to Governments and the replies received. Reports on country visits are usually presented as addenda to the annual reports. Some mechanisms are requested to report to the United Nations General Assembly, which meets in New York from September to December each year.

Special procedures mandate-holders also contribute expertise to other aspects of the Human Rights Council's work.

#### *f) Thematic studies*

Special procedures mandate-holders can also prepare thematic studies, which are useful tools to guide Governments, as well as civil society, on the normative content and implementation of human rights norms and standards. Mandate-holders also host and attend expert meetings on thematic human rights issues.

#### *g) Press releases*

Special procedures can—individually or collectively—issue press releases highlighting specific situations or the international norms to be respected by States.

196. APF, International Human Rights and the International Human Rights System: A Manual for National Human Rights Institutions (2012), p. 52.

Civil society actors, individually or collectively, may access and work with the special procedures. Unlike the United Nations treaty bodies, special procedures can be activated even where a State has not ratified the relevant instrument or treaty, and it is not necessary to have exhausted domestic remedies to access the special procedures. Special procedures can therefore be used for any country or human rights issue, within the parameters of existing mandates.

Civil society actors may contribute to the work of the special procedures by:

- Submitting individual allegations of human rights violations to the relevant special procedures mandate-holder(s);
- Providing support for country visits and information and analysis on human rights violations to various special procedures mandate-holders;
- Performing a preventive role by providing information to special procedures on the introduction of new legislation which may lead to human rights violations;
- Working on follow-up to special procedures' recommendations locally and nationally. More broadly, civil society can support the dissemination of the work and findings of special procedures mandate-holders within its constituencies.

The vital relationship between the special procedures and civil society is illustrated in the mandate of the Special Rapporteur on the situation of human rights defenders.

### 3. OTHER MECHANISMS

On June 18, 2007, one year after the first ITS meeting, the Human Rights Council passed Resolution (5/1) detailing "Creation of package Institutions" What procedures, mechanisms and structures form the basis of their work?

Among the new universal mechanisms, a mechanism for periodic review, the Advisory Committee and the complaint procedure. These auxiliary bodies depend directly on the Rights Council:

#### 3.1. THE INTERGOVERNMENTAL WORKING GROUP ON THE RIGHT TO DEVELOPMENT

The Working Group was established by the Commission on Human Rights, in its resolution 1998/72<sup>197</sup>, and by the Economic and Social Council, in its decision 1998/269, with the following mandate:

- (a) to monitor and review progress made in the promotion and implementation of the right to development as elaborated in the Declaration on the Right to Development, at the national and international levels, providing recommendations thereon and further analyzing obstacles to its full enjoyment, focusing each year on specific commitments in the Declaration;
- (b) to review reports and any other information submitted by States, United Nations agencies, other relevant international organizations and non-governmental organizations on the relationship between their activities and the right to development; and
- (c) to present for the consideration of the Commission on Human Rights a sessional report on its deliberations, including advice to the Office of the United Nations High Commissioner for Human Rights (OHCHR) with regard to the implementation of the right to development, and suggesting possible programmes of technical assistance at the request of interested countries with the aim of promoting the implementation of the right to development.

197. See its resolution 1998/72 and ECOSOC decision 1998/269.

In this same resolution, the Council also renewed for two years the mandate of the high-level task force on the implementation of the right to development, established within the framework of the Working Group on the Right to Development.

The objective of the task force is to provide the necessary expertise to the Working Group to enable it to make appropriate recommendations to the various actors on the issues identified for the implementation of the right to development. The task force comprises five experts nominated by the Chairperson of the Working Group on the Right to Development in consultation with each of the United Nations regional groups and other institutional members, including representatives from identified international trade, finance and development institutions. The task force convenes in annual sessions of seven working days and presents its reports to the Working Group.

### 3.2. THE SOCIAL FORUM

In 2007 the Human Rights Council renewed the mandate of the Social Forum, preserving it as a “unique space for interactive dialogue between the United Nations human rights machinery and various stakeholders, including grass-roots organizations, and underlines the importance of coordinated efforts at national, regional and international levels for the promotion of social cohesion based on the principles of social justice, equity and solidarity as well as to address the social dimension and challenges of the ongoing globalization process” (resolution 6/13).

An initiative of the former Sub-Commission, the Social Forum originated as a two-day pre-session forum on economic, social and cultural rights held before annual sessions of the Sub-Commission. Whereas the Social Forum was previously a subset of the Sub-Commission, it is now an independent Human Rights Council mechanism.

The Social Forum meets each year for three working days to focus on specific thematic issues designated to it by the Council. It met for the first time as a mechanism of the Council in September 2008 and, as requested by the Council, some thematic procedures mandate-holders participated in it. The Social Forum was asked to formulate conclusions and recommendations to be presented to relevant bodies through the Council and focused on:

- Questions relating to the eradication of poverty in the context of human rights;
- Capturing best practices in the fight against poverty in the light of grass-roots presentations to the Social Forum; and
- the Social dimension of the globalization process.

The Social Forum is chaired by a chairperson-rapporteur appointed by the Council’s President each year from among nominations presented by the regional groups.

### 3.3. FORUM ON MINORITY ISSUES

The Forum on Minority Issues<sup>198</sup> replaced the former Sub-Commission’s Working Group on Minority Issues. It provides a platform for promoting dialogue and cooperation on issues pertaining to persons belonging to national or ethnic, religious and linguistic minorities by:

- Providing thematic contributions and expertise to the work of the independent expert on minority issues; and
- Identifying and analysing best practices, challenges, opportunities and initiatives for the further implementation of the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.

The Forum meets for two working days in Geneva each year for thematic discussions, and is expected to contribute to the High Commissioner’s efforts to improve cooperation among

198. Created by Human Rights Council resolution 6/15 of 28 September 2007.

United Nations mechanisms, bodies and specialized agencies, and funds and programmes on activities related to the promotion and protection of the rights of persons belonging to minorities, including at the regional level<sup>199</sup>.

Whereas the Chairperson of the Forum (appointed by the Council's President each year on the basis of regional rotation) is responsible for the preparation of a summary of the Forum's discussions, the independent expert on minority issues guides its work and prepares its annual meetings. The independent expert is also invited to include in her/his report the thematic recommendations of the Forum and recommendations for future thematic subjects, for consideration by the Council.

### 3.4. EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES

The Expert mechanism on the rights of indigenous peoples<sup>200</sup> is the successor to the former Sub-Commission's Working Group on Indigenous Populations. A subsidiary of the Human Rights Council, the Expert Mechanism provides it with thematic expertise on the rights of indigenous peoples in a manner and form requested by it. The Expert Mechanism reports annually to the Council, focuses mainly on studies and research-based advice, and may, within the scope of its work, suggest proposals to the Council for consideration and approval.

The Expert Mechanism consists of five independent experts, each serving for three years with the possibility of being re-elected for an additional term. It may meet for up to five days per year in a combination of private and public meetings and is free to decide on its own methods of work, though unable to adopt resolutions or decisions.

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and a member of the Permanent Forum on Indigenous Issues also attend and contribute to the Expert Mechanism's annual meetings.

### 3.5. INTERGOVERNMENTAL WORKING GROUP ON THE EFFECTIVE IMPLEMENTATION OF THE DURBAN DECLARATION AND PROGRAMME OF ACTION

The Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action was established by the Commission on Human Rights (resolution 2002/68). In June 2006, the Human Rights Council extended its mandate for a further three years (resolution 1/5). The Intergovernmental Working Group is mandated to:

- Make recommendations with a view to the effective implementation of the Durban Declaration and Programme of Action; and
- Prepare complementary international standards to strengthen and update international instruments against racism, racial discrimination, xenophobia and related intolerance in all their aspects.

### 3.6. GROUP OF INDEPENDENT EMINENT EXPERTS ON THE IMPLEMENTATION OF THE DURBAN DECLARATION AND PROGRAMME OF ACTION

The World Conference requested the High Commissioner to cooperate with five independent eminent experts to follow up the implementation of the provisions of the Durban Declaration and Programme of Action<sup>201</sup>. In 2003, the independent eminent experts (one from each regional group) were appointed by the then Secretary-General, Mr. Kofi Annan, from among

199. At its inaugural session, on 15 and 16 December 2008, the Forum is expected to consider minorities and access to education

200. Created by Human Rights Council resolution 6/36 of 14 December 2007.

201. See para. 191 (b) of the Programme of Action and General Assembly resolution 56/266.

the candidates proposed by the Chairperson of the Commission on Human Rights after consultation with the regional groups. Their mandate is to:<sup>202</sup>

- Follow the implementation of the provisions of the Durban Declaration and Programme of Action in cooperation with the High Commissioner; and
- Assist the High Commissioner in preparing her/his annual progress report to the Council and to the General Assembly based on information and views provided by States, relevant human rights treaty bodies, special procedures and other mechanisms of the Council, international and regional organizations, NGOs and national human rights institutions (NHRIs).

### 3.7. WORKING GROUP OF EXPERTS ON PEOPLE OF AFRICAN DESCENT

The Working Group of Experts on People of African Descent is a special procedure of the Council. It was created by the Commission at the request of the World Conference.

The Working Group comprises five independent experts appointed on the basis of equitable geographic representation. It holds a five-day session every year and conducts country visits at the invitation of Governments in order to facilitate in-depth understanding of the situation of people of African descent in various regions of the world. It also submits an annual report to the Human Rights Council.

Its mandate is to:<sup>203</sup>

- Study the problems of racial discrimination faced by people of African descent living in the diaspora and to this end gather all relevant information from Governments, NGOs and other relevant sources, including through holding public meetings;
- Propose measures to ensure full and effective access to the justice system by people of African descent;
- Submit recommendations on the design, implementation and enforcement of effective measures to eliminate racial profiling of people of African descent;
- Elaborate short-, medium- and long-term proposals for the elimination of racial discrimination against people of African descent;
- Make proposals on the elimination of racial discrimination against Africans and people of African descent in all parts of the world; and
- Address all the issues concerning the well-being of Africans and people of African descent contained in the Durban Declaration and Programme of Action.

### 3.8. AD HOC COMMITTEE ON THE ELABORATION OF COMPLEMENTARY STANDARDS

The Human Rights Council established the Ad Hoc Committee on the elaboration of complementary standards in December 2006. It is mandated to develop, as a matter of priority and necessity, complementary standards in the form of either a convention or additional protocol(s) to the International Convention on the Elimination of All Forms of Racial Discrimination. These complementary standards are to<sup>204</sup>:

- Fill existing gaps in the Convention; and
- Provide new normative standards aimed at combating all forms of contemporary racism, including incitement to racial and religious hatred.

202. See Commission on Human Rights resolution 2003/30. See also General Assembly resolution 59/177.

203. See Commission on Human Rights resolutions 2002/68 and 2003/30.

204. See Human Rights Council decision 3/103 and its resolution 6/21.



The Ad Hoc Committee convenes in an annual session of 10 working days to draw up the requisite legal instruments. It held its inaugural meeting in February 2008 and is required to report regularly to the Council on its progress.

## 4. INTEGRATING HUMAN RIGHTS INTO THE WORK OF THE UNITED NATIONS

Promoting human rights and fundamental freedoms is a key objective of the United Nations. To that end, the Organization has adopted the policy of “integrating human rights”, namely, ensuring that human rights — as a cross-cutting theme — are taken into consideration by all organs of the United Nations system. Accordingly, in addition to the United Nations Commission on Human Rights, which remains the main human rights body, a steadily growing number of specialized agencies, programmes, funds and other United Nations bodies have been developing human rights promotion and protection activities.

The Vienna World Conference on Human Rights (1993), and subsequent resolutions of the General Assembly and the United Nations Commission on Human Rights called upon the United Nations to make available, at the request of the Governments concerned, certain assistance programmes. These should address the reform of national legislation and the establishment and/or strengthening of national institutions and related structures to uphold human rights, the rule of law and democracy, the provision of electoral assistance and the promotion of human rights awareness through training, teaching and education, popular participation and the involvement of a vibrant civil society.

The United Nations Secretary-General’s reform programme, launched in 1997, called for the integration of human rights into the work of the United Nations system as a whole and the development of practical tools to implement the Vienna blueprint. The result has been progress in the human rights policies and activities of several United Nations agencies and programmes.

The publication of the United Nations Secretary-Generals 2001 report entitled *Strengthening of the United Nations: An agenda for further change* (A/57/387) represented a further important development. In that second reform report, the Secretary-General reiterated that the promotion and protection of human rights constitutes “a bedrock requirement for the realization of the Charter’s vision of a just and peaceful world”. The main goal consists in building the capacities of United Nations humanitarian and development operations to enable them to support States Members’ efforts to establish and strengthen national human rights promotion and protection systems, consistent with international human rights norms and principles. Paragraph 50 of the report reads as follows:

“In paragraphs 25 and 26 of the Millennium Declaration, Member States resolved to strengthen their capacity at the country level to implement the principles and practices of human rights, including minority rights, the rights of women, the rights of children and the rights of migrants. Building strong human rights institutions at the country level is what in the long run will ensure that human rights are protected and advanced in a sustained manner. The emplacement or enhancement of a national protection system in each country, reflecting international human rights norms, should therefore be a principal objective of the Organization. These activities are especially important in countries emerging from conflict.”

### 4.1. HUMAN RIGHTS IN THE GENERAL ASSEMBLY AND ITS PERMANENT PROGRAMMES

The General Assembly is the the chief deliberative, policymaking and representative organ of the United Nations. Comprising all 193 Members of the United Nations, it provides a unique forum for multilateral discussion of the full spectrum of international issues covered by the Charter. The General Assembly (GA) meets in regular sessions intensively from September to December each year, and thereafter as required.

The General Assembly, the highest United Nations law-making body, not only has ensured the adoption of an impressive set of human rights conventions, declarations, principles, rules and other instruments, but also discusses at every session, particularly in its Third



Committee, which is responsible for social, humanitarian and cultural affairs, the factual human rights situation in many States, and adopts corresponding resolutions.

Many of the Organization's programmes, funds and institutes, such as the United Nations Development Programme (UNDP), the World Food Programme (WFP), the United Nations Children's Fund (UNICEF), the United Nations Human Settlements Programme (UN-HABITAT), the United Nations University (UNU), the Office of the United Nations High Commissioner for Refugees (UNHCR) and the Office of the United Nations High Commissioner for Human Rights carry out important activities in the field of human rights.

#### 4.2. THE ECONOMIC AND SOCIAL COUNCIL

The Economic and Social Council (ECOSOC) is made up of representatives from 54 Member States elected by the General Assembly every three years to coordinate the economic and social activities of the United Nations system. It is the main body for discussing international economic and social issues and policy-making, and is the main architect in international cooperation for development. It is the central forum for discussing international economic and social issues and for making policy recommendations on these issues for the Member States and the United Nations system as a whole. It also engages more than 2000 non governmental organisations (NGOs), thereby maintaining a vital link between the UN and civil society.

To help its work, ECOSOC has established several subsidiary bodies: 14 specialised United Nations organs, the organic commissions and five regional commissions. These organisms cover issues such as social development, the status of women, crime prevention and sustainable development. Among these organs are the former Human Rights Commission (1946-2006), the Commission on the Status of Women and the Commission on Crime Prevention and Criminal Justice, for example.

#### 4.3. HUMAN RIGHTS AND THE SECURITY COUNCIL

The Security Council, the sole United Nations body that is competent to adopt legally binding resolutions and enforce them when States Members fail to comply, has in recent years assumed an increasingly active role in the area of human rights. Human rights today form an essential component of peacekeeping and peacebuilding operations, and many human rights experts are deployed in the field to monitor the human rights situations in post-conflict contexts and assist the countries concerned in promoting the rule of law, in building an independent judiciary, in supporting law enforcement, in organizing prison administration, and in setting up national human rights commissions and other institutions necessary for the protection of human rights. In addition, the Security Council, in an increasing number of cases, has considered gross and systematic human rights violations as a threat to the peace and, consequently, acted under Chapter VII of the Charter of the United Nations by imposing economic and other sanctions, authorizing military force and establishing ad hoc international criminal tribunals (see Chapter 10).

#### 4.4. HUMAN RIGHTS AND THE "UNITED NATIONS FAMILY"

The United Nations system, informally referred to as the "United Nations family", consists of the United Nations and a growing number of specialized agencies that are legally independent intergovernmental organizations maintaining a special relationship with the Organization on the basis of agreements concluded with the Economic and Social Council under Article 63 of the Charter of the United Nations. Accordingly, the United Nations policy of human rights integration" applies also to the specialized agencies, many of which have a long history of activity related to specific human rights.

**The International Labour Organization (ILO)** is the main agency dealing with economic rights such as the rights to work, to equal and fair treatment and to healthy working conditions, with trade union rights, including the right to strike and to engage in collective bargaining, and with related provisions, such as the prohibition of forced labour, the worst forms of child labour and discrimination in hiring and the workplace. ILO, established in 1919 and run on the basis of a "tripartite system" which places employers' and employees' representatives

on a more or less equal footing with Government representatives, has developed many fundamental international treaties, recommendations and procedures for the protection of economic and other human rights.

The **United Nations Educational, Scientific and Cultural Organization** (UNESCO) is the main agency in the area of cultural rights (especially the right to education) and has developed various instruments and procedures for their protection. It also played a key role in the implementation of the United Nations Decade for Human Rights Education (1995 to 2004) and the promotion of a universal culture of human rights and peace.

The **World Health Organization** (WHO) is the main agency for the promotion and protection of the right to health, and has developed, inter alia, a successful global programme on HIV/AIDS.

The **Food and Agriculture Organization of the United Nations** (FAO) is the biggest of the specialized agencies, and is the major actor in the promotion and protection of the right to food, which is one of the most important elements in the global fight against poverty. This major development goal was agreed upon by some 150 heads of State and Government during the Millennium Summit, held in September 2000.

#### KEY UNITED NATIONS BODIES ACTIVE IN THE AREA OF HUMAN RIGHTS

##### Specialized agencies

- International Labour Organization (ILO)
- Food and Agriculture Organization of the United Nations (FAO)
- United Nations Educational, Scientific and Cultural Organization (UNESCO)
- World Health Organization (WHO)

##### Programmes and funds

- United Nations Children's Fund (UNICEF)
- United Nations Development Programme (UNDP)
- United Nations Development Fund for Women (UNIFEM)
- United Nations Human Settlement Programme (UN-HABITAT)
- United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)
- World Food Programme (WFP)

##### Research and training institutes

- United Nations Institute for Training and Research (UNITAR)
- United Nations International Research and Training Institute for the Advancement of Women (INSTRAW)
- United Nations Research Institute for Social Development (UNRISD)

##### Bodies established by the Security Council

- International Criminal Tribunal for the former Yugoslavia (ICTY)
- International Criminal Tribunal for Rwanda (ICTR)

##### Other United Nations entities

- Office of the United Nations High Commissioner for Human Rights (OHCHR)
- Office of the United Nations High Commissioner for Refugees (UNHCR)
- United Nations University (UNU)

# SUBJECT 2.2.:

## OPERABILITY OF AN HRBA

**Hours: 7**

**Subject**

**2.2.6.** Constitutional protection of human rights and national protection mechanisms

**Lecturer:**

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### SUMMARY OF THE TOPIC

Fundamental rights are only as good as their guarantees. Therefore, on the supranational level as well as the level of each State, mechanisms exist that protect rights to varying degrees. From the citizens' point of view, the most effective way to protect their rights is to be able to seek redress from an independent judge who belongs to the ordinary legal jurisdiction to protect any constitutionally proclaimed right that may be undermined by the actions of the public powers, or even by the citizens.

However, in a State of Law with a normative constitution, the established mechanisms play out not only on the jurisdictional level, but also on constitutional, legislative and institutional levels. Furthermore, there are some guarantees we can describe as "diffuse": public opinion, special interest groups, etc.

### GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for *this topic*, participants will develop efficiently the following general and specific competences:

## GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other individuals, departments and organisations.
- **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows individuals to continue acting effectively.
- **Interpersonal communication:** To positively relate with other individuals through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

## SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.
- To identify and apply international and regional human rights protection mechanisms.
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.

## REFERENCE AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

National or international legal documents:

- Constitution of country
- Legislation developing the guarantees of rights as applicable.

Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, Human Rights Handbook for Parliamentarians N° 26, Geneva, 2016. Also available in Spanish and French.

## REFERENCE AND OTHER COMPLEMENTARY RESOURCES

International Council on Human Rights Policy. Local Government and Human Rights: Doing Good Service. Geneva, 2005.

International Council on Human Rights Policy. Assessing the Effectiveness of National Human Rights Institutions. Geneva, 2005.

International Council on Human Rights Policy. Performance and Legitimacy: National Human Rights Institutions. Geneva, 2000.

Cherif Bassiouni (Ed.), Democracy: its principles and achievement. Geneva, 1998.

Office of the United Nations High Commissioner for Human Rights. National Institutions for the Promotion and Protection of Human Rights. Information file No. 19, Geneva, 1994.

Office of the United Nations High Commissioner for Human Rights. Who will be Accountable? Human Rights and the Post-2015 Development Agenda. New York and Geneva, 2013.

Office of the United Nations High Commissioner for Human Rights. Good Governance Practices for the Protection of Human Rights. New York and Geneva, 2007.

## LEARNING OUTCOMES

By the end of the topic, the participants in training should be able to:

- To understand the nature and scope of law
- To identify the holders of rights, and particularly, those at risk and those in vulnerable situations
- To determine the challenges to the right to participation in the Maghreb in general, and in its context in particular
- To integrate the right to participation in the teaching programme, proposing a learning service project regarding an identified situation of rights violation.
- To know the guarantee mechanisms of the right to participation

## METHODOLOGY

Methodology	Educational tools
Exposition method	Reading of texts
Problem-solving	Portfolio
Group discussions	Forum

## SCHEDULE OF LEARNING ACTIVITIES

### 1) Reading the Educational Guide to the topic

By this reading of the guide, the participant will acquire a general idea on the content of the topic and the activity to be carried out.

### 2) Reading the Exposition of the topic and the corresponding fact sheet.

By reading the exposition of the topic, the student will acquire a general idea as a kind of summary of the main elements of the right to adequate participation. This reading will be complemented with the Fact Sheet.

This first reading will enable participants to identify the area of interest as it relates to their teaching for the purpose of further studying the right to participation for practical application of the course.

### 3) Activities:

Please choose one of the activities described below. These tasks are designed either for discussion groups or as personal individual or group tasks.

#### ACTIVITY 1 (Individual work: a 3-page written presentation)

- Point out which articles in your country's Constitution refer to the protection of fundamental rights.
- Which mechanisms of the ones listed in the text (summary of the topic and development of the topic) are present in your country's Constitution?
- Make a flow chart that shows the path of a human rights complaint in your country from its violation to its effective reparation.

Evaluation: the ability to analyse the articles of the constitution, the ability to synthesise and understand the nature of the mechanisms and to understand the reasoning for the legal path followed to re-establish the violated legal order.

#### ACTIVITY 2: Group discussion in the forum of the virtual classroom:

In your opinion,

- Do human rights enjoy a better state of health in your country? Which rights in your opinion are the most vulnerable in your country?
- In your country, is there strong public opinion regarding human rights to contribute to guaranteeing the fundamental human rights?
- Do you think NGOs and other civil organisations that defend human rights could improve the situation of human rights in your country?

**Evaluation:** communicative skills and quality of argumentation

**ACTIVITY 3:** Activities: Group work: Do you know any NGO in your country dedicated to human rights? Summarise the basic aspects of their statutes and list the type of ordinary activities they perform: Preparation of a dossier on the NGO chosen.

**Evaluation:** ability connect the activities carried out by the NGO to human rights.

**ACTIVITY 4:** Group work: Prepare a DOSSIER. Cite five pieces of news on human rights from the media in your country in the last month.

Expository ability, quality of arguments and skill in choosing the news items.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Reading the Educational Guide of the topic	15 minutes	
Reading the Exposition of the topic	45 minutes	self-evaluation
Activity 1	1.30 hours	Portfolio
Activity 2	1.30 hours	Forum in the virtual classroom
Activity 3	1.30 hours	Portfolio: methodology used
Activity 4	1.30 hours	Portfolio: methodology used
	7 hours	

## SELF-ASSESSMENT EVALUATION

- What guarantees exist for protecting rights?
  - jurisdictional
  - legislative
  - constitutional
  - all the above
- Which institutional guarantee is the most common?
  - Ombudsman or equivalent
  - NGOs
  - Schools
  - Religious
- What must the law respect in relation to fundamental rights?
  - the acknowledgement of the right to national citizens
  - the limits of the rights
  - the essential content
  - the guidelines of the United Nations
- International declarations of rights
  - do not constitute a guarantee
  - at least mean a moral commitment for the States
  - the states are obliged to them more than the rights stated in the Constitution
  - are directly actionable before the national courts



## 5. Ordinary jurisdiction

- a) is the only jurisdictional guarantee
- b) is not suitable for defending fundamental rights
- c) is the first court wherever there is a constitutional jurisdiction
- d) need not be independent from other public powers

## SELF-ASSESSMENT EVALUATION

Question	Question Key
Question 1	d
Question 2	a
Question 3	c
Question 4	b
Question 5	c

## SUBJECT 2.2.:

## 2.2.6. CONSTITUTIONAL PROTECTION OF HUMAN RIGHTS AND NATIONAL PROTECTION MECHANISMS

### 1. INTRODUCTION

There are mechanisms on both the supranational and the State-wide level that protect rights to varying degrees of success. From the citizens' point of view, the most effective way to protect their rights is to be able to seek redress from an independent judge who belongs to the ordinary legal jurisdiction to protect any constitutionally proclaimed right that may be undermined by the actions of the public powers, or even by the citizens. However, in a State of Law with a normative constitution, the established mechanisms play out not only on the jurisdictional level, but also on constitutional, legislative and institutional levels. Furthermore, there are some guarantees we can describe as "diffuse": public opinion, special interest groups, etc.

#### NATIONAL HUMAN RIGHTS PROTECTION SYSTEM

Guaranteeing respect for human rights requires:

- Constitutional and legal framework
- Effective institutions (parliament, government, judiciary, public administration, human rights institutions)
- Procedures and processes for inclusion of effective resources
- Policies and programs, including awareness-raising
- Dynamics of civil society and a free press

It should be noted that the most important action regarding human rights, particularly actions regarding established standards and norms, takes place on the national level by means of the effective role played the various government institutions.

A national human rights protection system (NHRPS) mainly consists of legal frameworks, institutions, political processes and stakeholders to ensure that their human rights international standards and norms are promoted, respected, protected and realised.

The goal of the NHRPS is to guarantee sustainable and effective human rights in a country. It should pay special attention to ensuring that all the aspects of the NHRPS are sensitive to women's human rights. And it should always pay attention to groups who face discrimination and suffer a disadvantage in a country-including racial and ethnic minorities, children, the handicapped, women and the poor.

The main components of a national human rights protection system that a state needs to establish to promote, protect and fulfil human rights are:

- A constitutional and legal framework** reflecting international standards on rights and regulations;

- b) **Effective institutions for promoting and protecting human rights**, including on central and local levels, national and local parliaments, governments, central and local governments, the justice department, constitutional courts and an independent human rights institution and/or a mediator;
- c) **Policies, procedures and processes to promote and protect human rights**, including: indemnity for human rights violations and abuses, access to the procedures and mechanisms for settling controversies, effective enforcement, including sanctions and forms of use; participatory decision-making processes, cooperation with international organisations and regional human rights mechanism, and on a more global level, adoption of a policy based on human rights and the planning of development programmes.
- d) **Human rights consciousness-raising programs and policies including women's rights**, by means of human rights education at schools, universities and vocational schools, the rights to training so that civil servants and other interested professionals, as well as awareness campaigns for the general public.
- e) **The existence of a dynamic civil society with the full participation of men and women**, including free, active and independent media to defend the rights of communities. The role of trade unions and employer organisations may also prove vital in this context.

## 2. LEGAL NATURE OF THE GUARANTEES OF FUNDAMENTAL RIGHTS

The guarantees of rights help protect the use of any right, which is what makes them a fundamental right themselves with their own purpose or content: the right to effective judicial protection, i.e., the right to access a set of administrative and jurisdictional procedures that the State must maintain to defend the rights of its citizens. Nevertheless, other protection mechanisms exist that are more general or abstract, as we will see below.

## 3. THE CONSTITUTIONAL ACKNOWLEDGEMENT OF RIGHTS: THEIR DIRECT ENFORCEMENT

Human rights-fundamental rights when they are acknowledged in the Constitution, have a *persuasive* effect on leaders, who are at least morally obliged to be respectful of them. Human rights form part of a universal legal culture shared thanks to their contents being broadcasted by the mass media, by the theoretical reflections of legal scholars or by government action. This common participation in human rights culture is bound to be the best guarantee, especially if it is deep-rooted in society. But from the positive legal point of view, the legal and *constitutional guarantees* of fundamental rights are very important.

The first guarantee of fundamental rights is for them to be written into the Constitution itself, if the Constitution is *normative* (i.e., *actionable, directly applicable by the courts*) with whatever small differences can be added to this expression in each country.

The inclusion of fundamental rights in this type of Constitution enables citizens address judges directly (after filing suit accordingly with the appropriate public powers), appealing to the constitutionally acknowledged right *even if there is no specific law regulating it*.

Some national constitutions, such as Spain's and Morocco's, also incorporate a reference to international legal texts on human rights, when thus become a binding interpretive criterion for the public authorities in terms of the normative development and enforcement of constitutionally recognised fundamental rights.

## 4. THE LAW AS A GUARANTEE OF FUNDAMENTAL RIGHTS: SAFEGUARDING THE ESSENTIAL CONTENT OF FUNDAMENTAL RIGHTS

However, normally a constitutionally recognised right requires a law to be passed that regulates how it is used and developed, especially when it involves the right to a benefit or service, or when the right has a highly complex nature. Moreover, we can say that *the contents of rights and their guarantee are in the hands of the law*, whatever their nature. It is therefore essential for the Constitution to set material limits to the law so that the law does not infringe upon the *essential content of the right or of its essence*, so as to keep it always in accordance with the universally acknowledged convictions of legal scholars and endowed with suitable protection. In consequence, when the Constitution states an essential content of a right, the law is unable to erode it, even if there is near unanimous support to do so. The democratic principle must cede to the demands derived from a set of rights linked to human dignity. The essence or essential content of a right stands like a wall the lawmaker cannot breach.

## 5. LEGAL PROTECTION

However, who is to decide if the law is in accordance with the constitutionally declared right?

### 5.1 THE LEGAL PROTECTION OF CONSTITUTIONAL COURTS

In most cases, a special court is entrusted by the judiciary to ensure the *primacy of the Constitution*. No law that contradicts it—especially a law regulating a fundamental right—can prevail over the constitution. *Challenging the constitutionality*, real or apparent, may be up to the citizens in general or the public authorities (parliament, government, institutions specialised in defending rights, etc.) by means of specific procedures or resources that the parties may interpose in all kinds of process in which the disputed law is to be applied. Thus, some models are of concentrated jurisdiction and some are of diffuse control of the constitutionality of the law.

### 5.2 ORDINARY JUDICIAL PROTECTION

Only when this ordinary protection of the public powers fails does the other level of guarantee come into play: *jurisdiction*. Citizens who find their fundamental rights infringed upon can appeal to the *ordinary jurisdiction*, and if due satisfaction is not forthcoming, to the *constitutional jurisdiction* (if there is one), i.e., to a special and unique court in charge of enforcing constitutional guarantees. For this reason, it is of the utmost importance that the courts of justice are independent and subject only to the rule of law. It is best to keep the judiciary independent from the other powers of the State to ensure that the rights of citizens are protected.

Therefore, citizens must be ensured access to the judicial system to receive effective protection from judges and courts. This requires having certain procedural rights, such as the right to a judge predetermined by the law, the right to legal council, the right to be informed of the charges filed against them in the case of penal lawsuits, the right to a speedy trial without undue delays, the right to use pertinent means of proof for their defence, the presumption of innocence, etc.

## 6. THE ROLE OF THE PUBLIC POWERS

Once the law exists, those who must ordinarily guarantee the effectiveness of the fundamental rights are the *public powers* (the public administrations) by developing *public policies* or satisfying the interests that the citizens wish to assert in each specific case. In their ordinary action of governing, public powers guarantee the effectiveness of fundamental rights. Because many of them are rights to a benefit or service (education, health, housing, etc.), they are the only ones who have the resources needed to make them effective.

## 7. SUBJECTS OF JURISDICTIONAL GUARANTEES

Active subjects of jurisdictional guarantees are those whose rights have been violated, but also those who have a legitimate interest in taking the corresponding action even if not directly harmed.

Passive subjects of the guarantees are the public powers (legislative, executive and judicial) who, each from their own area of competency must make the constitutionally declared rights effective.

## 8. OTHER SPECIFIC INSTITUTIONS<sup>205</sup>

### THE PARIS PRINCIPLES

In 1993, the General Assembly of the United Nations adopted a set of principles for establishing national institutions on human rights. Known as the Paris Principles, these principles have become the international standard in setting the minimum criteria to follow when defining what these institutions are to do and how they are to do it. In accordance with these principles, national human rights institutions shall:

- be independent and have their independence ensured by legal and constitutional dispositions
- be pluralist, even in their functions and composition
- have as broad a mandate as possible mandate
- have sufficient universities for research
- be characterised by regular and efficient performance
- have sufficient funding
- be accessible to the public.

In addition, the legal systems are endowed with other non-judiciary institutions for defending rights that also act as promoters of their defence before the courts, the public administration and the parliament. These mechanisms are given different names in different countries: Ombudsman, Defender of the People, Parliamentary commissions, etc. These institutions report on the state of rights in the country, receive complaints and can prompt the judiciary to act in defence of the rights by submitting a report.

While these institutions are not the same in any two country, there are enough similarities to distinguish between the different entities mentioned earlier. All the national institutions are administrative in nature, in the sense that they are neither judiciary nor parliamentary. As a general rule, they have permanent consultative authority with respect to human rights on the national or international level. They pursue their goals either generally by formulating opinions and recommendations, or by reviewing complaints filed by individuals or groups and deciding on the claims. In some countries, the Constitution mandates the creation of a national institution for the protection of human rights. But more often, these institutions are created by a law or decree. While many of them are in some way or another related to

205. The content of this section has been taken from the following publication: Office of the United Nations High Commissioner for Human Rights (OHCHR). National institutions for the promotion and protection of human rights. Fact sheet 19, Geneva, 1994.

a specific Government, their real independence depends on various factors, including their composition and how they operate.

When States sign a supranational convention to uphold fundamental rights, the Court or Committee that guarantees them becomes the last recourse for defence. Thus, for instance, the European Convention on Human Rights (ECHR) (formally the Convention for the Protection of Human Rights and Fundamental Freedoms). Other universal conventions and treaties have their own institutions and defence procedures.

The majority of existing national institutions can be grouped together in two broad categories: “human rights commissions” and “ombudsmen”. Another less common, but no less important variety, are the “specialised” national institutions which function to protect the rights of a particular vulnerable group such as ethnic and linguistics minorities, indigenous population, women, refugees or children. These three categories of national institutions are considered in detail further on.

### COUNTRIES ENDOWED WITH NATIONAL HUMAN RIGHTS INSTITUTIONS

Countries endowed with national institutions accredited by the International Coordinating Committee of National Human Rights Institutions (as of August 2016):

**Asia and the Pacific:** Afghanistan, Australia, India, Indonesia, Jordan, Malaysia, Mongolia, Nepal, New Zealand, Philippines, Qatar, Republic of Korea, Samoa, State of Palestine, Timor-Leste

**Africa:** Burundi, Cameroon, Egypt, Ghana, Kenya, Malawi, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Rwanda, Sierra Leone, South Africa, Tanzania (United Republic of), Togo, Uganda, Zambia, Zimbabwe

**Americas:** Argentina, Bolivia (Plurinational State of), Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Peru, Uruguay, Venezuela (Bolivarian Republic of)

**Europe:** Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Croatia, Denmark, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Latvia, Luxembourg, Netherlands, Poland, Portugal, Russian Federation, Serbia, Spain, Ukraine, United Kingdom (Great Britain, Northern Ireland, Scotland)

32 NHRIs are accredited with B status (not fully in compliance with the Paris Principles) and 10 with C status (non-compliance with the Paris Principles).

Source: Inter-Parliamentary Union, Human Rights: Handbook for Parliamentarians No. 16, Geneva, 2016, p. 114.

## SUBJECT 2.2.:

# 2.2.7. THE HUMAN RIGHTS BASED APPROACH AS A TOOL OF SOCIAL INTERVENTION AND PROGRAMMING IN DEVELOPMENT COOPERATION

In recent years, UN agencies have moved to integrate human rights to different degrees. Some agencies have adopted a HRBA fully, which requires institutional change and the way development work is carried out through the design of country programmes and other activities. The different level of adoption and practice led to a need for a common understanding of HRBA among UN agencies and for conceptual clarity about human rights in regard to programming.

### UN Common Understanding on HRBA



Source: undg Working Group, The UN Common Learning Package on HRBA to Programming, Session 4.

The understanding reached highlights three implications of HRBA to development cooperation and programming, as well as in the implementation of any public policy, as follows<sup>206</sup>:

- a) **The final goal must be to achieve greater realization of rights:** A set of activity programmes that only contribute as accessories to the realization of human rights but do not necessarily constitute a HRBA for programming. In a HRBA, the objective

206. These are the three key elements of the UN Common Understanding elaborated at the Stamford meeting in 2003.



of all activities is to make progress on the realization of human rights. The more human rights become implemented, the more positive the impact of development and public policy. At the same time, a deterioration of human rights may indicate that the political or developmental strategies are on hard times.

The practical implications on programming are the following:

- The challenges and goals of development programs and public policies must be encompassed and formulated as human rights to be respected, protected and realized. For example, the objective of an education programme would be “to ensure universal free primary education for all” instead of “to ensure suitable and adequate teaching infrastructures”. This would thus require special attention for groups whose right to education is threatened more, especially young people, children in rural areas and ethnic and racial minorities.
- The norms on human rights help to make precise definitions of the objectives of development and public policies that otherwise would be too general and vague. For example, the objective of ensuring food security requires that the food be accessible, affordable and biologically and culturally acceptable.
- The observations and recommendations from international human rights mechanisms are recognised today as essential analytical and programming tools, even for determining the objectives of public policies.

**b) The development process and public policy should be governed by the standards and principles of human rights**, and this should be done for all political or developmental strategies in all sectors and stages of the programming cycle.

**c) The strategies are concentrated on developing the capability of the rights-holders** to claim their rights, and of the duty-bearers to fulfil their obligations.

In turn, human rights are sectoral and instrumental. Rules and principles contribute to improving the quality of the results and processes. The principles of human rights require the development process create a favourable environment that is not detrimental to realising human rights. In the HRBA, the guiding principles of the political or developmental process are just as important as the rules on human rights that define the content of the objectives of the policies or development. The type of process determines the end result and its sustainability. The HRBA also involves a procedural dimension. The basic principles of participation, equality and non-discrimination make the development and programming processes create a favourable environment for realizing human rights.

The HRBA penetrates all development practices to the point that the boundaries between human rights and development disappear as both turn into inseparable entities of the same process of social change on the conceptual and operative level alike. The HRBA is applied to development so as to modify how the programmes are conceived, implemented, followed and assessed, starting with the evaluation and analysis of the situation, which is the ideal starting point.

As we saw earlier upon presenting the HRBA concept, this approach acknowledges human beings as rights-holders, it defines obligations for the debtors and focuses on marginalized groups and groups that are victims of discrimination. The essential starting point consists in accepting that to have a RIGHT means that there is a DUTY. Rights entail responsibilities.

**Duty-bearers** have an obligation/responsibility to respect, protect and fulfill rights. Can be the State, individuals, groups of people including non-state actors such as NGOs and international development agencies (e.g. as signatory of human rights treaties, the State has a duty to do as much as possible to provide people with access to habitable, affordable, good quality and culturally acceptable housing)

Human rights obligations can also attach to private individuals, international organizations and other non-State actors. Parents, for example, have explicit obligations under the Convention on the Rights of the Child and States are obliged to cooperate with each other

to eliminate obstacles to development. Moreover, individuals have general responsibilities towards the community at large and, at a minimum, must respect the human rights of others.

However, the State remains the primary duty-bearer under international law, and cannot abrogate its duty to set in place and enforce an appropriate regulatory environment for private sector activities and responsibilities. National legislation and policies must detail how the State's human rights obligations will be discharged at national, provincial and local levels, and the extent to which individuals, companies, local government units, NGOs or other organs of society will directly shoulder responsibility for implementation.

**Capacity:** ability of individuals, organizations and societies to perform functions, solve problems, and set and achieve individual goals.

**Capacity development:** sustainable creation, use and retention of capacity.

**Rights holders capacities:** (i) to understand their rights, (ii) to formulate demands on the state to honor these rights and third, (iii) to seek redress if their rights are violated.

By developing the capacities of rights holders we are empowering them to claim their rights

**Duty bearers:** the capacity of the State at all levels (all branches of the State and all sectors of government, at the national, provincial, municipal level) to meet its obligations to respect, protect and fulfil.

**Rights-holders** are individuals or groups of people who are entitled to rights guaranteed by the international human rights frameworks and national laws (e.g. people displaced by conflict or natural disaster have a right to accessible and affordable housing)

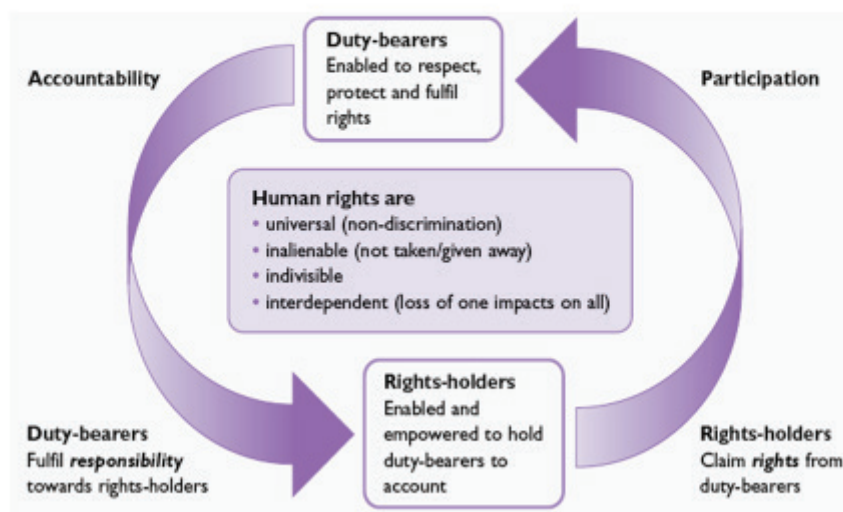
Programmes contribute to develop the capacity of **Rights-Holders to claim their rights**. Every individual is a rights-holder and entitled to the same rights without distinction. To some extent groups are also entitled to human rights. The HRBA requires that special attention be paid to supporting members of groups subjected to discrimination, or suffering from disadvantage or exclusion, to claim their rights.

### The relation between duty-bearers and rights-holders

A basic element in human rights based approaches is the process by which the duty-

bearers identify and are compelled to accept their responsibilities as well as the process by which the rights-holders are prepared to claim their rights. Therefore, it must be understood how that relationship works on various levels in a particular context. Any social intervention or development cooperation programme should help make the relation between duty-bearers and rights-holders function more effectively. It may be necessary to take some steps to hold the duty-bearers responsible and support them in fulfilling their responsibilities. It may also be necessary to strengthen the rights-holders' capacity for claiming their due rights. The following diagram displays that relationship.

## HRBA Basics ... the Duty-Bearer/ Rights-Holder relationship



Source: International Save the Children Alliance, Getting it Right for Children: A practitioners' guide to child rights programming, London, 2007, p. 9.

This matter brings us to a topic of enormous importance for good governance and human rights: empowerment, which we will analyse at the end of this topic. First, however, we must analyse some essential aspects that are common to all human rights.

## SUBJECT 2.3.:

# FUNDAMENTAL PREMISES COMMON TO ALL HUMAN RIGHTS

**Hours: 25**

**Subject**

**2.3.1.** Fundamental characteristics of human rights: universal, inalienable, interdependent and indivisible

**2.3.2.** Legal obligations engendering human rights: respect, protect, fulfil/guarantee

**2.3.3.** Basic principles of human rights: equality and non-discrimination, participation, access to reparation, access to information, accountability, the rule of law and good governance

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## SUMMARY OF THE TOPIC

The human rights based approach essentially contributes to developing the capability of the duty holders to respect them and/or the rights-holders to know how to claim them. From this perspective, merely knowing about international texts on human rights is not enough. It is vital to understand the characteristics that define the normative content of each right as well as the obligations it entails in practice.

With this purpose in mind, this topic presents the characteristics (availability, accessibility and quality) and legal obligations (to respect, protect and guarantee) the rights entail for States and non-state agents alike. Of course, the balance between these obligations or duties may vary depending on the right in question, but that does not keep them from applying to all rights, whether civil and political or economic, social and cultural.

Undeniably, for human rights to be effective, the States and the international community must take steps to apply the legal conditions and frameworks needed for the exercise of human rights.

Finally, beyond the denominations used during the Cold War, which referred to the term “generation” of rights, today the stress is placed above all on principles common to all human rights, both those regarding their content, such as universality, indivisibility and interdependence, and those related to the processes of their implementation, i.e., equality and non-discrimination, participation, inclusion and accountability.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the general and specific

competencies described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for *this topic*, participants will develop efficiently the following general and specific competences:

#### GENERAL:

- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.
- To identify and apply international and regional human rights protection mechanisms.
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

[Universal Declaration of Human Rights 1948](#)

[International Covenant on Economic, Social and Cultural Rights 1966](#)

[International Covenant on Civil and Political Rights 1966](#)

[Convention on the Elimination of All Forms of Discrimination against Women \(CEDAW\)](#)

[Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women \(CEDAW-OP\)](#)

[Convention on the Rights of the Child \(CRC\)](#)

[Convention on the Rights of Persons with Disabilities](#)

[Optional Protocol to the Convention on the Rights of Persons with Disabilities](#)

[Equal Remuneration Convention, 1951 \(No. 100\)](#)

[Discrimination \(Employment and Occupation\) Convention, 1958 \(No. 111\)](#)

[International Convention on the Elimination of all Forms of Racial Discrimination](#)

[Declaration on Race and Racial Prejudice](#)

[Convention against Discrimination in Education](#)

[Protocol Instituting a Conciliation and Good Offices Commission to be responsible for seeking a settlement of any disputes which may arise between States Parties to the Convention against Discrimination in Education](#)

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### EU INSTRUMENTS

- Charter of Fundamental Rights of the European Union (7 December 2000)
- Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (13 December 2007)

- Commission Recommendation 92/131/EEC on the protection of the dignity of women and men at work (27 November 1991)

Council declaration on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the code of practice to combat sexual harassment (19 December 1991).

Council Directive 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security (19 December 1978).

Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (27 November 2000).

Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) (5 July 2006).

Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (9 February 1976).

Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services (13 December 2004).

Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (29 June 2000).

### THE EUROPEAN CONVENTION ON HUMAN RIGHTS (4 NOVEMBER 1950)

Article 14 of the European Convention on Human Rights prohibits discrimination in the enjoyment of the rights guaranteed by the Convention: » the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

[Protocol No. 12 to the convention prohibits discrimination on any ground by the national authorities. The Court's judgments are legally binding.](#)

- [HUDOC database.](#)
- [Court Website](#)

### EUROPEAN COMMISSION AGAINST RACISM AND INTOLERANCE (ECRI): ECRI WEBSITE

ECRI is a human rights body of the Council of Europe, composed of independent experts, which monitors problems of racism, xenophobia, antisemitism, intolerance and discrimination on grounds such as “race”, national/ethnic origin, colour, citizenship, religion and language (racial discrimination); it prepares reports and issues recommendations to member States.

All of ECRI’s statements and declarations are aimed at protecting individuals against racism and racial discrimination. [General Policy Recommendation N°. 7](#) on national legislation to combat racism and racial discrimination is of particular relevance to the «Speak out against discrimination» campaign. This recommendation contains the main elements which ECRI considers important for inclusion in member states’ national legislation in order to combat effectively racism and racial discrimination. It advocates for the: *“adoption of a comprehensive body of anti-discrimination legislation, containing provisions in different fields of law and covering areas such as employment, housing, education, access to social and public services”*.

- [Country Reports](#)
- [General Policy Recommendations](#)
- [Good practice handbook](#)
- [ECRI General Policy Recommendation No..15: Combating Hate Speech](#)



## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

The Council of Europe fights hard to prevent discrimination and has a range of key instruments, including legally-binding conventions, recommendations and resolutions, which serve to combat discrimination and promote intercultural dialogue and media diversity.

- [Reference texts](#)
- [Toolbox: Journalism Training, Discrimination & Diversity](#)
- [Tell us about Diversity! A practical approach to intercultural media content](#)

[Media & diversity: the next steps to promote minority access to the media](#)

[Media & Discrimination: When young journalists investigate! - DVD](#)

Council of Europe: [No hate speech movement](#)

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## LEARNING OUTCOMES

By the end of the topic, the participants in training should be able to:

- Know and understand the characteristics of the normative content of human rights.
- Identify the obligations entailed in each right in daily life and the people responsible for applying them, case by case.
- Understand the different categories of discrimination and the means of defense, and be able to compare situations and distinguish when a difference in treatment means discrimination.
- Understand education in the mass media and in information and its importance and pertinence in the lives of students and teachers.
- Study the role of the media and other information multipliers such as archives, libraries and Internet.
- Understand and describe the functions of the mass media and other information multipliers on matters of access to information and knowledge, self-expression and participation in the democratic process;
- Identify the conditions needed for the media and other information multipliers to carry out these functions.

## METHODOLOGY

We include, as a suggestion, the following:

Methodology	Educational tools
Exposition method	Reading of texts
Case studies	Portfolio / Forum
Simulation or role-playing	
Group discussions	Wiki

## SCHEDULING OF LEARNING ACTIVITIES

A detailed description of the activities to be carried out by the student, at an individual level or in a group, specifying the expected results and, if applicable, the evaluation criteria.

**Activity 1:** Reading the Educational Guide and the topic.

**Activity 2:** Case study. Choose one of the two individual complaints presented to the human rights organisms of the United Nations.

- a) Discrimination for reasons of gender: communication no. 18/2008, Karen Tayag Vertido v Philippines from the Committee on the Elimination of Discrimination against Women.
- b) Racial discrimination: communication no 10/1997, Ziad Ben Ahmed ABC v Denmark from the Committee on the Elimination of Racial Discrimination.

Read the case and answer the following questions in writing (600 words maximum):

- 1) What does the Commission base this report on? Outline the facts and the affected rules.
- 2) Give your personal appraisal of the final report: do you think it correct and well-reasoned?
- 3) What type of discrimination is involved in this case? Give reasons for your answer.
- 4) Do you think there are any similar situations in your national legislation? And in practice? Give an example, if there is one. You can share your answer with members of the forum.

Add the document to the folder found at the end of teaching module 2.

This activity can use the teaching strategy of role-play: in a virtual or real classroom, the students are divided into groups of three: State, claimant and Committee, and each presents his argument.

**Activity 3:** Give an example of good practice and one of bad practice that occur in your country (either nationally or locally) regarding the following two principles:

- Participation
- Inclusion
- Accountability
- Access to information

If possible, back up your example with a news article on the topic.

**Activity 4:** Find an article in a national media outlet and in a European one that talks of a relevant discrimination, whatever the type (race, language, religion, sexual, etc.) and share the news in the wiki with your classmates: identify the case and write a letter to the editor (200 words maximum).

**Activity 5:** Choose one of the following two activities. The activity is available for students following the training. This may be group work or individual.

- a. Research at schools, universities or libraries to find books or other available resources that give information on democracy in other parts of the world, different cultures, their social and economic life, etc., and reflect on questions such as: Who decides on the level of resources that should be assigned to libraries? Who decides which books to include in a library and which to exclude? Who decides on the most important books? Do libraries fulfil their purpose? (A similar activity may be done with museums or archives).
- b. Search the web for stories involving the deliberate destruction of libraries, museums, archives or books due to war, ethnic conflicts, etc. How can you verify that the story is true? In what way does the destruction of the means of communication, libraries, archives, and other repositories of information, as well as the resources and services provided by these institutions affect peoples, their history and their culture? After your comment, what other consequences could this type of act have?
  - The results will be discussed in class; one student will act as secretary, collecting and synthesizing the different answers to each question to make an orderly, consensual text.
  - If possible, this text will be written and projected at the same time for all the participants to review and approve it at the end.
  - The final document should also refer to the number of participants, their distribution by gender and their specialty.
  - The student will share this document with the others in the training programme.

**Activity 6:** Make a list of the means of communication present in the daily life of students and teacher today. What are the main roles and functions of each of these means? What does it mean to be “educated” with respect to using the means of communication and other information multipliers? What knowledge, skills and attitudes are required?

The student will share this document (600 words maximum) in the forum with the others in the training programme.

### Suggested activities:

1. What is public domain information? Search how public domain information is handled by two public institutions in your country. Discuss the pertinence (or lack thereof) of the information provided by these institutions. Are there any national policies regarding how information is to be made public? Are there any laws that grant the right to access information in your country? Are they enforced? What are the rights of citizens mentioned in article 19 of the Universal Declaration of Human Rights? From the answers at the end of the previous activity, identify the consequences for education for the media and the information (what someone educated in the means of communication and information should be able to do).
2. Choose the media coverage of a topic or local story and examine it carefully. Being educated in the media and information largely consists in being consistent and able to apply the criteria regarding the coverage of different topics in the media. To what extent does the example of local information meet the citizens’ expectations? What impact does media coverage have on the local community? When expectations are not met, what resources do the citizens have to avoid it? What role can education in the media and information have in the citizens’ development?
3. Imagine that you woke up one day and the media, the libraries, internet or the cellphone didn’t exist. Furthermore, all the newspapers, magazines, radio and television stations were gone, too. Analyse in small groups what would happen to the citizens:
  - How would they keep informed now?
  - How could they communicate news, facts and events?
  - What would happen with the decisions you take on a daily basis?
  - What would you personally lose most in that situation?
  - What would society lose in those circumstances?
4. Write a letter to the editor with your conclusions on the value of the media and information in a democratic society.
5. Using the resources of the libraries and internet, search for five to ten news items from last year published on the national or international level. Identify the elements referred to in those articles. What are the key elements of these stories that are pertinent examples? For stories that do not live up to these expectations, suggest changes that could be introduced to improve them.
6. Write a brief essay with the argument that readers are obliged to handle information with an open mind rather than only wanting that the information reinforces their opinions.
7. Do you think a well informed citizen is better able to take decisions and participate in a democratic society? Why? Write an editorial expressing your opinion.
8. Discuss: how is paper information considered and valued in your business? In your opinion, what is the relation between information and knowledge and between information and power?

9. The media plays an important role in encouraging the development and construction of a nation. Discuss how exaggerated restrictions imposed on the media can hinder them from performing that function. Think about the means of communication in your country. How many different points of view can you find on the development, nation-building, national interests and from what perspective?

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1	3h	Self-evaluation test
Activity 2	5h	
Activity 3	4h	
Activity 4	3h	
Activity 5	8h	
Activity 6	4h	
	25	

## SUBJECT 2.3.:

# 2.3.1. FUNDAMENTAL CHARACTERISTICS OF HUMAN RIGHTS: UNIVERSAL, INALIENABLE, INTERDEPENDENT AND INDIVISIBLE<sup>207</sup>

## 1. HUMAN RIGHTS ARE UNIVERSAL

*“Human rights are foreign to no culture and native to all nations; they are universal.”*

*Kofi A. Annan, former Secretary-General of the United Nations, Address at the University of Tehran on Human Rights Day, 10 December 1997.*

Human rights are universal because they are based on every human being's dignity, irrespective of race, colour, sex, ethnic or social origin, religion, language, nationality, age, sexual orientation, disability or any other distinguishing characteristic. Since they are accepted by all States and peoples, they apply equally and indiscriminately to every person and are the same for everyone everywhere.

### Human rights: a Western concept?

The universality of human rights has sometimes been challenged on the grounds that they are a Western notion, part of a neocolonial attitude that is propagated worldwide. A study published by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1968<sup>1</sup> clearly showed that the profound aspirations underlying human rights correspond to concepts – the concepts of justice, an individual's integrity and dignity, freedom from oppression and persecution, and individual participation in collective endeavours – that are encountered in all civilizations and periods. Nevertheless, assertions that human rights are not universal still appear in a variety of contexts. For example, States have often questioned the universality of human rights in justifying violations of women's human rights in the name of culture. These practices are often based on harmful stereotypes regarding women's role in society, and the obligation to eliminate such stereotypes and prejudices is clear under international human rights law. A human rights perspective recognizes that culture changes over time, and also interrogates whether women exercise influence in decisionmaking processes which define the culture of any given community. Today, the universality of human rights is borne out by the fact that the majority of nations, covering the full spectrum of cultural, religious and political traditions, have adopted and ratified the main international human rights instruments.

*Le droit d'être un homme, anthology of texts prepared under the direction of Jeanne Hersch, UNESCO and Robert Laffont, 1968.*

207. This section has been drawn up using passages from Inter-Parliamentary Union and Office of the High Commissioner for [Human Rights, Human Rights, Handbook for Parliamentarians N° 26](#), Geneva, 2016, pp. 22-27.



Universality also refers to each State's obligation to respect and protect human rights in international instruments. These rights conform a minimum threshold to be respected by each State. They constitute ethical precepts that, as such, are generalizable in nature. They are configured as a requisite minimum ethics common to all mankind, although their interpretation may vary in different cultures accordingly. They constitute criteria of rationality that in and of themselves tend to seek out maximum acceptance, and thus, universality.

### Universality and inalienability

This principle requires ...

- That no one is left out or excluded from human rights

Programming implications:

- Disaggregated data to identify difficult cases of exclusion and marginalization
- Specific strategies in response to this caseload (e.g. polio vaccination campaigns)

**Application of these principles:** The question to ask is whether all the people of a specific country are able to enjoy all their human rights? For example, are women and men able to enjoy their human rights on an equal basis? Are children, adolescents, minorities and other groups within the population able to enjoy their rights? By all their human rights we are referring to those rights that have been recognized in the international human rights treaties, including the Universal Declaration of Human Rights.

While every human being is entitled to his or her human rights, there are groups of people who are most likely to be overlooked or marginalized, and whose rights are most in danger of being violated or remaining unfulfilled. The HRBA requires that we keep this potential negative outcome in mind. We need therefore to ensure that duty bearers attend – not just to majorities of people – but also to the most marginalized and excluded people. And the UN's own programming must similarly ensure this outreach and inclusion. Among the groups most in danger of being left outside of human rights protection are those suffering from multiple forms of disadvantage, such as the poorest of the poor, or rural ethnic minorities.

## 2. HUMAN RIGHTS ARE INALIENABLE

Human rights are inalienable insofar as no person may be divested of his or her human rights, save under clearly defined legal circumstances. For instance, a person's right to liberty may be restricted if he or she is found guilty of a crime by a court of law at the closure of a fair trial. The inalienable nature of the rights is essentially referred to its basis: human dignity, which cannot be renounced. The active subject of human rights cannot renounce holding the right in question, but can renounce executing it. The limit on this renunciation is set by not infringing on other basic rights and goods. In this regard, more than inalienability, one could perhaps affirm the necessity. Rights are necessary because they belong to each person. In this way, they are also affirmed to be rights inseparable from the person.

The characteristic of inalienability also bears relation to the fact that human rights cannot be the object of contracts, as they are beyond commerce.

## 3. HUMAN RIGHTS ARE INDIVISIBLE AND INTERDEPENDENT

Human rights are indivisible and interdependent. Because each human right entails and depends on other human rights, violating one such right affects the exercise of other human rights. For example, the right to life presupposes respect for the right to food and to an adequate standard of living. Denial of the right to basic education may affect a person's access to justice and participation in public life. The promotion and protection of economic and social rights presupposes freedom of expression, of peaceful assembly and of association. Accordingly, civil, cultural, economic, political and social rights are complementary and

equally essential to the dignity and integrity of every person. Moreover, respect for all rights is a prerequisite to sustainable peace and development.

### Civil, cultural, economic, political and social rights are universal, indivisible and interrelated

Amartya Sen, Nobel Laureate in economics, has provided empirical proof that all human rights are indivisible and interdependent. In his research on famines, for instance, he found that there is a clear and unequivocal link between famine, governance and respect for all human rights, among rich and poor countries alike. When governments respect civil and political rights, people are able to voice their concerns and the media can raise awareness of the risk of famine. Consequently, leaders are aware of the dangers of ignoring such risks and are more likely to be held accountable for their policies, including those affecting economic, social and cultural rights.

*Amartya Sen, Poverty and Famines: An Essay on Entitlements and Deprivation, Clarendon Press, 1982.*

The international community affirmed the holistic concept of human rights at the World Conference on Human Rights, held in Vienna in 1993.

*“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”*

World Conference on Human Rights, Vienna, 1993, Vienna Declaration and Programme of Action, paragraph 5.

**Application of this principle:** In applying this principle, the question to ask is whether in the specific country some rights are regarded as more important than others to the detriment of the enjoyment of some human rights? For example, are civil and political rights equally respected and protected, as well as economic, social and cultural rights? Are other treaty rights – such as rights to equality under CEDAW and CERD – given the same priority as the rights guaranteed by the ICCPR and ICESCR?

### Indivisibility and interrelatedness

This principle requires ...

- Equal recognition and protection of rights

Programming implications:

- Legal frameworks:
  - Should not privilege the protection of certain rights to the detriment of others
- Public policies
  - Should be based on holistic analysis of development problems and provide integral and multi-sectoral responses
- State institutions:
  - Ensure inter-institutional and multi-sectoral coordination
  - Include those institutions in charge of protection, monitoring and accountability

Inter-dependence and Inter-relatedness: The realization of one right often depends, wholly or in part, upon the realization of others. For instance, realization of the right to health may depend, in certain circumstances, on realization of the rights to education, information, food, participation etc. Development issues are not addressed in isolation, rather, by recognizing the interdependence of human rights, the analysis of any situation and the strategic response becomes more holistic and comprehensive.

To these essential characteristics of human right, some authors also add their historic, absolute and expansive nature.

## 4. HUMAN RIGHTS ARE HISTORICAL

The old liberal conception spoke of innate rights that were supra-historic and thus previous to man's emergence into society, which existed in the so-called state of nature. In contrast, the current conception of human rights affirms almost without exception that human rights are a historical concept. This characteristic implies the following consequences:

- There is no a priori concept of human rights. The concept of human rights is always “in fieri”, in a continuous process of creation, enriched by historic changes while also dependent on them.
- Consequently, there is not a single human right that is not situational: from a particular historical perspective and from a particular culture. Nevertheless, as intercultural communication is greater today, the barriers to a unitary concept of human rights are gradually being torn down.
- Human rights correspond to particular political, social and cultural structures belonging to a particular point in history, in a particular society. Therefore, they are culturally determined. Human rights are sufficiently characterised, and thus can be demanded socially when they are inculturized; i.e., when they have become integrated into a particular cultural form and have found an appropriate development. This development is reflected in the existence of a socially binding ethical language and a degree of legal and political institutionalization.
- Both the bases and the guarantees of rights are historical achievements. The recognition of personal human dignity as a basis for human rights and the need to guarantee its respect is the result of a long-running historical struggle that has not yet concluded.
- There is no definitive catalogue of human rights. Their existence and enumeration depend on many different factors, such as:
  - The evolution of the sources of power throughout history. This involves the appearance of new challenges and threats to human rights. See for example what is currently happening with advances in science and technology, which involve problems such as genetic manipulation, artificial procreation, the destruction of the environment, biological experimentation or the use of information technology.
  - The needs for and forms of aggression against rights at every step in history. Human rights are normative and non-normative responses to the most insufferable experiences of limitation and risk for freedom.
  - The degree of awareness of them.
  - The differences in interpretation and conception of human rights depending on different ideologies and their influence on their recognition and guarantee.
  - The forms of social and political organisation as crucial objectives of their existence.

That is why many constitutions guarantee human rights by establishing a “numerus apertus” of rights, stating -as does article 50 of the Venezuelan Constitution of 1961- that the listing of rights and guarantees in the Constitution should not be understood as the negation of others that, being inherent in the human person, do not appear expressly stated in it.

- Unlike the old liberal conception that defended the absolute and unlimited nature of rights, the doctrine held today, without exception, is that because of their very nature, human rights have the objective cultural “limitation” of historicalness and

situation, but also limits of an ethical and legal kind that address the structure itself of human rights, and correlative limitations of a strictly legal nature aimed at make the exercise of rights compatible through by regulating them. These limits and limitations of human rights are impediments to claims that rights are absolute, in the sense of not being limited.

## 5. HUMAN RIGHTS ARE ABSOLUTE

The absolute nature, but not in the sense given above, of being unlimited, but rather in three basic ways that are mutually complementary:

- They make up the basic legal-ethical dimension, the most important and radical normative area, and therefore they are configured as the most pressing and unyielding demands.
- There is no possible justification for violating them and they must be satisfied without exception.
- They grant an immediate and direct power on the good of the person, and are enforceable against everyone (*erga omnes*).
- They prevail over political decisions and legal norms that, although formally legitimate, do not preserve values gathered in the Constitution.
- They are original or innate. They are acquired just for being a person, without having to meet any other circumstance.

They are outside assets. This characteristic means that they cannot be reduced to a mere economic appraisal; although they may entail economically advantageous goods or realities or economic repercussions or that their harm may be repaired at least in part by a pecuniary settlement.

## SUBJECT 2.3.:

## 2.3.2. LEGAL OBLIGATIONS

### ENGENDERING HUMAN RIGHTS: RESPECT, PROTECT, FULFIL/GUARANTEE

#### 1. ESSENTIAL NORMATIVE CONTENT OF RIGHTS: DIMENSIONS OF HUMAN RIGHTS

The international human rights instruments contain the human rights standards that constitute the **minimum normative level or content** of entitlements and obligations against which duty-bearers at all levels of society—but especially organs of the State—can be held accountable.

- Articles in the treaties (e.g. rights relating to health can be found in the ICESCR, CEDAW, and the CRC)
- General comments of the UN treaty bodies (e.g. availability, accessibility, acceptability and quality of health services, GCESCR; gender equality and women's rights to health, GRCEDAW)". Ask participants for an example in which they think food is not culturally acceptable.
- National legislation (national constitution, laws and regulations, jurisprudence...) can establish higher standards than international law.

##### Human Rights Standards

###### The **minimum normative content of the right**:

the type of claims and obligations that the right implies *at the minimum* in practice

In programming, the standards guide the...

...Identification of development challenges as human rights issues (Assessment)

...analysis of roles and capacities of rights-holders and duty bearers

...definition of development objectives

...formulation of corresponding benchmarks and indicators

The essential content is the minimum level or content needed to be able to affirm that a right is being respected. An example of minimum content is the following: food may be available, accessible, and affordable in sufficient quantity and quality to satisfy the nutritional needs of the individuals. However, if the food available is not culturally acceptable (i.e., pork in a Muslim culture), it would be in violation of the right to food.

The content of every human right features a set of elements that define its essential content:

**Availability** : facilities, services, goods and programmes must be available in sufficient quantity within the State party.

**Accessibility:** facilities and services relating to the enjoyment of any given right have to be accessible to everyone without discrimination. Accessibility has four overlapping dimensions:

- i) *physical accessibility* meaning that facilities and services must be within safe reach for all sections of the population;
- ii) *economic accessibility* meaning that facilities and services must be affordable for all and whatever costs and charges involved must not compromise or threaten the realization of other rights;
- iii) *non-discrimination* meaning that facilities and services must be accessible to all including the most vulnerable or marginalized sections of the population, in law and in fact without discrimination on any of the prohibited grounds; and
- iv) *information accessibility* which includes the right of everyone to seek, receive and impart information concerning the right question.

**Acceptability:** laws, policies, strategies, programmes and measures should be formulated and implemented in a way that is acceptable by the individuals and communities involved. Consultation and participation processes are key in this context.

**Adaptability:** requires strategies, policies, programmes and measures adopted by States parties to be flexible and relevant so as to respond to the needs of changing societies and communities and to the needs of different within their diverse social and cultural settings.

**Quality:** facilities, services and goods relating to the enjoyment of any given right must be scientifically appropriate and of good quality.

**Appropriateness:** refers to the realization of a specific human right in way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individual and communities, including minorities and indigenous peoples.

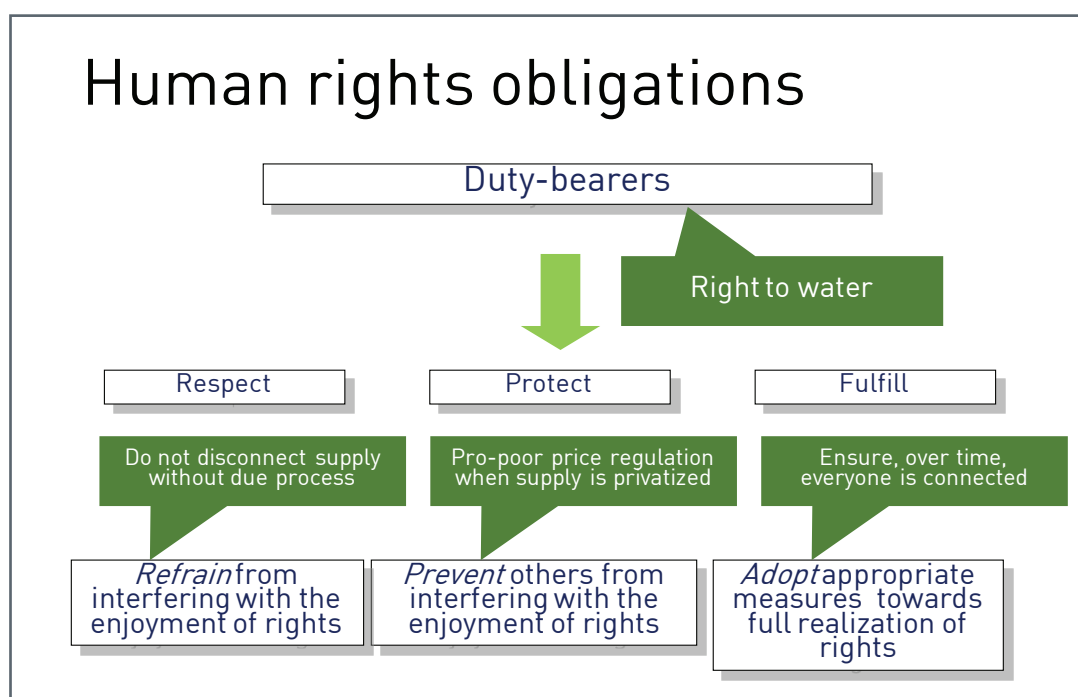


Source: UNDG Working Group, The UN Common Learning Package on HRBA to Programming, Session 4

## 2. LEGAL OBLIGATIONS OF THE STATE DERIVED FROM HUMAN RIGHTS<sup>208</sup>

As international law currently stands, States are the primary duty-bearers of human rights obligations. In principle, however, human rights can be violated by any person or group, and in fact, human rights abuses committed by non-State actors (such as business enterprises, organized criminal groups, terrorists, guerrilla and paramilitary forces and intergovernmental organizations) are on the increase.

International human rights treaties and customary law impose three obligations on States: the duty to respect; the duty to protect; and the duty to fulfill. While the balance between these obligations may vary according to the rights involved, they apply to all civil, political, economic, social and cultural rights. Moreover, States have a duty to provide a remedy at the domestic level for human rights violations.



Source: NDG Working Group, The UN Common Learning Package on HRBA to Programming, Session 1.

**The “obligation to respect”** means that States are obliged to refrain from interfering in the enjoyment of rights by individuals and groups. It prohibits State actions that may undermine the enjoyment of rights. For example, with regard to the right to education, it means that governments must respect the liberty of parents to establish private schools and to ensure the religious and moral education of their children in accordance with their own convictions.

**The “obligation to protect”** requires States to protect individuals against abuses by non-State actors, foreign State agents, or State agents acting outside of their official capacity. The obligation entails both a preventative and remedial dimension. A State is thus obliged to enact legislation protecting human rights; to take action to protect individuals when it is aware (or could have been aware) of threats to their human rights; and also to ensure access to impartial legal remedies when human rights violations are alleged (see below). Once again, the right to education can serve as an example. The right of children to education must be protected by the State from interference and indoctrination by third parties, including parents and the family, teachers and the school, religions, sects, clans and business firms.

208. Cf. Inter-Parliamentary Union and Office of the Commissioner for Human Rights, [Human Rights, Handbook for Parliamentarians No. 26](#), Geneva, 2016, pp. 33-34.



States enjoy a margin of discretion with respect to the obligation to protect. For instance, the right to personal integrity and security obliges States to combat the widespread phenomenon of domestic violence against women and children. States have a responsibility to take positive measures – in the form of pertinent criminal, civil, family or administrative laws, police and judiciary training or general awareness raising – to reduce the incidence of domestic violence.

According to the **“obligation to fulfil”**, States are required to take positive action to ensure that human rights can be realized. The extent of the obligation to fulfil varies according to the right concerned and the State’s available resources. Generally speaking, however, States should create “the legal, institutional and procedural conditions that rights holders need in order to realize and enjoy their rights in full.”<sup>209</sup> The International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child both provide that States should “take steps, to the maximum of available resources, towards the progressive achievement of the full realisation of these rights.” Thus, the State must take steps such as by setting goals, targets and timeframes for their national plans for fulfilling rights, which may also include seeking international development assistance. In respect of the right to education, for instance, States must provide ways and means for free and compulsory primary education for all, free secondary education, higher education, vocational training, adult education, and the elimination of illiteracy (including such steps as setting up enough public schools or hiring and remunerating an adequate number of teachers).

## THE STATE’S OBLIGATION TO RESPECT, PROTECT AND FULFIL: EXAMPLES<sup>210</sup>

### Right to life

Respect	The police shall not intentionally take the life of a suspect to prevent his or her escape.
Protect	Life-threatening attacks by an individual against other persons (attempted homicide) shall be crimes carrying appropriate penalties under domestic criminal law. The police shall duly investigate such crimes in order to bring the perpetrators to justice.
Fulfil	The authorities shall take legislative and administrative measures to progressively reduce child mortality and other types of mortality whose underlying causes can be combated.

### Prohibition of torture or cruel, inhuman or degrading treatment or punishment

Respect	The police shall not use torture in questioning detainees.
Protect	The authorities shall take legislative and other measures against domestic violence.
Fulfil	The authorities shall train police officers in acceptable methods of questioning.

209. Walter Kalin and Jorg Kunzli, *The Law of International Human Rights Protection*, Oxford, Oxford University Press, 2009, p. 112.

210. Source: Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, [Human Rights, Handbook for Parliamentarians N° 26](#), Geneva, 2016, pp. 33-34.

**Right to vote**

Respect	The authorities shall not interfere with the voting procedure and shall respect the election results.
Protect	The authorities shall organize voting by secret ballot to preclude threats by persons in power (such as politicians, heads of clan or family or employers).
Fulfil	The authorities shall organize free and fair elections and ensure that as many citizens as possible can vote.

**Right to education**

Respect	The authorities shall respect the liberty of parents to choose schools for their children.
Protect	The authorities shall ensure that third parties, including parents, do not prevent girls from going to school.
Fulfil	The authorities shall take positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all.

**Right to health**

Respect	The authorities shall not restrict the right to health (inter alia through forced sterilization or medical experimentation).
Protect	Female genital mutilation shall be prohibited and eradicated.
Fulfil	An adequate number of hospitals and other public health-care facilities shall provide services equally accessible to all.

**Right to food**

Respect	The authorities shall refrain from any measures that would prevent access to adequate food (for instance, arbitrary eviction from land).
Protect	The authorities shall adopt laws or take other measures to prevent powerful people or organizations from violating the right to food (such as a company polluting the water supply or a landowner evicting peasants).
Fulfil	The authorities shall implement policies – such as agrarian reform – to ensure the population's access to adequate food and the capacity of vulnerable groups to feed themselves.

## 2.1. THE PRINCIPLE OF PROGRESSIVE REALIZATION

The States Parties have the specific obligation to respect, protect and realize the rights recognised in the treaties and to take the necessary steps to enforce them. *All rights, to varying degrees, entail immediate obligations*, such as the obligation not to discriminate in realizing the right in question. Particularly for economic, social and cultural rights, the obligations *may also be progressive*, and realization of the right is subject to limited resources.

### Progressive realization of economic, social and cultural rights

#### The Covenant provides that States can progressively realize ESC rights

- By taking appropriate measures
- To the maximum of available resources
- Where needed, through international assistance and cooperation

#### But some aspects need immediate actions:

- Elimination of **discrimination**
- Rights that are **not resource-dependent**
- Obligation to **'take steps'** and have targeted measures, irrespective of resource constraints
- Avoid **retrogressive measures**
- **'Minimum core obligations'**

The principle of progressive realization applies to the positive State obligations to fulfil and to protect human rights, in particular economic, social and cultural rights. The human right to health, for example, does not guarantee the right of everyone to be healthy. However, it does oblige States, in accordance with their respective economic capabilities, social and cultural traditions as well as international minimum standards, to establish and maintain a public health system that can in principle guarantee access to certain basic health

services for all. Progressive realization means that States should, for example, establish targets and benchmarks in order to progressively reduce the infant mortality rate, increase the number of doctors per 1000 inhabitants, raise the percentage of the population that has been vaccinated against certain infectious and epidemic diseases, or improve basic health facilities. The health standard in poor countries may be lower than in rich countries without any violation of a State's obligations to fulfil the right to health. The total absence of positive measures to improve the public health system, retrogressive measures or the deliberate exclusion of certain groups (such as women and religious or ethnic minorities) from access to health services can, however, amount to a violation of the right to health.

## 2.2. THE RIGHT TO AN EFFECTIVE REMEDY

The very notion of rights entails, in addition to a substantive claim, the availability of recourse to a national judicial or administrative authority – including courts and national human rights institutions (NHRIs) – in the event that a right is violated. Every person who claims that his or her rights have not been respected, protected or fulfilled must be able to seek an effective remedy before a competent and independent domestic body vested with the power to order reparations and to have its decisions enforced. According to the Human Rights Committee (the UN body in charge of monitoring implementation of the ICCPR) Article 2(3)(a) of the ICCPR obliges States to take effective steps to investigate violations of human rights “promptly, thoroughly and effectively through independent and impartial bodies.”<sup>211</sup> Failure to do so may in and of itself amount to a violation of the ICCPR<sup>212</sup>. Further, the Human Rights Committee has held that States are obliged to “bring to justice” perpetrators of certain violations, including torture, cruel, inhuman or degrading treatment, summary and arbitrary killing and enforced disappearance<sup>213</sup>. Furthermore, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law<sup>214</sup> specify that States have an obligation to investigate alleged violations and take further action where appropriate;

211. Human Rights Committee, general comment No. 31 (26 May 2004), paragraph 15.

212. Ibid

213. Ibid, paragraph 18.

214. UN Doc. A/RES/60/147 (16 December 2005)

take appropriate legislative and administrative measures to prevent violations; and provide victims with effective remedies and equal and effective access to justice<sup>215</sup> Amnesties that prevent prosecution of individuals for international crimes or gross violations of human rights would interfere with the right to an effective remedy, including reparations<sup>216</sup>.

### **The right to obtain remedy under international and regional human rights treaties: examples**

According to Article 2 (3) of the ICCPR, States Parties undertake “to ensure that (a) ... any person whose rights or freedoms ... are violated shall have an effective remedy” and that (b) persons claiming such a remedy shall have their “right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State”; and “to develop the possibilities of judicial remedy”.

Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) stipulates that: “Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority ...”.

Article 25 (1) of the American Convention on Human Rights (also known as the Pact of San José, Costa Rica) establishes this remedy as a separate human right: “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention ...”.

Article 23 of the Arab Charter on Human Rights states that: “Each State Party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

## **2.3. THE RIGHT TO RECOURSE TO AN INTERNATIONAL OR REGIONAL HUMAN RIGHTS MECHANISM**

The right to have recourse to an international or regional human rights court, once all avenues of seeking redress at the domestic level are exhausted, has been accepted only partially. Under the ECHR, individuals may appeal to the permanent European Court of Human Rights, whose judgments are legally binding. The American Convention on Human Rights, the African Charter on Human and People’s Rights Optional Protocol and the Economic Community of West African States (ECOWAS) Treaty also provide for an individual complaints mechanism, subject to specific rules in each case). In addition, individuals can submit complaints to the treaty body responsible for monitoring compliance with each core international human rights treaty. However, there is currently no international human rights court per se.

## **2.4. THE RIGHT TO REPARATION FOR HARM SUFFERED**

As mentioned above, the right to reparation is an essential element of the right to an effective remedy. Where the State is responsible for a human rights violation through its acts or omissions, it is under an obligation to provide adequate, effective and prompt reparation to the victim(s). Indeed, where reparation is not provided, “the obligation to provide an effective remedy ... is not discharged<sup>217</sup>.” The basic principles and guidelines on the right to remedy

215. *ibid*, principle 3.

216. OHCHR, Rule-of-Law Tools for Post-Conflict States: Amnesties, New York and Geneva, United Nations, 2009, at p. 11.

217. Human Rights Committee, general comment No. 31, paragraph 16.

and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law provide for the following forms of reparation<sup>218</sup> (véase el recuadro siguiente).

### Right of victims to reparation after gross human rights violations

In accordance with domestic and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, which includes the following forms:

**Restitution** entails, where appropriate and desirable, restoring the victim to the situation existing before the occurrence of the human rights violation concerned. Restitution may include restoration of liberty, return to one's place of residence, restoration of employment and return of property.

**Rehabilitation** includes legal, medical, psychological and social measures to help victims recover (for instance, setting up rehabilitation centres for torture victims).

**Compensation** refers to indemnification for financial or non-financial damages, including physical or mental harm; lost opportunities (such as employment, education or social benefits); material damages; loss of earnings or earning potential; and moral damage.

**Satisfaction** refers to public apologies; acceptance of responsibility; victim commemorations and tributes; verification of facts with full and public disclosure of the truth where possible and appropriate; an official declaration or judicial decision; judicial and administrative sanctions against the perpetrators of gross human rights violations; search for disappeared persons; identification and reburial of bodies in accordance with victim and family wishes; and inclusion of an accurate account of gross human rights violations in educational material at all levels.

**Guarantee of non-recurrence** entails measures to help prevent future human rights violations. These may include legislative and institutional reforms (such as to strengthen the independence of the judiciary); programmes to vet the integrity and suitability of individuals for public employment; and efforts to improve the observance of codes of conduct by public servants.

## 2.5. REMEDIES FOR VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The provisions for the right to a remedy cited above refer primarily to civil and political rights, whereas most treaties relating to economic, social and cultural rights – such as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter – contain no similar provisions. Despite this, violations of economic, social and cultural rights are increasingly adjudicated before domestic and regional courts, as well as United Nations treaty bodies. Indeed, arguments that economic, social and cultural rights are too vague to be adjudicated, or involve policy decisions better left to political authorities than to the courts, are not convincing. All human rights that entail a positive obligation to fulfil necessarily require policy decisions by State officials. For example, the capacity of a justice system to fulfil the right to a fair trial within a reasonable time depends on policy decisions, including the allocation of necessary resources.

218. UN Doc. A/RES/60/147 (16 December 2005), principles 19–23.

In the same way that violations of civil and political rights can be adjudicated by courts, so too can the violations of many economic, social and cultural rights. For example, courts can decide whether States have fulfilled their positive obligations to ensure access to essential primary medical care in accordance with the core content of the right to the enjoyment of the highest attainable standard of physical and mental health. Courts can also adjudicate whether States have complied with their duties to respect economic, social and cultural rights and other immediate duties arising therefrom, including the prohibition of discrimination in guaranteeing the rights enshrined in the ICESCR.

At a domestic level, economic, social and cultural rights are not always entrenched in national constitutions or laws. However, as demonstrated by the South African and Indian constitutional courts in particular, national courts are increasingly adjudicating the rights to health, education, water and adequate housing (for details with regard to South Africa see Chapter 13). Another important example is the Human Rights Chamber for Bosnia and Herzegovina, which, pursuant to Annex 6 to the Dayton Peace Agreement of 1995<sup>219</sup>, handed down many decisions relating to alleged or apparent discrimination in the enjoyment of various economic, social and cultural rights<sup>220</sup>.

At the regional level, the European Committee of Social Rights can consider collective complaints for alleged violations of the European Social Charter, and has developed significant jurisprudence in this regard. Additionally, the Inter-American Court of Human Rights, the ECOWAS Court of Justice and the African Court and Commission of Human and Peoples' Rights have jurisdiction to hear complaints regarding violations of economic, social and cultural rights. While the ECOWAS Court and the African Court and Commission are able to hear complaints relating to all rights in the African Charter, the Inter-American Court of Human Rights, by virtue of article 19 (6) of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, is only authorized to decide on individual petitions relating to the right to education and the right to organize trade unions.

At the international level, complaints can now be submitted to the Committee on Economic, Social and Cultural Rights (CESCR-Committee), following the entry into force in May 2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR). The Committee is a quasi-judicial body whose views, while not legally binding, carry important interpretive weight. They will help to clarify the scope of State obligations in specific cases and the types of remedies that need to be adopted to bring redress to victims. A number of other international human rights treaties also include provisions on economic, social and cultural rights. The respective treaty bodies for the Convention on the Rights of the Child (CRC), CEDAW, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW) and the Convention on the Rights of Persons with Disabilities (CRPD), are competent to consider individual complaints regarding economic, social and cultural rights as defined under these treaties. In the same sense, as some economic, social and cultural rights and civil and political rights are interdependent, aspects of economic, social and cultural rights can also be considered under the complaints mechanisms provided by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Optional Protocol to the International Covenant on Civil and Political Rights (OP-ICCPR). For example, denial of food or health care to persons deprived of liberty can amount to torture or inhumane and degrading treatment. Forced evictions can also affect the right to private and family life, or violate due process of law.

Although challenges remain in ensuring the right to an effective remedy for economic, social and cultural rights, recent trends such as the entry into force of the OP-ICESCR indicate progress in reversing the outdated assumption that economic, social and cultural rights are not justiciable.

219. Dayton Peace Agreement, Annex Six: Agreement on Human Rights, article XIV (14 December 1995).

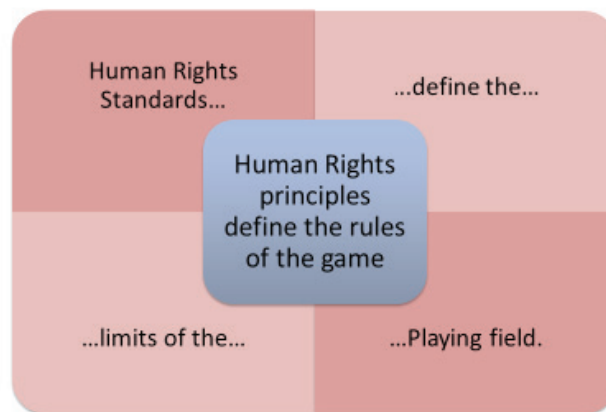
220. Committee on Economic, Social and Cultural Rights, Concluding Observations of the Committee on Economic, Social and Cultural Rights, E/C.12/BIH/CO/1 (24 January 2006) paragraph 5.

## SUBJECT 2.3.:

### 2.3.3. BASIC PRINCIPLES OF HUMAN RIGHTS: EQUALITY AND NON-DISCRIMINATION, PARTICIPATION, ACCESS TO REPARATION, ACCESS TO INFORMATION, ACCOUNTABILITY, THE RULE OF LAW AND GOOD GOVERNANCE

To put a human rights based approach into practice, the basic principles of human rights must be applied to decision-making and to all aspects of public or private service. Human rights principles apply to all levels of policy-making, from initial planning to follow-up and evaluation, passing through budgeting and being put into practice. In each phase, the government agents responsible are subject to public examination to ensure they answer to their decisions before those who have an interest in the political options carried out. To promote mechanisms for accountability that respect and foster human rights, it is necessary to supervise the operative orientations and political documents at each step as per human rights.

#### HR standards and principles



Source: Adapted from UNFPA and Harvard School of Public Health materials (2010).

#### 1. THE RIGHT TO EQUALITY AND THE PROHIBITION OF DISCRIMINATION<sup>221</sup>

All individuals are equal as human beings and by virtue of the inherent dignity of each human person. All human beings are entitled to their human rights without discrimination of any kind, such as race, colour, sex, age, language, religion, political or other opinion, national

221. This section has been drawn up using passages from the European Union Agency for Fundamental Rights and Council of Europe, [Handbook on European non-discrimination law](#), Luxembourg: Office des publications de l'Union européenne, 2011.



or social origin, disability, property, birth or other status as established by the human rights treaties and further interpreted by the human rights treaty bodies. For this reason, the advancement of the rights of both men and women on the basis of equality is an absolute requirement of international human rights law.

The preamble, Articles 1(3) and 55 of the UN Charter and Article 2(1) of the Universal Declaration of Human Rights prohibit discrimination in the enjoyment of economic, social and cultural rights. Moreover, equality and non-discrimination is cross-cutting to all human rights treaties<sup>222</sup>

### Equality and Non discrimination

#### Programming implications:

- Laws should:
  - Abolish or amend discriminatory legislation
  - Be conducive to the enjoyment of all human rights by all
- Public institutions should ensure:
  - Representation of marginalized or excluded groups
  - Services are accessible and sensitive to gender, age and cultural differences
- Public policies should:
  - Challenge model of appropriation and concentration of resources leading to structural discrimination and exclusion
  - Take affirmative steps to reduce social and economic disparities, based on disaggregated data
  - Promote education and public awareness

Discrimination compromises the realization of economic, social and cultural rights for a significant portion of the world population. Economic growth by itself has not led to sustainable development, and individuals and population groups are still struggling with socio-economic inequalities, often due to persistent forms of discrimination passed down from history or contemporary.

### 1.1. NORMATIVE CONTENT OF NON-DISCRIMINATION IN RIGHTS

As per General Comment no. 18 (1989) from the Human Rights Committee: “Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights. Thus, article 2, paragraph 1, of the International Covenant on Civil and Political Rights obligates each State party to respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognized in the Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Indeed, the principle of non-discrimination is so basic that article 3 obligates each State party to ensure the equal right of men and women to the enjoyment of the rights set forth in the Covenant. While article 4, paragraph 1, allows States parties to take measures derogating from certain obligations under the Covenant in time of public emergency, the same article requires, inter alia, that those measures should not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Furthermore, article 20, paragraph 2, obligates States parties to prohibit, by law, any advocacy of national, racial or religious hatred which constitutes incitement to discrimination.

.....

222. Such as the International Covenant on Civil and Political Rights (arts. 2 and 26); the International Covenant on Economic, Social and Cultural Rights (art. 2); International Convention on the Elimination of All Forms of Racial Discrimination; Convention on Elimination of All Forms of Discrimination Against Women; Convention relating to the Status of Refugees; Convention relating to the Status of Stateless Persons; Convention on the Rights of the Child (art. 2); International Convention on the Protection (art. 5), while other treaties require the elimination of discrimination in specific fields, such as employment and education (ILO Convention No. 111, Discrimination in Respect of Employment and Occupation; UNESCO Convention against Discrimination in Education).

Because of their basic and general character, the principle of non-discrimination as well as that of equality before the law and equal protection of the law are sometimes expressly referred to in articles relating to particular categories of human rights. Article 14, paragraph 1, provides that all persons shall be equal before the courts and tribunals, and paragraph 3 of the same article provides that, in the determination of any criminal charge against him, everyone shall be entitled, in full equality, to the minimum guarantees enumerated in subparagraphs (a) to (g) of paragraph 3. Similarly, article 25 provides for the equal participation in public life of all citizens, without any of the distinctions mentioned in article 2" (paras. 1-3).

**The General Comment No.. 20 (2009)** clarifies the Committee's understanding of the provisions of Article 2(2) of the International Covenant on Economic, Social and Cultural Rights. The Article obliges each State Party, "to guarantee that the rights enunciated in the present Covenant" "will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Discrimination constitutes "any distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights. Discrimination also includes incitement to discriminate and harassment" (vid. art. 20 PIDCP)<sup>223</sup>

### Right to equality and prohibition of discrimination

- Non-discrimination is a pillar of human rights.
- Differentiation in law must be based on difference in facts.
- Distinctions require reasonable and objective justification.
- The principle of proportionality must be observed.
- Characteristics that have been – and still are – used as grounds for discrimination include sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, membership of a national minority, property, birth, age, disability, sexual orientation and social or other status.

## 1.2. EXPRESSLY PROTECTED CHARACTERISTICS

A 'protected ground' is a characteristic of an individual that should not be considered relevant to the differential treatment or enjoyment of a particular benefit. Articles 2(2) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights lay out the prohibited reasons for discrimination, such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The European non-discrimination directives prohibit differential treatment that is based on certain 'protected grounds', containing a fixed and limited list of protected grounds, covering sex (Gender Goods and Services Directive, Gender Equality Directive (Recast)), sexual orientation, disability, age or religion or belief (Employment Equality Directive), racial or ethnic origin (Racial Equality Directive). The ECHR, in contrast, contains an open-ended list, which coincides with the directives, but goes beyond them. Article 14 states that there shall be no discrimination 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'. The category of 'other status' has allowed the ECHR to include those grounds (among others) that are expressly protected by the non-discrimination directives,

223. General Comment No. 20 (2009), par. 7. For a similar definition see Article 1, ICERD, Article 1, CEDAW and Article 2, Convention on the Rights of Persons with Disabilities. The Human Rights Committee comes to a similar interpretation in General Comment No.. 18, paras. 6 and 7. The Committee has adopted a similar position in previous General Comments.

namely: disability, age and sexual orientation. Article 21 of the EU Charter of Fundamental Rights also contains a prohibition on discrimination. The Charter binds the institutions of the European Union, but will also apply to the Member States when they are interpreting and applying EU law. The Charter provision on discrimination contains a combination of both the grounds of the ECHR and the non-discrimination directives, although it does not contain the open-ended ground of 'other status'.

### 1.3. CATEGORIES OF DISCRIMINATION

#### Direct discrimination will have occurred when:

- an individual is treated unfavourably
- by comparison to how others, who are in a similar situation, have been or would be treated
- and the reason for this is a particular characteristic they hold, which falls under a 'protected ground'.

#### The elements of indirect discrimination are:

- a neutral rule, criterion or practice
- that affects a group defined by a 'protected ground' in a significantly more negative way
- by comparison to others in a similar situation.

#### Harassment will be deemed to be discrimination when :

- unwanted conduct related to a protected ground takes place
- with the purpose or effect of violating the dignity of a person
- and/or creating an intimidating, hostile, degrading, humiliating or offensive environment.

Non-discrimination law prohibits scenarios where persons or groups of people in an identical situation are treated differently, and where persons or groups of people in different situations are treated identically. Both direct and indirect forms of differential treatment can amount to discrimination under article 2, paragraph 2, of the Covenant:

(a) **Direct discrimination** occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground; e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) **Indirect discrimination** refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights

as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals

**Multiple discrimination** : Some individuals or groups of individuals face discrimination on more than one of the prohibited grounds – *cumulative discrimination* (merits particular consideration and remedying).

**Structural or systemic discrimination:** this derives from the historic processes of exclusion from accessing economic political and institutional resources needed to live on equal footing with the rest of the population. This discrimination is omnipresent, deeply rooted in the behaviour and organisation of society and often implies acts of indirect or unquestioned discrimination. This discrimination may consist of legal, political norms or cultural practices or attitudes predominant in the public or private sector but that generate comparative disadvantages for some groups and privileges for others.

Example: in a case before the Hungarian Equal Treatment Authority, a complaint was made about teachers who told Roma students that their misbehavior at school had been notified to the 'Hungarian Guard', a nationalist organization known for committing acts of extreme violence against Roma.<sup>43</sup> It was found that the teachers had impliedly endorsed the racist views of the Guard and created a climate of fear and intimidation, amounting to harassment.

*Decision No.. 654/2009, 20 December 2009, Equal Treatment Authority (Hungary).*

**Harassment and instruction to discriminate:** A prohibition on harassment and on instruction to discriminate as part of EU non-discrimination law are relatively new developments, which were introduced to allow for more comprehensive protection.

Harassment features as a specific type of discrimination under the EU non-discrimination directives<sup>224</sup>. It had previously been dealt with as a particular manifestation of direct discrimination. Its separation into a specific head under the directives is based more on the importance of singling out this particularly harmful form of discriminatory treatment, rather than a shift in conceptual thinking.

According to this definition, there is no need for a comparator to prove harassment. This essentially reflects the fact that harassment of itself is wrong because of the form it takes (verbal, non-verbal or physical abuse) and the potential effect it may have (violating human dignity).

Much of the guidance on harassment at EU level is derived from the Council Declaration of 19 December 1991 on the implementation of the Commission Recommendation on the protection of the dignity of women and men at work, including the Code of Practice to Combat Sexual Harassment. EU law adopts a flexible objective/subjective approach. Firstly, it is the victim's perception of the treatment that is used to determine whether harassment has occurred. Secondly, however, even if the victim does not actually feel the effects of the harassment, a finding may still be made so long as the complainant is the target of the conduct in question.

Although the non-discrimination directives do not oblige Member States to use criminal law to address acts of discrimination, a Framework Decision of the European Council does oblige all EU Member States to provide for criminal sanctions in relation to incitement to violence or hatred based on race, colour, descent, religion or belief, national or ethnic origin, as well as dissemination of racist or xenophobic material and condonation, denial or trivialisation of genocide, war crimes and crimes against humanity directed against such groups<sup>225</sup>. Member States are also obliged to consider racist or xenophobic intent as an aggravating circumstance.

It is quite probable, therefore, that acts of harassment and acts of incitement to discriminate, in addition to constituting discrimination, may well be caught under national criminal law, particularly where they relate to race or ethnicity.

While the ECHR does not specifically prohibit harassment or instruction to discriminate, it does contain particular rights that relate to the same area. Thus, harassment may fall under the right to respect for private and family life protected under Article 8 of the ECHR, or the right to be free from inhuman or degrading treatment or punishment under Article 3, while instruction to discriminate may be caught by other Articles, such as freedom of religion or assembly under Article 9 or 11, depending on the context. Where these acts display a discriminatory motive, the ECtHR will examine the alleged breaches of relevant Articles in conjunction with Article 14, which prohibits discrimination. Below is a selection of examples that show cases on similar facts to those discussed above, considered in the context of the ECHR.

224. Racial Equality Directive, Article 2(3); Employment Equality Directive, Article 2(3); Gender Goods and Services Directive, Article 2(c); Gender Equality Directive (Recast), Article 2(1)(c).

225. Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328, 6.12.2008, p. 55.

## SPECIAL OR SPECIFIC MEASURES

As noted above, in cases of indirect discrimination, the reason that discrimination is found to occur is due to the fact that the same rule is applied to everyone without consideration for relevant differences. In order to remedy and prevent this kind of situation, governments, employers and service providers must ensure that they take steps to adjust their rules and practices to take such differences into consideration – that is, they must do something to adjust current policies and measures. In addition, to redress the long-term effects of past discrimination, temporary special measures may be necessary. In the UN context, these are labelled ‘special measures’, while the EU law context refers to ‘specific measures’ or ‘positive action’. By taking special measures, governments are able to ensure ‘substantive equality’, that is, equal enjoyment of opportunities to access benefits available in society, rather than mere ‘formal equality’. Where governments, employers and service providers fail to consider the appropriateness of taking special measures, they increase the risk that their rules and practices may amount to indirect discrimination.

The terms ‘special measures’ and ‘specific measures’ can be taken to include redressing past disadvantage suffered by those with a protected characteristic. Where this is proportionate, it may constitute a justification of discrimination.

The term ‘special measures’ is sometimes taken to include a situation where differential treatment takes place that favours (rather than disadvantages) individuals on the basis of their protected grounds; for instance, where a woman is chosen over a man for a particular post because she is a woman and the employer has a policy of redressing the under-representation of women among their staff. The terminology used to describe this varies greatly to include ‘positive’ or ‘reverse’ discrimination, ‘preferential treatment’, ‘temporary special

measures’ or ‘affirmative action’<sup>226</sup>. This reflects its accepted function as a short-term and exceptional means of challenging prejudices against individuals who would normally suffer discrimination, as well as creating role models to inspire others sharing that characteristic. The permissibility of taking positive measures in favour of disadvantaged groups is further reinforced by guidance issued by several of the monitoring bodies responsible for interpreting UN human rights treaties. These bodies have stressed that such measures should be temporary in nature, not extending in time or scope beyond what is necessary to address the inequality in question<sup>227</sup>.

According to the UN Committee on the Elimination of Racial Discrimination, in order to be permissible such measures should have as their sole purpose the elimination of existing inequalities and the prevention of future imbalances<sup>228</sup>. The UN Committee on the Elimination of Discrimination Against Women elaborated that such ‘temporary special measures’ could include ‘preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems’<sup>229</sup>. According to the case-law of the ECJ,

226. For example, the UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination’ UN Doc. CERD/C/GC/32, 24 September 2009; UN Committee on Economic Social and Cultural Rights, ‘General Comment 13: The Right to Education’ UN Doc. E/C.12/1999/10, 8 December 1999; UN Committee on the Elimination of Discrimination Against Women, ‘General Recommendation No. 25: Article 4(1) of the Convention (temporary special measures)’ UN Doc. A/59/38(SUPP), 18 March 2004; UN Human Rights Committee, ‘General Comment No. 18: Non-Discrimination’ UN Doc. A/45/40 (Vol. I) (SUPP), 10 November 1989; UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No. 30 on Discrimination against Noncitizens’ UN Doc. HRI/GEN/1/Rev.7/Add.1, 4 May 2005.

227. Ibid

228. UN Committee on the Elimination of Racial Discrimination, ‘General Recommendation No. 32: The Meaning and Scope of Special Measures in the International Convention on the Elimination of All Forms of Racial Discrimination’ UN Doc. CERD/C/GC/32, 24 September 2009, paras. 21-26.

229. UN Committee on the Elimination of Discrimination Against Women, ‘General Recommendation No. 25: Article 4, para. 1 of the Convention (temporary special measures)’ UN Doc. A/59/38 (supp), 18 March 2004, para. 22.

discussed below, the proportionality of such measures will be examined strictly. The courts have tended to treat discrimination in this context not as a distinct form of discrimination in itself but as an exception to the prohibition on discrimination. In other words, the courts accept that differential treatment has occurred, but that it may be justified in the interests of correcting a pre-existing disadvantage, such as under-representation in the workplace of particular groups.

### Temporary special measures: an example

It should be stressed that discrimination based on gender is not limited to women. For instance, in Norway, the Gender Equality Ombudsman focused on men in the context of gender equality. As a result, the maternity leave legislation has been amended to extend rights to them. One change has been that four weeks of the leave period are now reserved for the father. If he fails to use that entitlement, known as the “father’s quota”, the family loses its entitlement to that part of the leave. The “father’s quota” was introduced in 1993, and in the next two years the percentage of new fathers taking paternity leave increased from 45 to 70 per cent. The Ombudsman further proposed positive action in favour of men in a limited number of care-related occupations in order to activate men’s potential in that area and thereby counteract strict gender segregation in that labour market segment, and to provide children with a less stereotyped concept of gender roles.

The concept features rarely in the case-law of the ECtHR, although it has received greater consideration in the context of EU law, where the ECJ has dealt with cases in the sphere of employment. Specific measures appear as a defense in their own right under the non-discrimination directives and in the case-law of the ECJ, as well as within the specific defense of ‘genuine occupational requirement’.

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) defines such measures as “a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems<sup>230</sup>”. For instance, temporary quota systems designed to give women preferential treatment regarding access to specific jobs, political decision-making bodies or university education can be considered as affirmative action aimed at accelerating the attainment of actual gender equality in areas where women have traditionally been underrepresented and have suffered from discrimination. Under article 4 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), these temporary measures are encouraged and shall, therefore, not be considered as discrimination against men. However, as soon as the objectives of equality of opportunity and treatment have been achieved, these measures must be discontinued; otherwise, they would constitute unjustified privileges for women and, consequently, discrimination against men.

According to general recommendation No. 25 of the CEDAW-Committee, no proof of past discrimination is necessary for such measures to be taken: “While the application of temporary special measures often remedies the effects of past discrimination against women, the obligation of States Parties under the Convention to improve the position of women to one of de facto or substantive equality with men exists irrespective of any proof of past discrimination<sup>231</sup>”.

### 1.4. DIFFERENCE IN FACT MAY JUSTIFY DIFFERENCE IN LAW

Not every differentiation constitutes discrimination. Factual or legal distinctions based on reasonable and objective criteria may be justifiable. The burden of proof falls on governments: they must show that any distinctions that are applied are actually reasonable and objective.

230. General recommendation No. 25 on Article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures (2004).

231. Ibid



### Justified differentiation with regard to employment

Two European Union directives on racial equality and equality in employment allow governments to authorize differentiated treatment in certain circumstances. Differentiation is thus allowed in a small number of cases involving jobs whose performance actually requires distinction on such grounds as racial or ethnic origin, religion or belief, disability, age or sexual orientation. Examples include acting and modelling jobs, where authenticity or realism may require performers to be of a particular origin or age, and some positions in church or similar organizations which involve contact with the public and (unlike other jobs in the same bodies, such as office work or catering) should be staffed with persons of a given confession or belief.

## 1.5. SPECIFIC INSTRUMENTS FOR CERTAIN GROUPS

### Special rights of persons with disabilities: an example

In the United Kingdom, the Disability Discrimination Act of 1995 obliges employers to make “reasonable adjustments” to work organization and premises to accommodate disabled workers. The Act contains a detailed list of the types of measures required. It includes modifying premises and equipment, transferring disabled persons to suitable places of work, reassigning some of their duties to other workers and providing for alternative working hours.

The principles of equality, universality and non-discrimination do not preclude recognizing that members of specific groups may need particular protection. Specific human rights instruments and mechanisms have been designed to protect the rights of women as well as certain groups, such

as aliens, stateless persons, refugees, displaced persons, minorities, indigenous peoples, children, persons with disabilities, persons with albinism, migrant workers and detainees.

Group-specific human rights, however, are compatible with the principle of universality only if they are justified by special (objective) reasons, such as the group’s vulnerability or a history of discrimination against it. Otherwise, special rights could amount to privileges equivalent to discrimination against other groups.

## 1.6. STATE PARTIES’ OBLIGATIONS

Non-discrimination is an immediate and cross-cutting obligation in the ICESCR. As per the Committee’s General Comment No. 20 (para. 8), “to “guarantee” that Covenant rights will be exercised without discrimination of any kind, discrimination must be eliminated both formally and substantively:

- (i) **Formal discrimination:** Requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds; for example, laws should not deny equal social security benefits to women on the basis of their marital status.
- (ii) **Substantive discrimination:** Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. For example, ensuring that all individuals have equal access to adequate housing, water and sanitation will help to overcome discrimination against women and girl children and persons living in informal settlements and rural areas. (States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.)



In addition to refraining from discriminatory actions, States parties should take concrete, deliberate and targeted measures to ensure that discrimination in the exercise of Covenant rights is eliminated.

- (i) **Legislation** – should aim at eliminating formal and substantive discrimination, attribute obligations to public and private actors and cover the prohibited grounds discussed above. Other laws should be regularly reviewed and, where necessary, amended.
- (ii) **Strategies, policies and plans of action** – should address both formal and substantive discrimination by public and private actors in the area of the Covenant rights and State parties are encouraged, amongst other possible steps, to adopt temporary special measures in order to accelerate the achievement of equality.
- (iii) **Elimination of systematic discrimination** - States parties must adopt an active approach to eliminating systemic discrimination and segregation in practice. Tackling such discrimination will usually require a comprehensive approach with a range of laws, policies and programmes, including temporary special measures. (Use of incentives/penalties to change attitudes and behaviour)
- (iv) **Remedies and accountability** - National legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights. Institutions dealing with allegations of discrimination customarily include courts and tribunals, administrative authorities, national human rights institutions and/or ombudspersons, which should be accessible to everyone without discrimination (these institutions should also be empowered to provide effective remedies, such as compensation, reparation, restitution, rehabilitation)
- (v) **Monitoring, indicators and benchmarks** - Monitoring should assess both the steps taken and the results achieved in the elimination of discrimination.

States parties should also ensure that they refrain from discriminatory practices in international cooperation and assistance and take steps to ensure that all actors under their jurisdiction do likewise.

### Equality and Non discrimination

This principle requires ...

#### Eradication of legal, institutional, interpersonal and structural discrimination

- Common to all human rights treaties - No one can be discriminated against on the grounds of sex, age, national or social origin, political or other opinion, disability, etc.
- Ensure that the rights of marginalized and disadvantaged groups are not overlooked (e.g. ethnic/religious minorities, indigenous peoples, women, children, elderly, persons with disabilities, etc), that their rights are safeguarded, and that they are encouraged to participate meaningfully in the development/recovery process
- While promoting non-discrimination, particular attention must be given to the most vulnerable – if everyone is treated equally, inequalities and disadvantages may not be addressed and may in fact be made worse. (e.g. most vulnerable among the poor – women, children, the elderly, low caste members, IDPs, etc.)

Some of the worst human rights violations have resulted from discrimination against specific groups. The right to equality and the prohibition of discrimination, explicitly set out in international and regional human rights treaties, are therefore central to the protection of all human rights. The right to equality obliges States to ensure observance of human rights without discrimination on any grounds, including sex, race, colour, language, religion, political or other opinion, national, ethnic or social origin, membership of

a national minority, property, birth, age, disability, sexual orientation and social or other status. Moreover, it is important to note that discrimination is constituted not simply by an unjustifiable “distinction, exclusion or restriction” but also by an unjustifiable “preference” in respect of certain groups. The fight against discrimination remains a struggle for many people around the globe today.

**Application of these principles:** The question to ask is which are the sectors of society excluded or not enjoying equal status and thus deprived of exercising their human rights? Are there laws in the country that are discriminatory? Are there institutional, administrative or regulatory practices that are discriminatory against a particular group of the population? Is there a prevailing culture of “*de facto*” discrimination in the society? Are there national standards for positive discrimination or affirmative action recognized and applied? How has the problem impacted disadvantaged groups differently? Do men experience it differently than women? Does the project reach the most vulnerable in the communities? Are there any hidden obstacles preventing disadvantaged groups from accessing resources? What can be done to ensure that particular attention is paid to disadvantaged group? Has disaggregated data been collected? Has the data been used to inform the interventions?

It should be borne in mind that human rights treaties have identified particular discriminated and disadvantaged groups on which to focus their attention: women (CEDAW), children (CRC), racial and ethnic minorities (CERD) and migrant workers (CMW).

## 2. PRINCIPLE OF PARTICIPATION AND INCLUSION

Every person and all peoples are entitled to active, free and meaningful participation in, contribution to, and enjoyment of civil, economic, social, cultural and political development in which human rights and fundamental freedoms can be realized. The participation of individuals or groups representing individuals engenders joint decision-making and ownership by the recipients of public services<sup>232</sup>. This is reflected in article 25 of the International Covenant on Civil and Political Rights and article 3 of the Declaration on the Right to Development, which places emphasis on free, active and meaningful participation of everyone, including by extension, participation in public service provision and decision-making. Obstacles to effective participation can include language barriers, geographical remoteness of communities, poverty, lack of access to basic services, as well as inefficiency on the part of public administration, and corruption. In promoting human rights principles and good governance in the context of public services, information and communications technologies can be an effective tool to foster greater participation<sup>233</sup>. As the Committee of Experts on Public Administration noted at its twelfth session, “it is undeniable that a framework enabled by information and communications technologies is essential for public administration, particularly for the effective delivery of public services<sup>234</sup>”.

### 2.1. THE MEANING OF PARTICIPATION IS EMPOWERMENT

#### Participation and Inclusion

##### This principle requires ...

- Free, active, meaningful and inclusive participation

##### Programming implications:

- Policies, processes and procedures should provide:
  - Opportunities for participation of the most disadvantaged in planning and development
  - Access to relevant information
  - Capacities to marginalized groups to formulate proposals
- Institutional mechanisms should:
  - Be based on democratic principles
  - Not disempower existing democratic or traditional structure
- Civil society should:
  - Be active, independent and with capacities
  - Represent the voice of the marginalized and excluded groups
  - Have control over decision making process

A HRBA entails the free, active and meaningful involvement and participation of individuals and social groups in the development process. The meaning of participation here is in the sense of “empowerment” of individuals and groups, which implies significant control over decision-making processes, rather than mere consultation or information sharing. Accordingly, in the context of development programming broad participation involving for example,

232. See Committee on the Rights of the Child, CRC/C/15/Add.139; Committee on the Elimination of Discrimination against Women, CEDAW/C/TUV/CO/2; and the report of the Special Rapporteur on the human rights to water and sanitation, A/HRC/18/33/Add.2.

233. Global Thematic Consultation on Governance and the Post-2015 Development Framework: Consultation report, 2013, sect. 4.2.3.

234. UN Doc. E/2013/44-E/C.16/2013/6, párr. 78.

children, women, minorities, rural communities and civil society organizations during the assessment and in the gathering of information can lead not only to valuable findings but to increased understanding by all members of society of what their roles are in claiming and fulfilling human rights. Furthermore, when there are spaces for people to examine problems together and agree on the causes, they are more likely to support the implementation of actions to resolve them.

## 2.2. THE ROLE OF MANAGING EFFECTIVE PARTICIPATION

Managing effective participation takes time and patience. Whether it takes place at the local project level or the national policy level, it is important to stress that the principal mechanism for participation should, as far as possible, be existing democratic structures. In some circumstances, establishing alternative framework for participation can undermine fledgling democratic structures, create unwelcome parallel systems and, in the longer term, prove unsustainable. Nevertheless, in many cases, innovative arrangements may well be needed to facilitate the participation of marginalized groups.

## 2.3. APPLICATION OF THIS PRINCIPLE

The question to ask is whether marginalized and excluded people are able to participate freely in their own development and whether there are opportunities for participation? Do marginalized groups have access to information and the capacities to participate meaningfully and make specific proposals? Are there spaces for public participation in the decision-making process? Are there parallel mechanisms disempowering the participation? Is there an active and independent civil society in the country that has the capacity to participate in such processes? Are civil society organizations representing the voice of the most marginalized and excluded? In the context of development cooperation it is necessary to ask whether the beneficiary target group is involved in the development and implementation, monitoring and evaluation of the programmes?

# 3. ACCOUNTABILITY AND RULE OF LAW

States and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in human rights instruments. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law.

## 3.1. THE ROLE OF CONSTITUTIONAL COURT OR SIMILAR INSTITUTION

### Accountability and the Rule of Law

#### This principle requires ...

- Accessible, effective and independent mechanisms and procedures of redress

#### Programming implications:

- Legal framework should:
  - Be in conformity with human rights norms
  - Establish conditions, procedures and mechanisms for rights-holders to claim their rights and duty-bearers to comply with their obligations
- Public policies should:
  - Take progressive steps to address the weakness in the accountability systems
  - Implement the human rights obligations of the State at a central, regional and local level
- Institutional mechanisms should ensure:
  - Appropriate judicial and administrative redress mechanisms

The existence or establishment of an independent institution, charged with the surveillance of laws adopted by the Parliament and to rule on their constitutionality and/or their conformity with international human rights norms and standards, is important in the context of an effective NHRPS. Ideally, such courts or institutions automatically review all adopted legislation. However, in many cases they review laws which have been challenged - either by the Government, the Parliament, or in some cases by a judge or

members of the civil society. Prerogatives of a Constitutional Court can be mandated to the Supreme Court.

Courts in a wide range of countries and legal systems are applying international human rights principles and standards. For example, in 2002 the Constitutional Court of South Africa declared that the Government had breached its human rights obligations by failing to take reasonable measures (at affordable cost) to make wider provision of anti-retroviral medication to prevent mother-to-child transmission of HIV. This decision and the grass-roots campaign surrounding it have helped to save many lives. The successful outcomes in these cases are to a great extent attributable to the fact that litigation strategies were integrated within wider social mobilization processes.

### Constitutional & Legal Frameworks Should:

- Be in conformity with international human rights norms, standards and principles
- Establish frameworks for policies for human rights protection
- Allow effective remedies for violations and abuses
  - Promote participation, decision-making processes and cooperation with international and regional protection system

## 3.2. APPLICATION OF THESE PRINCIPLES

### Accountability and the Rule of Law

#### This principle requires ...

- States and other duty bearers to be answerable for the observance of human rights

#### Programming implications:

- Independent State institutions should:
  - Be provided with sufficient resources, responsibilities and independent authority to effectively monitor the Government
  - E.g., independent human rights parliamentary bodies, national human rights institutions, judges, courts and legal counsel
- States to cooperate with international human rights systems:
  - Complying timely with international reporting obligations
  - Inviting Special Rapporteurs and providing information
  - Implementing the TB/SP recommendations

By voluntarily accepting the obligations of the international human rights instruments, and the corresponding domestic laws, the State and all its actors have a duty to respect, protect and fulfil human rights. Therefore, the question to ask is whether the relevant authorities at the State, local and community level comply with their duties? If not, what are the main obstacles? Are there mechanisms in place for those deprived of their rights and entitlements to seek appropriate redress? Is the

Rule of Law respected and enforced in the country? Do the Civil Society Organizations have the capacity to mobilize the society in monitoring and evaluating the performance of institutions and public policies?

## 4. PRINCIPLE OF ACCESS TO INFORMATION<sup>235</sup>

Transparency ensures unhindered, prompt access to reliable information on decision and the results obtained<sup>236</sup>. Access to information is essential for both democracy and development. Citizens have the right to free speech and the right of access to public information. This information is equally the property of citizens. Media and other information providers such as

235. This topic has been drawn up using extracts from Alton Grizzle and Carolyn Wilson (Eds.), Media and Information Literacy Curriculum for Teachers, UNESCO, Paris, 2012, pp. 67-75.

236. Different mechanisms of the UN have urged the responsible parties to take a transparency test in areas of granting benefits for social assistance, mining and extraction industries, security and penal justice, and subcontracting or privatisation of the services, among others.

libraries, archives and the Internet should help to ensure the right to freedom of information for each citizen.

### Access to information

#### This principle requires ...

- Free and independent media, and groups of human rights defenders representative of men, women and marginalized or excluded groups

#### Programming implications:

- An active, rights-sensitive civil society should:
  - Monitor the State compliance with its human rights obligations
  - Articulate concerns of the society and advocates for social human rights mechanisms

During the recent twelfth session of the Committee of Experts on Public Administration, “the right to access information was underscored for its role in promoting transparency. Governments should not only recognize the right of access to information but engage in the proactive disclosure and elimination of requirements to provide prior proof of interest ... The judiciary must be capable of enforcing these rights and/or responsible institutions could be charged with guaranteeing implementation”<sup>237</sup>. In his 2013 report, the Special Rapporteur on the promotion and protection of the

right to freedom of opinion and expression points out that “the right to access information is one of the central components of the right to freedom of opinion and expression, as established by the Universal Declaration of Human Rights (art. 19), the International Covenant on Civil and Political Rights (art. 19 (2)) and regional human rights treaties<sup>238</sup>”. He also lists some of the core principles that are crucial to guaranteeing the right to information, including maximum disclosure, obligation to publish, promotion of open government, limited scope of exceptions, processes to facilitate access, limited costs, open meetings and the fact that disclosure takes precedence over laws that are inconsistent with the right to information<sup>239</sup>”.

The Special Rapporteur considers that these principles continue to represent a crucial tool for translating into practice the various human rights obligations concerning the right to information. The core principles include, obligation to publish, promotion of open government, limited scope of exceptions, processes to facilitate access, lower costs, open meetings, disclosure takes precedence, protection for individuals who disclose relevant information (whistleblowers)<sup>240</sup>.

The role of media and other information providers is changing with the rapid spread of technologies, such as information and communication technologies (ICTs). ICTs provide access to information and knowledge almost instantaneously. Media and information providers, such as libraries, archives and the Internet, are able to provide new services and are becoming more than just resource centers or information providers. These new possibilities offer new opportunities for effectively and efficiently meeting the needs of citizens for life-long learning, research and entertainment, and for connecting communities. Media and information providers have several key functions, which include:

- providing open access to information resources without any racial, gender, occupational and religious restrictions; public libraries, in particular, provide access free of charge
- protecting readers’ privacy and confidentiality in terms of content consulted on the premises or online providing access to diverse and plural information resources, based on professionalism and without political, religious or moral bias
- collecting and preserving information for future generations

237. UN Doc. E/2013/44-E/C.16/2013/6, para. 56.

238. UN Doc. A/68/362, para. 2.

239. Ibid

240. Ibid. par. 76.

Journalism and media sources are important in every society. Without journalists and the news media, there would be no ‘window on the world’— we would have little way of knowing what was happening in our communities or in the world beyond our immediate experience. There are several key factors that journalistic practices should respect, and that citizens have come to expect of journalism:

- **Organizing knowledge** – making chaotic information organized and comprehensible, and going behind official positions to uncover special interests
- **Truthfulness** – in the media, sources of information should be clearly stated so that citizens can judge relevance, reliability and potential biases; important unanswered questions should be noted with an expectation of a follow up if controversy exists
- **Public interest** – in the work they do, journalists can do much to further the public interest by equipping citizens with the information they need to take part in public affairs
- **Independence** – it should be clear that the citizen debate should take place over and above personal biases; commentators must examine ‘both sides of the coin’ (i.e. discuss ideas they both agree and disagree with); and journalists must show independent thinking in their work
- **Forum for public criticism and problem solving** – the media should offer several channels for public interaction (letters, e-mail, phone contact or public forum); citizens also expect that the media give them access to space or airtime to allow conversations in their own ‘language’ with fellow citizens; further, they expect that a broad representation of views and values is visible in news coverage
- **Accountability** – the media should monitor all those who exercise power, not only governments, but also important public and private bodies; by holding the powerful to account, the media can inform community thinking
- **Proportional and relevant news** – citizens have a need for timely knowledge of important issues and trends; reports should not overstate or understate the true nature of threats and risks
- **Balancing privacy and the right to know** – citizens expect media professionals to balance the public right to know with the personal right to privacy<sup>241</sup>

Media and other information providers are central to democracy and good governance, both as a platform for democratic discourse and as providers of information and knowledge. If the media are to support democracy, citizens need to understand how to use them critically, knowing how to interpret the information that they receive, including the use of metaphors, irony, and the way that stories and events are framed to suggest certain meanings. As citizens, people need specific competencies (knowledge, skills and attitudes) to engage with the media, and ultimately with their political processes and governance, and to effectively use resources provided by media, libraries, archives and other information providers. Media and information literacy offers a necessary set of competencies for the 21st century.

Media and other information providers play a central role in information and communication processes. They are one way of communicating information, although their role is much broader than that. Media play several roles. They:

- act as channels of information and knowledge through which citizens communicate with each other and make informed decisions
- facilitate informed debates between diverse social actors provide us with much of what we learn about the world beyond our immediate experience
- are means by which a society learns about itself and builds a sense of community

241. cf. Fackson Banda, UNESCO, 2009.



- function as a watchdog of government in all its forms, promoting transparency in public life and public scrutiny of those with power through exposing corruption, maladministration and corporate wrong-doing
- are essential facilitators of democratic processes and one of the guarantors of free and fair elections
- are a vehicle for cultural expression and cultural cohesion within and between nations
- function as an advocate and social actor in its own right while respecting pluralistic values.

The proper use of information made available by media and various information providers depends on people's abilities to understand their information needs, and to locate, retrieve and evaluate the quality of the information they can access. Today, there is an extremely wide and diverse selection of information material, content, and resources available, particularly on the Internet, varying greatly in accuracy, reliability, and value.

Before evaluating information sources, it is important to think about what the information is for. This will help you to identify credible information sources. The key questions might be: What source or what kind of source would be the most credible for providing information in this particular case? Which sources are likely to be fair, objective, lacking hidden motives, showing quality control?

We can think of information as being held by media and other information providers, such as libraries, museums, archives and the Internet. These information providers have a number of roles, including to:

- Inform
- Educate
- facilitate teaching and learning processes
- provide access to all types of information (often free of charge, plural, reliable and without restrictions) serve as a gateway to information
- promote universal values and civil rights, such as freedom of expression and information
- serve as society's collective memory
- gather information
- preserve cultural heritage
- entertain

## 5. GOOD GOVERNANCE AND HUMAN RIGHTS<sup>242</sup>

The relationship between good governance and human rights is a complex one, given the different origins and usage of the concepts. In earlier connotations, the good governance concept had a technocratic bias which was aimed at creating the best possible conditions for economic development.

242. This topic has been developed based on passages from the High Commissioner for Human Rights on the role of the public service as an essential component of good governance in the promotion and protection of human rights, 23 December 2013 (UN Doc. A/HRC/25/27).



## 5.1. WHAT IS GOOD GOVERNANCE?

There is no single and exhaustive definition of “good governance,” nor is there a delimitation of its scope, that commands universal acceptance. The term is used with great flexibility; this is an advantage, but also a source of some difficulty at the operational level. Depending on the context and the overriding objective sought, good governance has been said at various times to encompass: full respect of human rights, the rule of law, effective participation, multi-actor partnerships, political pluralism, transparent and accountable processes and institutions, an efficient and effective public sector, legitimacy, access to knowledge, information and education, political empowerment of people, equity, sustainability, and attitudes and values that foster responsibility, solidarity and tolerance.

The definition of good governance has evolved over time and has shifted from governance priorities aimed at increasing economic efficiency and growth to those governance policies and institutions that best promote greater freedom, genuine participation, sustainable human development and human rights.

However, there is a significant degree of consensus that good governance relates to political and institutional processes and outcomes. It has been said that good governance is the process whereby public institutions conduct public affairs, manage public resources and guarantee the realization of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law. The true test of “good” governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights. The key question here is to know if the institutions of governance are effectively guaranteeing the right to health, adequate housing, sufficient food, quality education, fair justice and personal security.

## 5.2. KEY ATTRIBUTES TO GOOD GOVERNANCE

The international community has, directly or indirectly, established the interconnection between good governance, human rights and sustainable development in a number of declarations and other global conference documents. The concept of good governance was earlier dealt with by the former Commission on Human Rights in a number of resolutions between 2000 and 2005. In its resolution 2000/64, the Commission identified the key attributes of good governance as transparency, responsibility, accountability, participation and responsiveness to the needs and aspirations of the people. The resolution also expressly linked good governance to an enabling environment conducive to the enjoyment of human rights and to promoting growth and sustainable human development.

In making the link between good governance and human rights, Human Rights Council resolution 7/11 recognizes that transparent, responsible, accountable and participatory government that is responsive to the needs and aspirations of the people, including women and members of vulnerable and marginalized groups, is the foundation on which good governance rests. It also recognizes that such a foundation is an indispensable condition for the full realization of human rights, including the right to development<sup>243</sup>

## 5.3. HOW ARE GOOD GOVERNANCE AND HUMAN RIGHTS LINKED?

Good governance and human rights are mutually reinforcing. Human rights principles provide a set of values to guide the work of Governments and other political and social actors. They also provide a set of performance standards against which these actors can be held accountable and “shared many core principles, namely participation, accountability, transparency and responsibility. Indeed, human rights needed a conducive and enabling environment, in particular appropriate regulations, institutions and procedures framing the action of the State. Human rights provided a set of performance standards against which Governments and other actors could be held accountable. At the same time, good governance policies should empower individuals to live with dignity and freedom. Whilst human rights empowered people, they could not be respected and protected in a sustainable manner

243. Ibid., Parar. 4.

without good governance. In addition to relevant laws, political, managerial and administrative processes and institutions were needed to respond to the rights and needs of populations. It was important to note that there was no one single model for good governance and that institutions and processes evolved over time<sup>244</sup>. Furthermore, governance is essential for effective activities of formulating and enforcing policies of integrated entitlements to essential services such as education, water, sanitation and health, among others<sup>245</sup>.

It explores the links between good governance and human rights in four areas<sup>246</sup>:

When led by human rights values, *good governance reforms of democratic institutions* create avenues for the public to participate in policymaking either through formal institutions or informal consultations. They also establish mechanisms for the inclusion of multiple social groups in decision-making processes, especially locally. Finally, they may encourage civil society and local communities to formulate and express their positions on issues of importance to them.

In the realm of *delivering State services to the public*, good governance reforms advance human rights when they improve the State's capacity to fulfil its responsibility to provide public goods which are essential for the protection of a number of human rights, such as the right to education, health and food. Reform initiatives may include mechanisms of accountability and transparency, culturally sensitive policy tools to ensure that services are accessible and acceptable to all, and paths for public participation in decision-making.

When it comes to *the rule of law*, human rights-sensitive good governance initiatives reform legislation and assist institutions ranging from penal systems to courts and parliaments to better implement that legislation. Good governance initiatives may include advocacy for legal reform, public awareness-raising on the national and international legal framework, and capacity-building or reform of institutions.

Finally, *anti-corruption measures* are also part of the good governance framework. Although the links between corruption, anti-corruption measures and human rights are not yet greatly explored, the anti-corruption movement is looking to human rights to bolster its efforts. In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as anti-corruption commissions, creating mechanisms of information sharing, and monitoring Governments' use of public funds and implementation of policies.

#### 5.4. GOOD GOVERNANCE, HUMAN RIGHTS AND DEVELOPMENT

The interconnection between good governance, human rights and sustainable development has been made directly or indirectly by the international community in a number of declarations and other global conference documents. For example, the Declaration on the Right to Development proclaims that every human person and all peoples "are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development" (article 1). In the Millennium Declaration, world leaders affirmed their commitment to promote democracy and strengthen the rule of law as well as to respect internationally recognized human rights and fundamental freedoms, including the right to development. According to the United Nations strategy document on the millennium development goals (MDGs), entitled *The United Nations and the MDGs: a Core Strategy*, "the MDGs have to be situated within the broader norms and standards of the Millennium Declaration," including those on "human rights, democracy and good governance."

244. UN Doc. E/CN.4/2005/97, para. 8.

245. Global Thematic Consultation on Governance and the Post-2015 Development Framework: Consultation report, 2013, sect. 4.1.1.

246. Cf. Office of The United Nations High Commissioner for Human Rights, Good Governance Practices For The Protection Of Human Rights, New York and Geneva, 2008 (HR/PUB/07/4), pp. 1-3.

## 5.5. THE CONCEPT OF GOOD GOVERNANCE IN THE MAIN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS<sup>247</sup>

The legal framework of human rights in the context of public service can be briefly summarized as follows: States have core human rights obligations under human rights treaties and pertinent national laws, which are applicable to all public services. These include both positive and negative obligations, and the obligations to guarantee non-discrimination and ensure equality. If rights are violated in the context of public service provision, accountability must be ensured and in particular, remedies must be provided.

- Article 21 of the Universal Declaration of Human Rights recognizes the importance of a participatory government and article 28 states that everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized.
- Article 2 of the International Covenant on Civil and Political Rights requires States parties to respect and ensure the rights recognized in the Covenant and to take the necessary steps to give effect to those rights.
- According to article 2 of the International Covenant on Economic, Social and Cultural Rights, each State party 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 rights recognized in the Covenant by all appropriate means, including particularly the adoption of legislative measures. In its General Comment No. 3 (1990) on the nature of States parties' obligations, the Committee on Economic, Social and Cultural Rights pointed out that "other measures which may also be considered 'appropriate' for the purposes of article 2 (1) include, but are not limited to, administrative, financial, educational and social measures" (para. 7). These measures can be interpreted to include the delivery of public services.
- In its general comment No. 12 (1999) on the right to adequate food, the Committee on Economic, Social and Cultural Rights stated that good governance is essential to the realization of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all (para. 23). Moreover, "on the part of states ... this requires capable public sector institutions, including effective legislative, electoral, regulatory and anti-corruption institutions and an independent judiciary. It also requires oversight over other responsible actors such as the private sector. On the other hand ... rights-holders need to be empowered to participate in decision-making processes and to hold to account those who are responsible for formulating policies and delivering services<sup>248</sup>". States should also not take steps which may lead to retrogression and minimum core obligations must be met.
- The obligations to ensure equality and non-discrimination are recognized in article 2 of the Universal Declaration of Human Rights and are encountered in many United Nations human rights instruments, such as the International Covenant on Civil and Political Rights (arts. 2 and 26), the International Covenant on Economic, Social and Cultural Rights (art. 2 (2)), the Convention on the Rights of the Child (art. 2), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 7) and the Convention on the Rights of Persons with Disabilities (art. 5). In terms of public services, this means that States have an immediate obligation to ensure that deliberate, targeted measures

247. This section has been developed with text passages from UN Doc. A/HRC/25/27, paras. 22-30.

248. Global Thematic Consultation on Governance and the Post-2015 Development Framework, cit., sect. 4.1.1.

are put into place to secure substantive equality and that all individuals have an equal opportunity to enjoy their right to access public services.

- States should also provide an effective remedy to individuals when their rights are violated, and provide a fair and effective judicial or administrative mechanism for the determination of individual rights or the violation thereof. Article 2 (3) of the International Covenant on Civil and Political Rights refers to the right to “an effective remedy”, and paragraph 5 of general comment No. 3 (1990) of the Committee on Economic, Social and Cultural Rights and paragraphs 3 and 9 of its general comment No. 9 (1998) on the domestic application of the Covenant refer to the need to provide judicial or other effective remedies.

Specific treaties also include obligations that are relevant to public service. According to article 2 of the Convention on the Rights of Persons with Disabilities, “‘reasonable accommodation’ means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms”. Interpreting the Convention on the Rights of the Child, the Committee on the Rights of the Child has addressed the issue of governments’ capacity to coordinate policies for the benefit of the child and the issue of decentralization of services and policymaking. It has also addressed corruption as a major obstacle to the achievement of the objectives of the Convention.

## 5.6. GENERAL ADDED VALUE OF A HUMAN RIGHTS-BASED APPROACH TO PUBLIC SERVICE<sup>249</sup>

A human rights-based approach to public services is integral to the design, delivery, implementation and monitoring of all public service provision. Firstly, the normative human rights framework provides an important legal yardstick for measuring how well public service is designed and delivered and whether the benefits reach rights-holders. The human rights framework empowers rights-holders and requires States as duty bearers to act in conformity with their human rights obligations. Secondly, human rights principles can contribute to guiding and improving public service, complementing existing value systems such as public service ethos and other good governance principles such as efficiency, competency and integrity. This approach also leads to improved public service outcomes and better quality of public service. Thirdly, public service providers should not underestimate the financial or reputational costs of violating human rights and the resulting loss of public trust, low morale and poor public perception. Fourthly, a human rights-based approach also protects against discrimination and tests whether existing public service systems protect the rights of persons who are vulnerable and marginalized or whose access is hampered by poverty, disability or other forms of exclusion.

## 6. ACCOUNTABILITY: A HUMAN RIGHTS PERSPECTIVE<sup>250</sup>

“Accountability” is a cornerstone of the human rights framework. The latter is essentially a system of norms and practices that govern the relationship between the individual and the State or those in authority. Human rights standards set out the rights and freedoms to which all are entitled by virtue of being human, and the corresponding duties of those who exercise authority or forms of power. Accountability from a human rights perspective refers to the relationship of Government policymakers and other duty bearers to the rights holders affected by their decisions and actions. Accountability has a corrective function, making it possible to address individual or collective grievances, and sanction wrongdoing by the individuals and institutions responsible. However, accountability also has a preventive function, helping

249. Ibid. para. 12.

250. This section has been developed with text passages from United Nations Office of The High Commissioner Human Rights, [Who will be accountable? Human Rights and the Post-2015 Development Agenda](#), New York and Geneva, 2013, pp. 10-21 (HR/PUB/13/1).

to determine which aspects of policy or service delivery are working, so they can be built on, and which aspects need to be adjusted. Accountability principles and mechanisms can improve policymaking by identifying systemic failures that need to be overcome in order to make service delivery systems more effective and responsive.

Although central to human rights practice, accountability has long been a prime concern in development, governance, politics, law, ethics, business and activism. While the meanings and functions of accountability differ across disciplines, in most public policy contexts, accountability refers to the obligation of those in authority to take responsibility for their actions, to answer for them by explaining and justifying them to those affected, and to be subject to some form of enforceable sanction if their conduct or explanation for it is found wanting. Much of the literature on accountability in development converges around these **three constituent elements**: responsibility, answerability and enforceability.

Accountability has a corrective function, making it possible to address individual or collective grievances, and sanction wrongdoing by the individuals and institutions responsible. However, accountability also has a preventive function, helping to determine which aspects of policy or service delivery are working, so they can be built on, and which aspects need to be adjusted. They can improve policymaking by identifying systematic failures that need to be overcome in order to make service delivery systems more effective and responsible.

Human rights have much to contribute to our understanding of accountability in development. The normative framework of human rights and the processes through which it is applied can help to give effect to the different dimensions of accountability identified above. This chapter explores how the distinctive characteristics of human rights accountability can be applied to improve policymaking with regard to the Millennium Development Goals and their successor framework.

From a human rights perspective, accountability in development can be constructed around three clusters of human rights standards. Together, they create conditions in which officials and institutions can be held responsible for their actions, answerable to those they serve and subject to enforceable sanction where appropriate.

First, the human rights framework helps to **define the substantive responsibilities** of public officials, by setting out specific obligations which should inform their conduct. Under international human rights law, every State (and every local, national and international official who is appointed by a State) is obliged to respect, protect and fulfil a range of rights that the State in question has recognized by ratifying human rights treaties and internalizing them in its domestic legal order. The obligations under these treaties include civil and political rights as well as economic, social and cultural rights, all of which are relevant to the substantive goals of development policy for which decision makers are responsible.

*Responsibility* requires that those in positions of authority have clearly defined duties and performance standards, enabling their behavior to be assessed transparently and objectively.

*Answerability* requires public officials and institutions to provide reasoned justifications for their actions and decisions to those they affect, including the public at large, voters who invest public officials with authority and institutions mandated to provide oversight.

*Enforceability* requires public institutions to put mechanisms in place that monitor the degree to which public officials who do not comply, and ensure that appropriate *corrective and remedial action is taken when required*.

Second, human rights standards also elucidate the freedoms and entitlements that public officials must guarantee in order to be answerable to citizens and others whom their decisions affect. A number of process-related rights are crucial to accountability, because they make it possible to monitor the actions of individuals and officials, to collect, verify and communicate information, and to draw it to the attention of civil and judicial officials. These rights include the rights to information and to participate in public affairs, and the freedoms of expression, assembly and association. Where these rights cannot be exercised, individuals who suffer abuse (or observe it) cannot document, make known, or make good, claims against individuals or institutions that act abusively.

Third, human rights principles and mechanisms help to **enforce** accountability and give effect to claims for redress. Principles of



due process and the right to an effective remedy are a third essential pillar of accountability. An independent judiciary, which applies fair rules of evidence impartially and has powers to adjudicate, punish and provide various forms of redress, underpins the operationalization of accountability, as do non-judicial human rights mechanisms such as national human rights commissions. However, in economic and social policy, fair and transparent administrative procedures for redressing grievances and establishing responsibility are equally important.

Combining the concept of official responsibility, the exercise of procedural rights and the possibility of recourse to a fair and functional justice system generates a model of accountability that is actionable. It becomes possible to hold officials and institutions answerable for their actions against agreed standards of responsibility, and to sanction those who act (or fail to act) in a manner that causes violations of rights to occur or persist, applying procedures that are transparent, principled and are themselves accountable.

This last point is important. It means that officials cannot be accused in broad terms. The human rights grounds on which officials and institutions can be held accountable and (if necessary) subjected to judicial or administrative sanction are limited, specific and subject to fair rules of evidence. Officials, too, are protected by human rights law from abuse of their rights, including unfounded, exaggerated or generalized accusations of wrongdoing.

For the purposes of this publication and in the context of debates on the post-2015 development agenda, human rights accountability exists when practices and procedures are in place that:

- Oblige persons in authority or their institutions to take responsibility for their actions, and to explain and justify their actions to those to whom they are answerable, against standards of behavior and performance which reflect and affirm international human rights standards;
- Subject those in authority to forms of enforceable sanction or appropriate corrective action if their conduct is found to have breached human rights obligations. Procedures for appraising and sanctioning conduct, whether judicial, administrative or other, should also reflect and affirm international human rights standards; and
- Enable those living in poverty who have been deprived of their rights to access fair and transparent mechanisms to enforce their claim against those in authority, and to obtain appropriate redress if their rights have been violated.

### 6.1. RESPONSIBILITY: ACCOUNTABILITY FOR WHAT?

The Millennium Development Goals were never intended to provide a complete development agenda; they address a small number of (largely) quantifiable and measurable human development outcomes. By contrast, the nine core United Nations human rights treaties and the array of declarations and guidelines that elaborate on their provisions are far more comprehensive and set out minimum universal guarantees for a life with dignity.<sup>39</sup> They offer a framework of substantive and procedural standards that can be mapped against the sparser commitments of the current Millennium Development Goals, and that should be a key point of reference in deciding the responsibilities of States under the successor framework post-2015.

Human rights standards are derived from binding international treaty norms, as well as “soft law” emerging from internationally recognized declarations and programmes of action. They are also informed by domestic constitutional frameworks, legislation and interpretative adjudication by national courts. The standards grant States leeway, within certain parameters, to determine the best course of action to fulfil the economic, social and other human rights that are central to development. At the same time, they are designed to enable both States and observers to assess the adequacy and reasonableness of a State’s development policies and performance. Over time, human rights standards have been defined with increasing clarity and specificity, by means of international jurisprudence and authoritative interpretation by international and regional human rights bodies.

Box 1 outlines summarily the key human rights principles and duties to which States are accountable in the context of national and international development policymaking. It highlights the principal (though often neglected) obligations that States have adopted, and in regard to which they have agreed to be accountable, by virtue of becoming a party

to the core international human rights treaties. These include the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child. It should be noted that 90 per cent of States have ratified four or more of the core treaties and all States have ratified at least one.

### Box 1. Defining responsibilities: accountability for what?

<p><b>Accountability for efforts as well as outcomes:</b> human rights standards impose obligations of conduct as well as result. From a human rights perspective, in the context of the Millennium Development Goals States should be held accountable not only for the outcomes they achieve but for the policy efforts they make, the processes by which these efforts are carried out and the resources that are invested.</p> <p><b>Accountability for the full range of human rights:</b> States cannot subordinate one set of rights to another, but must treat all rights recognized in international standards with equal emphasis, whether civil, political, economic, social or cultural. Approaches to development which sacrifice political freedoms in the name of poverty reduction, or which acknowledge the value of participation but fail to take into account economic and social rights obligations, cannot be considered human rights-based.</p> <p><b>Accountability for positive as well as negative obligations:</b> States have an obligation to respect human rights by refraining from direct or indirect interference with their enjoyment (by forcibly evicting people from their homes, for example); and to protect human rights by preventing, investigating, punishing and ensuring remedies if third parties infringe them (for example, by regulating and sanctioning companies that discriminate against their female employees). States also have positive obligations to fulfil human rights, by taking legislative, administrative, judicial, budgetary and other steps to create the conditions in which these rights can be realized. Human rights therefore demand active policy intervention and not simply refraining from harm.</p> <p><b>Accountability for pace of progress and prioritization:</b> although steps to fulfil economic, social and cultural rights may be undertaken progressively (progressive realization), States should apply the maximum available resources to advance as swiftly as possible, making use of national resources and international cooperation.</p>	<p>National strategies and plans of action, supported by indicators and benchmarks, should describe how and by when States will achieve their goal. States must guard against deliberate retrogression (backsliding), even in periods of economic downturn. They have a core obligation to prioritize the fulfilment of minimum essential levels of economic, social and cultural rights for all, regardless of their level of economic development and above all other policy and economic objectives, including when allocating resources.</p> <p><b>Accountability for meeting certain standards of services:</b> States must ensure social services meet certain criteria. For example, health services should be sufficiently available, accessible (physically, economically and to all), acceptable (sensitive to cultural or gender differences, for example) and of adequate quality (AAQ).</p> <p><b>Accountability for tackling inequality and discrimination:</b> States have a cross-cutting duty to eliminate discrimination and ensure substantive equality in the enjoyment of rights. In addition to refraining from adopting discriminatory laws, policies, programmes and expenditures, States should take specific, deliberate and targeted measures to ensure rights are enjoyed equally, in practice and in law. Several international instruments set out specific obligations with regard to eliminating discrimination on grounds such as gender, race, ethnicity, age, disability and indigenous status.</p> <p><b>Accountability to those beyond borders:</b> States have obligations to the human rights of people beyond their borders. They are required to engage in international cooperation to fulfil human rights, particularly economic, social and cultural rights (which are more dependent on resource availability and coherent international economic policies). States in a position to do so must provide international assistance (financial, technical and other) to States that lack the resources to fulfil at least minimum levels of economic, social and cultural rights. States are also obliged to refrain from implementing bilateral or multilateral policy measures or creating conditions which may restrict the enjoyment of human rights in other countries.</p>
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## 6.2. ANSWERABILITY: FOSTERING STATE RESPONSIVENESS AND ACTIVE PARTICIPATION

This dimension of accountability refers to the capacity to demand that those in authority give reasoned justification for their behavior to those on whose behalf they exercise that authority. It speaks to the relational aspect of accountability. Accountability is a dynamic process of continuous interaction and contestation among the State, the individual and other forces such as civil society and market institutions. In the context of development, the relationship of power between individuals and State institutions, between providers of social services and the individuals and communities that use them is often an asymmetrical one. Human rights transform these asymmetries by recasting the relationship in terms of duty bearers and rights holders, empowering individuals to control the behavior of public institutions as a matter of entitlement, and requiring that these be more responsive and transparent as a matter of legal obligation.

Human rights standards are also concerned with inequalities between social groups and asymmetries of power within societies. An array of international human rights agreements have been adopted by the international community to address the rights of particular sectors of the population facing systemic discrimination, such as women, people with disabilities and indigenous peoples. These standards set out a comprehensive framework for tackling discrimination in their enjoyment of the full spectrum of rights, including affirmative measures to enable their full participation in decision making and ensure equal access to justice if their rights are violated. Human rights norms and instruments relating to discrimination therefore shed a more nuanced light on the question of “to whom” duty bearers are answerable.

Human rights are not conceded in a top down manner by State institutions, but are claimed through the exercise of active citizenship (wherein rights are claimed within a framework of a social contract between governors and the governed, including noncitizens). Being answerable to rights holders therefore means creating an environment which fosters meaningful democratic participation and people’s active engagement in shaping, monitoring and challenging policies that affect their lives. Safeguarding civil and political rights is therefore critical if conditions for answerability are to exist and flourish. For those in power to answer for their actions and decisions to ordinary people, the latter must be endowed with the freedom to question, access to the information necessary to assess whether justifications are reasonable and space to challenge them publicly and voice dissent if they are not. As this is rarely an individual endeavor, rights to freedom of assembly and association are crucial to enable interrogation of public policy through collective means, whether through trade unions, human rights groups or community-based organizations. International civil and political rights instruments set out stringent conditions which must be met if these rights are to be curtailed in any way, providing objective standards against which to assess the necessity, legitimacy and proportionality of any restrictive measures that have the effect of shielding development policies from public scrutiny.

In his seminal work on the connections between political freedoms and development outcomes, Amartya Sen highlighted the inherent and instrumental value of these rights<sup>251</sup>. Rights to freedom of expression, information and so forth are an inherent good in themselves, but they also serve to foster answerability, obliging policymakers to respond to their constituencies, so that lessons are learned from past shortcomings and the delivery of social services improved. Amartya Sen also highlights the constructive role of these freedoms in fostering deliberation and helping to create a more open political culture in which social policy choices and allocations of resources are justified and debated with the full participation of those who have most at stake. In turn, such dialogue enables communities to arrive at a shared understanding of the norms and values that should govern the conduct of public life<sup>252</sup>.

The instrumental as well as inherent value of making development strategies more answerable to the individuals and communities concerned has been highlighted in the more recent development literature. Empirical studies of the impact of participatory and community-based

251. Cf. Amartya Sen, *Development as Freedom*, Oxford, Oxford University Press, 1999.

252. Cf. Anne-Marie Goetz and Rob Jenkins, *Reinventing Accountability: Making Democracy Work for Human Development*, Basingstoke, United Kingdom, Palgrave Macmillan, 2005.

development approaches by international agencies such as the World Bank suggest that participatory approaches that actively involve communities in local development decisions, including taking the lead in identifying and managing community-level investments, can often lead to a better use of resources geared towards meeting the communities' needs and serve to foster more accountable systems of service delivery, although their longer-term "constructive" impact on governance reform and social transformation is more difficult to assess empirically.

Other studies, however, caution against an oversimplified approach to building bottomup accountability, and have questioned the effectiveness of development interventions aimed primarily at stimulating community-level demand for accountability without simultaneously incentivizing responsiveness and better performance on the part of key institutions<sup>253</sup>. Emerging evidence from empirical research indicates that the accountability relationship should not categorically be reduced to an adversarial process, pitting citizens against State agencies and service providers in a tug of war between rights and responsibilities. Rather, accountability can be more effectively fostered when approached as a collective action problem, requiring solutions focused on brokering mutual commitments among providers and users within the sociocultural dynamics of a particular setting. From a human rights perspective, the interplay between rights holders' demands for answerability and the responsiveness of duty bearers should also be seen as a nuanced and complex one, requiring a holistic approach to the full web or "ecosystem" of accountability in any given context.

State responsiveness and active citizenship can be seen as defining characteristics of accountable governance. As UNDP puts it, "the concept of accountability is at the heart of both democratic, rights-based governance and equitable human development. Democratic and inclusive societies are based on a social contract between responsive and accountable States and responsible and active citizens, in which the interests of the poorest and most marginal are taken into account"<sup>254</sup>. Given the critical role that civil and political rights play in fostering State answerability and active citizenship, any attempts to measure or assess governance in a post-2015 framework should be informed by the relevant provisions of international treaties relating to these rights.

### 6.3. ENFORCEMENT: PREVENTIVE AND CORRECTIVE FUNCTIONS

To be accountable, a person or institution must have defined responsibilities, must be answerable for his or her conduct with regard to those responsibilities, and must be subject to forms of enforceable sanction or remedial action if he or she fails to carry out her responsibilities without good reason. Enforcing accountability is not solely concerned with punishment, but is about ensuring fair and systematic mechanisms are in place to assess compliance by individuals and institutions with agreed standards of responsibility and adopting appropriate corrective action. The enforcement dimension is therefore complementary to the others in fulfilling the preventive and corrective functions of accountability.

The human rights framework provides a strong rationale for the enforcement of accountability, as well as a potentially effective means for doing so. Rights imply remedies that is, mechanisms that people can use to enforce and give effect to their rights if they believe these to have been infringed<sup>255</sup>. States have an obligation to provide effective remedies and means for human rights enforcement. These include incorporating international human rights norms into their

253. In addition to David Booth, *Problem: Addressing the Real Challenges of African Governance* (London, Overseas Development Institute, 2012); see Gina Bergh and others, "Building governance into a post-2015 framework: exploring transparency and accountability as an entry point", London, Overseas Development Institute, 2012.

254. UNDP, [Reflections on Social Accountability: Catalysing Democratic Governance for Progress Towards the MDGs](#), July 2013, p. 7.

255. The right to an effective remedy for violations of human rights is codified in article 8 of the Universal Declaration of Human Rights and in a range of international treaties which subsequently flowed from it. See also "Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law" (General Assembly resolution 60/147).

domestic legal system, adopting legal and administrative procedures under which violations can promptly and fairly be investigated, and providing timely and effective access to justice and appropriate redress if a violation is established. Redress can take different forms, including compensation, rehabilitation and guarantees of non-repetition.

While the right to a remedy is expressed in terms of access to a competent tribunal, judicial mechanisms are not the only means of human rights enforcement. The quasi-judicial bodies, national human rights commissions, ombudsmen and parliamentary human rights bodies may also have an enforcement function. Accountability mechanisms not specifically created within a human rights framework, such as law enforcement agencies, sector-specific regulatory bodies or administrative grievance procedures, may also contribute to the enforcement of human rights.

Courts are the enforcement mechanism most commonly associated with human rights, although the formal justice system is just one among many components of an effective national accountability system. Judicial enforcement of human rights is important in principle, because—subject to certain preconditions—it ensures that norms can be upheld fairly and that serious misconduct can be punished. However, access to justice through litigation can be expensive, longwinded and beyond the reach of most people living in poverty. Litigation is sometimes perceived to be an inappropriately punitive means of holding public authorities and policymakers to account, or to privilege individual claims over broader social interests.

Nevertheless, there is increasing evidence of the effectiveness of judicial enforcement mechanisms in fulfilling the two closely interrelated aims of corrective and preventive accountability in development-related contexts. A growing body of literature confirms that, under the right conditions, formal adjudication on economic and social rights can have a significant life-saving and pro-poor impact. For example, up to 1 million human life years may have been saved in South Africa alone by court-ordered dispensation of antiretroviral treatment, following social mobilization on this issue. Similarly, it has been estimated that 350,000 additional girls are now going to school in India thanks to the midday school meal scheme implemented as a result of right to food litigation before the Indian Supreme Court.

Claims seeking judicial accountability in the socioeconomic sphere have now become a “permanent and prominent feature of the policymaking landscape”<sup>256</sup>. As the above economic and social rights cases illustrate, judgements have often identified systemic policy failure, rather than individual malpractice, as the cause of deprivation. Courts can punish individual lapses in performance, but they can also promote positive structural and institutional change. Rights claimed through courts, often spurred or accompanied by social mobilization, have saved lives, generated policy dialogues, and strengthened answerability, social reflection and scrutiny of public policy choices. While further empirical research is undoubtedly needed, the development dividends of enforcing accountability through judicial means should not be underestimated.

Human rights accountability is primarily enforced at the national level. International enforcement of human rights accountability is particularly fraught with challenges given the weak and undemocratic nature of most global forums or mechanisms of political and economic governance, and the weak enforcement powers of international human rights bodies. Nevertheless, as discussed in Part Two, international human rights mechanisms and other supervisory bodies have an important role to play in monitoring, promoting and ensuring the enforcement of human rights standards at the national level.

#### 6.4. WHO IS ACCOUNTABLE?

Both the human rights and governance traditions locate accountability primarily in the relationship between the State and its citizens and others under its jurisdiction. Under international human rights law, States have the first and main responsibility to respect and protect the rights of people within their territories or under their effective control. The proliferation of actors in international development—from business enterprises and

256. Gauri y Brinks, *Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, 2008, p. 303.

multilateral economic institutions to new donors—has made it necessary to develop a more multidimensional approach. A number of processes associated with globalization, including political decentralization, the privatization of public services and broader transformations in the global economy, have multiplied the number of and interconnections between institutions that shape development. The bond between State and citizen is now at the centre of a more elaborate web of interrelated responsibilities.

In the Millennium Declaration the General Assembly recognized this complexity when it asserted the principle of shared responsibility. Democratic governance theorists have traditionally considered accountability to be vertical or horizontal. Vertical accountability occurs when individuals hold those in power to account directly (most obviously through periodic elections). Horizontal accountability occurs, for example, when one State official or body has authority to demand explanations and impose penalties on another. In the current era of accelerated globalization, these two axes must be set in a larger web of accountability, encompassing a range of State agencies, diverse civil society actors, the private sector, other Governments and international institutions.

Recognizing this new geometry of interaction and power, a multidimensional concept of human rights accountability is beginning to emerge in response to the transformations that are occurring within, below and above the State. Just as recent development thinking has called into question unduly linear approaches to accountability based on binary State/citizen and principal/agent relationships, so human rights practice has expanded its focus to address the interconnected responsibilities of a complex variety of actors. Across both fields, a key implication for policymaking is the need to look at systems of accountability (not just individual mechanisms or duty bearers in isolation) and to focus on creating incentives for action in the collective interest by both users and providers of services (not just adversarial solutions based on remedies for individual grievance)<sup>257</sup>.

## 6.5. NATIONAL AND SUBNATIONAL ACCOUNTABILITY MECHANISMS.

Accountability becomes actionable when effective mechanisms are in place. A large array of institutions and mechanisms exist that Governments, other institutions and individuals (rights holders) can potentially use to hold officials and other duty bearers to account for abuses of authority and violations of rights that are relevant to the current development agenda.

Accountability mechanisms available to aggrieved individuals include the entities of the State charged with ensuring judicial, political and administrative accountability; bodies specifically responsible for monitoring and enforcing human rights; and institutions that oversee development. These mechanisms can, among other functions, monitor adherence to human rights standards, independently review Government performance, and recommend measures for remedy and redress in the event of non-compliance.

A distinction should be made between national accountability mechanisms and international or transnational mechanisms. Judicial or administrative enforcement mechanisms are generally associated with local or national accountability systems. International accountability systems generally have a supervisory or oversight rather than enforcement function. This said, there is considerable interplay, and international mechanisms (such as the monitoring bodies of the United Nations or regional human rights systems) can require States to justify their MDG performance in the light of human rights principles, such as progressive realization and non-discrimination. Such bodies can also scrutinize whether adequate national mechanisms of redress exist and issue recommendations for strengthening domestic accountability. They

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257. For a critique of linear approaches to accountability in development, see Booth, *Development as a Collective Action*. On systemic approaches to accountability from a human rights perspective, see Alicia Ely Yamin, "Toward transformative accountability: applying a rights-based approach to fulfill maternal health obligations", *Sur International Journal on Human Rights*, vol. 7, N° 12 (June 2010), pp. 94–121. On a "systems approach" to accountability in development, see OECD, "Draft orientations and principles on development co-operation, accountability and democratic governance", document DCD/DAC(2012)28, 29 June 2012.

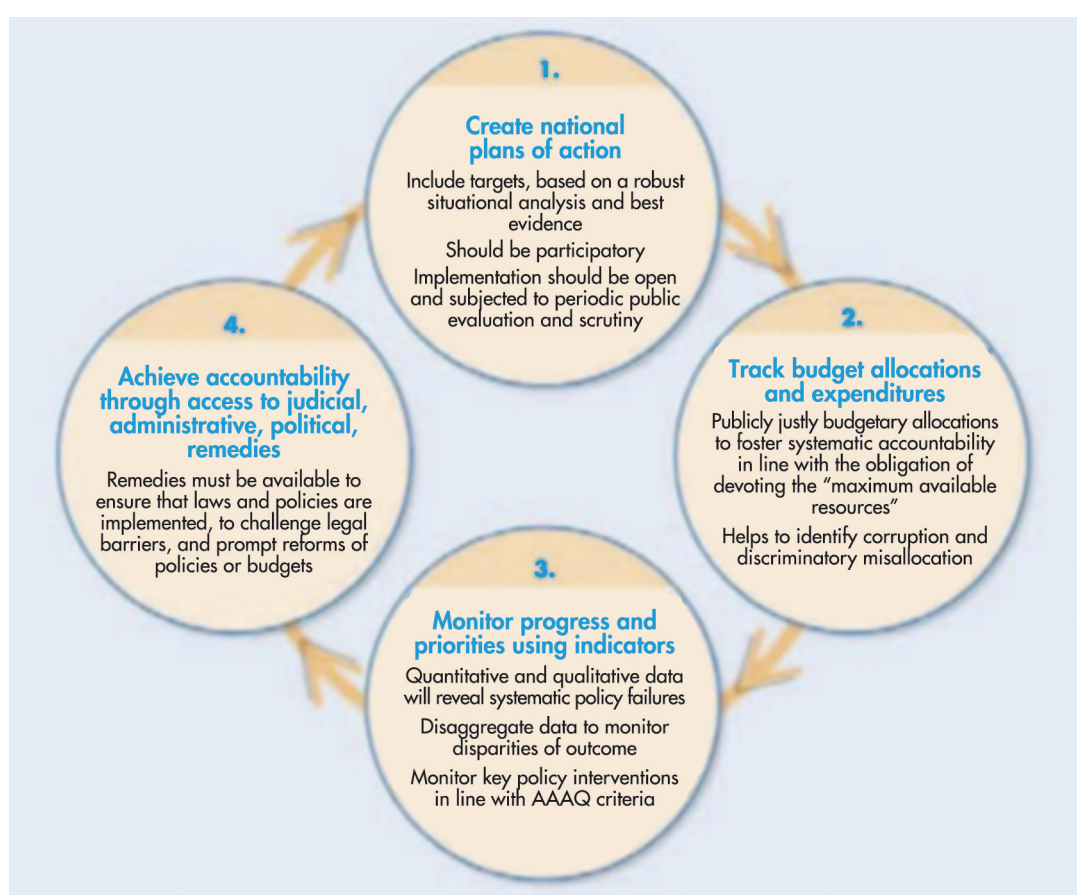
offer additional forums for raising and negotiating grievances, and are particularly helpful to groups whose opinions are disregarded by their own Governments.

The most appropriate accountability mechanism to pursue will depend on: the circumstances of a particular violation; who the duty bearer is; whether the duty bearer has breached a positive or negative obligation; how the rights holder has been affected; and whether an individual remedy or broader systemic reform is required. Because the record of horizontal accountability mechanisms has been irregular, accountability claimants have developed a number of new approaches to engaging them.

An approach to accountability anchored in human rights would also require States to show that their policymaking and implementation processes are in accordance with human rights principles. As already mentioned, key standards in this area include the rights to information and to participate in public affairs, and the freedoms of expression, assembly and association.

Mechanisms to assess the adequacy of such processes might include: indicators that measure the range and number of participatory forums that are available in the MDG context; the public's awareness of them; the regularity of consultation; attendance rates; the social composition of those who attend; the extent to which recommendations made by participants are considered and acted upon by the authorities; and perceptions of satisfaction among the stakeholders and the public.

Figure III describes four key steps in national policymaking in which the above human rights principles and standards should be integrated: planning, budgeting, monitoring and accountability.



Source: Adapted from Alicia Ely Yamin, "Toward transformative accountability: Applying a rights-based approach to fulfill maternal health", *International Journal on Human Rights*, vol. 7, No. 12 (June 2010).

Methodologies for monitoring human rights compliance at each stage of the policy cycle can draw on the growing body of work on human rights impact assessment (HRIA). Its methods vary greatly and have been developed in different contexts for a variety of purposes. In general terms, however, such assessments measure the actual or likely impact of policy measures on the enjoyment of human rights norms, standards and principles as identified in international treaties and national legislation. In addition to measuring human rights outcomes, they also examine issues of process. For example, the policymaking process should promote popular participation as much as possible, should not be discriminatory and should be accountable, including to parliament.



## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 5**

**Subject**

**2.4.1.** Right to life and to physical and moral integrity. Right to liberty and security

**Lecturer:**

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## SUMMARY OF THE TOPIC

The right to life is defined differently according to time and place. Historically, it meant the right not to be killed and, after the Second World War, it became a general right in the Universal Declaration of Human Rights (Art. 3). Subsequently, the right to life has been invoked to protect citizens against what is considered to be “legal murder”, namely the death penalty. The right to life is occasionally invoked to defend children, the free choice of women and also to promote euthanasia.

In 1776, the United States Declaration of Independence declared that all men are endowed with inalienable rights and among these are “Life, Liberty and the Pursuit of Happiness”.

In 1948, the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations, declared in Article 3: “Everyone has the right to life, liberty and security of person”

In 1950, the European Convention on Human Rights was adopted by the Council of Europe and Article 2 was entitled “right to life”. It stipulates that: “everyone’s right to life shall be protected by the law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

In 1986, the African Charter on Human Rights and Peoples, adopted by the Assembly of Heads of State and Governments of the Organisation of African Unity (OAU) on 27 June 1981 in Nairobi which came into force on 21 October 1986 and was ratified by all the Member States of the African Union, declares, in Article 4, that: “human beings are inviolable”. Every human being shall be entitled to respect for his life in the integrity of his person. No one may be arbitrarily deprived of this right”.



Finally, in 1976, the International Covenant on Civil and Political Rights (ICCPR) stipulates in Article 6(1) that: “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

Furthermore, the constitution of the Democratic Republic of Congo, and national human rights instruments, provides in Article 16(1) and (2) that: “the individual is sacred. The State has the obligation to respect and protect him/her. In 16(2): “All persons have the right to life, physical integrity and to the free development of their personality, while respecting the law, public order, the rights of others and public morality. And finally, Article 61(1) also guarantees the right to life”.

There is a political persuasion which wants the right to life to become the right to live and stands for the prohibition of unjustified death. Following this line of thought, the right to live is also the right to have the resources and the opportunities to live. The right to life is the source of all rights – and property ownership rights are their only possible application. Without the rights to property ownership, no other rights are possible. Insofar as humans must live by their own efforts, humans who have no right over the products of their efforts have no resources to live.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

### GENERAL:

- **Critical reasoning:** Analyse and evaluate legal statements in textbooks and compare them with the ideas that society accepts as true in relation to the right to life
- **Ethical awareness and commitment:** Incline towards everything that stands for the right to life, direct experience, the achievement of this right and the sense of justice in its proper place.
- **Teamwork:** Engage in critical discussion over different conceptualisations of the right to life

### SPECIFIC:

- Develop analytical, systemic, practical and collegial thinking about the right to life
- Analyse, discuss and evaluate critical cases where the right to life is threatened
- Consider and observing the responsibility of holders of the right to life who stand in the way of actions or the transformation of the situation where there is an infringement of human rights (e.g. euthanasia).

## BIBLIOGRAPHY AND OTHER COMPULSORY TEACHING RESOURCES

Bertrand Mathieu, *The Right to Life in European Constitutional and International Case-law*, Council of Europe, Strasbourg: Council of Europe, 2006.

J.-F. AKANDJI-KOMBE; [Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights](#), Human rights handbooks No 7, Brussels, 2007.

UN Human Rights Committee: Procedure for the Adoption of the General Comment General Comment No 36 - Article 6: Right to life - [General Discussion on the preparation for a General Comment on Article 6 \(Right to Life\) of the International Covenant on Civil and Political Rights](#) (see also references in the text for an updated version)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY TEACHING RESOURCES

Macovei, Monica. [The right to liberty and security of the person. A guide to the implementation of Article 5 of the European Convention on Human Rights](#), Human rights handbooks No. 5: Strasbourg Cedex, 2002.

Office of the United Nations High Commissioner for Human Rights / Asia Pacific Forum of National Human Rights Institutions / Association for the Prevention of Torture, [Preventing Torture: An Operational Guide for National Human Rights Institutions](#), Geneva, 2010.

In light of the different case studies, view the following websites and read the following texts:

In reference to children's right to life:

- UNICEF, [Reimagine the future. State of world children 2015: summary. Innovation for all the boys and girl](#)
- UNICEF, [State of world children 2016: a fair chance for every child](#)
- Humanium is an international child sponsorship NGO dedicated to stopping violations of children's rights throughout the world: [Situation of children's right to life in the world](#) and [Understanding children's right to life](#)

For discussion of [abortion and termination of pregnancy](#)

To open a debate on the right to live with dignity:

- [Euthanasia](#)
- [Marginalisation and poverty](#)
- [Difficult social conditions](#)

## LEARNING OUTCOMES

At the end of the topic, the student will be able to:

- Understanding the value and importance of the right to life, in different contexts
- Interpreting the historical development of the right to life, as a backdrop to current challenges, and reflect on possible solutions.

- Supplementing analytical work on the right to life by placing it in one's own social, economic and cultural context
- Engaging in critical discussion

## TEACHING METHODS

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### 1. READING:

- Texts about the topic, recommended by the course tutor
- Documents which appear in "Bibliography and other compulsory teaching resources"
- Documents which appear in "Bibliography and other complementary teaching resources"

### 2. GROUP DISCUSSION:

- Arrive at a shared definition of the right to life
- Identify at least two case studies and discuss the contents

### 3. NOTES FOR THE FORUM:

- Contribute some brief remarks to the forum (maximum 100 words) with personal thoughts about the conclusions of the group discussion

## SYLLABUS OF LEARNING ACTIVITIES

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### 1. READING TEXTS ON THE TOPIC

- Bertrand Mathieu, *The Right to Life in European Constitutional and International Case-law*, Council of Europe, Strasbourg: Council of Europe, 2006. Read: chapter I (section I, section II); chapter II (section III, only part C "The question of euthanasia" pp. 72-80)
- J.-F. AKANDJI-KOMBE; [Positive obligations under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights](#), Human rights handbooks No 7, Brussels, 2007. Read: Chapter II "Protection of personal life and integrity (pp. 21-34) and Chapter III "Protection of private and family life" (pp. 38-49).

### 2. VIEW THE FOLLOWING WEBSITES:

- UNICEF, [Reimagine the future. State of world children 2015: summary. Innovation for all the boys and girl](#)
- UNICEF, [State of world children 2016: a fair chance for every child](#)
- [Situation of children's right to life in the world and Understanding children's right to life](#)
- Amnesty International: [Death Penalty](#)

### 3. PARTICIPATION IN THE FORUM, WITH AT LEAST TWO CONTRIBUTIONS PER PERSON:

- First: provide a personal opinion summarising your reading and the video clips
- Second: comment on other participants' contributions

## TIMETABLE OF TOPIC ACTIVITIES

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Identification of the activity	Estimated work time
Activity 1	2 hours
Activity 2	2 hours
Activity 3	1 hour
Total	5 hours

## SUBJECT 2.4.:

# 2.4.1. RIGHT TO LIFE AND TO PHYSICAL AND MORAL INTEGRITY. RIGHT TO LIBERTY AND SECURITY

### 1. INTRODUCTION: THE NATURE OF CIVIL AND POLITICAL RIGHTS

Civil and political rights generally seek to protect basic human rights from the State and they allow individuals to enjoy all their freedoms. What sets these rights apart is the fact that they impose on the State the duty of non-interference in these freedoms and that they are directly applicable, in other words they are effective without any need for implementing measures. These rights require positive action by the State and they apply to relationships between individuals<sup>258</sup>.

Specifically, civil and political rights include the right to life; the right to liberty and security, including the right not to be subject to arbitrary arrest or detention; the right not to be tortured and freedom from slavery and forced labour; the right to equal access to justice and a fair trial; basic freedoms of belief, the freedom of conscience and religion; freedoms of expression, information and association; the right to equality and freedom from discrimination and the right to the self-determination of peoples and to legal safeguards for anyone who is arrested, detained, charged or convicted under criminal legislation.

Historically, these rights first appeared in the 18th century<sup>259</sup>. Effectively, before this period, Greece and Roman law had recognised inherent natural rights, but they only applied to the nobility. It is therefore clearly apparent that the rights of slaves and women were not respected.

258. See E. Denninger (ed.), *Diritti dell'uomo e legge fondamentale*, Turin, Giappichelli, 1998; G.M., Flick, *Globalizzazione e diritti umani*, in *Jus*, No 2, pp. 171 et seq., 2000; E. Ondei, *Le persone fisiche e i diritti della personalità*, Unione, Turin, 1965; G. Peces Barba Martinez, *Teoria dei diritti fondamentali*, Milan, Giuffrè, 1993; A. Spadaro, *Dai diritti individuali ai doveri globali: la giustizia distruttiva internazionale nell'età della globalizzazione*, Soverina Mannelli, Rubbettino, 2005; A. Baldassarre, *Diritti inviolabili*, in "Enciclopedia giuridica", vol. XI, Istituto dell'Enciclopedia italiana, Rome, 1989; B. Constant, *La libertà degli antichi, paragonata a quella dei moderni*, Einaudi, Turin 2005.

259. Cf. F. Ruffini, *Diritti di Libertà*, La Nuova Italia, Firenze 1975; O. Oestreich, *Storia dei diritti umani e delle libertà fondamentali*, Laterza, Rome-Bari, 2001; G. M. Salerno, *I nostri diritti*, Laterza, Rome-Bari, 2002.

In the Middle Ages, the *Magna Carta Libertatum*<sup>260</sup>, of 1215, recognised the right to individual freedom, and provided that no free man shall be charged, except by the lawful judgement of his peers and by the law of the land.

The *Petition of Right*<sup>261</sup> of 1628 restricted violence on the part of the authorities when collecting taxes and set the imprescriptible rights of subjects before the monarch.

*The Habeas Corpus Act*<sup>262</sup> of 1679 prohibited arbitrary detention and required the defendant be given the grounds for arrest without delay.

Over time views have changed and many authors agree on dating the origin of these rights to the time of the (English) *Bill of Rights*<sup>263</sup> of 1689, yet religious wars had heralded a return to absolutism. At the time of the Enlightenment, these rights were effectively codified in the 1789 French *Declaration of the Rights of Man and of the Citizen* and in the *American Bill of Rights*, in 1791, in the United States.

In legal studies, civil and political rights are defined as “first-generation rights” because they are the first human rights to be codified in the Constitutions of Western countries. They protect fundamental human rights rather than economic social and cultural rights which, on the contrary, are called “second-generation rights” and appeared in the 19th century along with the first labour laws. There are also “third-generation rights”, also referred to as “solidarity rights” as they cover groups and not just individuals. These rights are still poorly defined and cover the environment, development, humanitarian assistance, peace, etc. Unfortunately, only the *African Charter on Human and Peoples’ Rights* has turned third-generation rights into fundamental principles<sup>264</sup>.

260. *La Magna Carta* is a founding text of contemporary democracies because it limits the king’s powers and obliges the monarch to recognise sovereign rights which exist independently of him or her. The charter was signed by John Lackland, the King of England, and it has served as a basis for Western democratic constitutions. Clause 39 is the most important part of the document, stating that no citizen may be charged or imprisoned by the King without a fair trial. *The Magna Carta is a control tool that has become a symbol of liberty and still an integral part of international political life.* Cf., R. V. Turner, *Magna Carta through the Ages*, London, Harlow, 2003; P. Linebaugh, *The Magna Carta Manifesto: Liberties and Commons for All*, Berkeley and Los Angeles, University of California Press, 2008; C. Breay, *Magna Carta: Manuscript and Myths*, London, The British Library, 2002; G. Musca, *La nascita del parlamento nell’Inghilterra medievale*, Bari, Nuova Biblioteca Dedalo, 1995.

261. *The Petition of Right* restricted attempts by the king to institute an absolute monarchy and placed the first constitutional limits on monarchy. Under the petition, no taxes could be introduced without the consent of Parliament; unlawful detentions were prohibited; no martial law could be used in peacetime nor any quartering of soldiers in citizens’ homes in an attempt to make them pay taxes. Cf. C. Russell, *Parliaments and English Politics 1621-1629*, Oxford, Clarendon Press, 1979; L. J. Reeve, *The Legal Status of the Petition of Right*, in “*The Historical Journal*”, No 29, Cambridge University Press, 1986, pp. 257-277; J. S. Flemin, *The Struggle for the Petition of Right in the House of Lords: The Study of an Opposition Party Victory*, in “*The Journal of Modern History*”, Vol. 45, No 2, University of Chicago Press, 1973, pp. 193-210.

262. Habeas corpus established the freedom not be imprisoned without trial and for all persons arrested to have the right to know why they have been detained and of what they are accused. Cf. G. M. Trevelyan, *Storia di Inghilterra*, Milan, Garzanti, 1967.

263. The English Bill of Rights of 1689 is an Act of the English Parliament and is a fundamental document which asserts the subject’s right to petition the monarch and allows citizens to bear arms for their defence. Article 10 completes the provisions of the 1679 Habeas Corpus act by protecting defendants against excessive fines. Cf. L. G. Schworer, *Locke, Lockean Idea, and the Glorious Revolution*, in “*Journal of the History of Ideas*”, Vol. 51, No 4, University of Pennsylvania Press, 1990, pp.531-548.

264. A. de Benoist, *Au-delà des droits de l’homme. Pour défendre les libertés*, Paris, Krisis, 2004; S. Moyn, *The Last Utopia: Human Rights in History*, Cambridge, Harvard University Press, 2010.

## 2. LEGAL TOOLS TO UPHOLD RIGHTS

Civil and political rights are upheld in several international instruments and the *Universal Declaration of Human Rights*<sup>265</sup> (1948) was the first document to have established *inviolable* and *inalienable* human rights. However, this declaration is not legally binding because it merely contains a series of principles with which States undertake to comply. These rights are also upheld in the *International Pact on Economic, Social and Cultural Rights*<sup>266</sup> which, like the *International Pact on Economic, Social and Cultural Rights*, was adopted in 1966 and came into force in 1976<sup>267</sup>. Furthermore, the United Nations has adopted conventions and declarations on the protection of human rights. The most widely ratified are:

- the [International Convention on the Elimination of All Forms of Racial Discrimination](#) (1965),
- the [International Convention on the Elimination of All Forms of Discrimination against Women](#) (1979);
- the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)<sup>268</sup> (1984) and the [Convention on Children's Rights](#) (1989).

The *International Covenant on Civil and Political Rights* is a formal commitment. This means that the signatory State agrees to respect all rights contained in this instrument and makes this commitment to the international community and to its citizens. Furthermore, the State may express reservations about certain standards in the sense that it commits itself under the treaty, but is not in a position to comply fully. We always find reservations in international documents about the protection of human rights, unless the text to be signed prohibits this and the reservations do not run counter to the object and purpose of the treaty<sup>269</sup>.

## 3. THE RIGHT TO LIFE

The right to life is a universally recognised right for all humans but is defined differently depending on time and place. Firstly, the right to life is said to be the first individual right, and

265. Cf. R. Cassin, *La Déclaration universelle et la mise en œuvre des droits de l'homme* de 1948, Académie des sciences morales et politiques, Typographie de Firmin-Didot et cie, Paris, 1958; A. Eide, *The Universal Declaration of Human Rights. A Commentary*, Scandinavian University Press, Oslo; A. Verdoodt, *Naissance et signification de la Déclaration universelle des droits de l'homme*, Paris, Nauwelaerts, 1968.

266. L. Hennebel, [La jurisprudence du Comité des droits de l'homme des Nations Unies: International Covenant on Civil and Political Rights](#), Brussels, Bruylant, 2007.

267. Cf. M. Bossuyt, *La distinction juridique entre les droits civils et politiques et les droits économique, sociaux et culturels*, in "Revue des droits de l'homme", No 8, 1975, p.793; J. Mourgeon, *Les pactes internationaux relatifs aux droits de l'homme*, in "Annuaire française de droit international", No 13 (1), 1967, p. 326-363.

268. Cf. J. Sarah et al., *Quel recours pour les victimes de la torture? Guide sur les mécanismes de communications individuelles des organes de traités des Nations unies*, Geneva, World Organisation Against Torture, 2005.

269. Cf. M. Aragon Reyes, *La tutela diretta dei diritti fondamentali*, in G. Rolla, *Tecniche di garanzia dei diritti fondamentali*, Torino, 2001; M. Cappelletti, *La giurisdizione costituzionale delle libertà*, Giuffrè, Milan, 1955; P. Caretti, *I diritti fondamentali. Libertà e diritti sociali*, Turin, 2002; R. Ciraolo, *La tutela dei diritti fondamentali nelle Comunità europee*, in Nomos, 1993, II; L. P. Comoglio, *Diritti fondamentali e garanzie processuali comuni nella prospettiva dell'Unione europea*, in Foro it., 1994; G. Conetti, *La carta dei diritti fondamentali dell'unione europea*, in Stadium juris, 2001; Oestreich G. (G. Gozzi, ed.), *Storia dei diritti umani e delle libertà fondamentali*, Rome-Bari, Laterza, 2004.



protects the human being and the individual's bodily integrity and dignity<sup>270</sup>. It is a fundamental right that overrides all other existing rights and is ontological in nature. Clearly, if there is no life, all other rights have no meaning and also this right depends on the existence of other rights.

Originally, the right to life meant the right not to be killed and was merely the condemnation of homicide, which supported the formal prohibition on deliberately causing a person's death. However, currently, by extension, the right to life also refers to a collection of rights covering human beings in general and human beings in particular which encompass a variety of prohibitions including: the death penalty, war, abortion, euthanasia, suicide, the right to bear arms, etc.<sup>271</sup>.

Historically, in 1776, the *United States Declaration of Independence* stated that all men are created with inalienable rights and that among these are life, liberty and the pursuit of happiness. The first declarations of rights do not explicitly recognise the right to life. Only at the end of the Second World War, following atrocities committed against human dignity, did the right to life start to be expressly proclaimed in national Constitutions.

In 1948, the *Universal Declaration of Human Rights* (UDHR), adopted by the General Assembly of the United Nations, declared, in Article 3: "Everyone has the right to life, liberty and security of person" In 1950, the *European Convention on Human Rights* (ECHR) was adopted by the Council of Europe and Article 2, entitled "right to life", stipulates that "everyone's life shall be protected by the law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." In 1966, the *International Covenant on Civil and Political Rights* stipulated in Article 6(1) that: "every human being has the inherent right to life. No one shall be arbitrarily deprived of his life". The ECHR, in paragraph 72, defines the right to life as "an inalienable attribute of human beings and forms the supreme value in the hierarchy of human rights at international level". Finally, in 1986, the *African Charter on Human Rights and Peoples*<sup>272</sup>, adopted by the Assembly of Heads of State and Governments of the Organisation of African Unity (OAU) and ratified by all the Member States of the African Union, declares, in Article 4, that: "human beings are inviolable". Every human being shall be entitled to respect for his life in the integrity of his person. No one may be arbitrarily deprived of this right".

Generally speaking, there is currently an extremely complex and unfortunately controversial debate on the right to life which raises issues about the dual, positive and negative, nature of this right<sup>273</sup>. This gives rise to questions such as: does the right to life include the right to put an end to one's own life? Can individuals put an end to their own lives? Can individuals ask the State to help them die? Is the right to die the converse of the right to life? Is euthanasia acceptable? Is the right to live is also the right to have the resources and the opportunities to live? Does the unborn child benefit from the right to life? And therefore, in the case of a voluntary termination of pregnancy, is the woman harming the life of a child who has been conceived but not yet born?<sup>274</sup>

270. Cf. A. Cassese, *I diritti umani oggi*, Rome-Bari, Laterza, 2009; N. Bobbio, *L'età dei diritti*, Turin, Einaudi, 1990.

271. Cf. M. Bertrand, *The Right to Life in European Constitutional and International Case-law*, Council of Europe, Belgium, 2006; F. Freni, *Una bibliografia sul diritto alla vita*, in "Quaderni di diritto e politica ecclesiastica", No 2, August 1991, pp. 401-406.

272. The African Charter is an international document but not an adaptation of the fundamental principles of the Universal Declaration to the specificities of Africa – it places both the rights of African peoples to self-determination vis-à-vis the outside world and the duties of the individual towards the family and the State on the same level as human rights.

273. Cf. A. Puleo, *Quale giustizia per i diritti di libertà? Diritti fondamentali, effettività delle garanzie giurisdizionali e tecniche di tutela inibitoria*, Milan, Giuffrè, 2005;

274. Cf. Balestrero, E., *Il diritto alla vita prenatale nell'ordinamento internazionale*, Bologna, Studio Domenicano, 1991, A. D'Aloia (ed.), *Il diritto alla fine delle vita. Principi, decisioni, casi*, Edizioni Scientifiche Italiane, Naples, 2012.

### 3.1. THE PROTECTION OF THE LIVES OF BEINGS YET TO BE BORN

International instruments do not determine explicitly the moment from which the protection of life begins and no international human rights body deems the right to life to be the protection of the lives of beings yet to be born<sup>275</sup>. Human embryos and fetuses are consequently, for the moment, excluded from any protection and conventionally established human rights bodies leave States a large degree of discretion which is difficult to understand.

At regional level, the only instrument to explicitly provide a right to abortion in certain circumstances is the optional Protocol on the Rights of Women in Africa (Art. 14.2.c). At the Inter-American level, the Inter-American Commission on Human Rights (IACHR) does not exclude public provision of safe and legal access to abortion (IACHR Baby Boy v. USA, Commission 6 March 1981)<sup>276</sup>, and exhorts Member States to adopt measures to address violations resulting from the right to life, amongst other things.

At European level, the ECHR has never set out legislation on abortion and it specifies that Article 2 does not protect the life of the foetus but rather that of the pregnant woman.

According to the Supreme Court of the United States, abortion is a principle enjoyed by women and it derives from the right to privacy. The decision to bring a child into the world is such an important decision that the State cannot interfere in this choice. The State cannot oppose a voluntary termination of pregnancy. Nevertheless, this principle is time-limited. A termination of pregnancy can only be carried out within the first 15 weeks of gestation. An exception is attached to this limit. After this 15-week period, termination is nonetheless allowed in the United States when the risk of the pregnancy to the woman's life is justified by scientific reasons.

In France, a similar situation exists: the French approach is effectively similar to the American position and deadlines take precedence over criminalisation. Nearby neighbouring countries, Belgium, the Netherlands and Great Britain have proposed legislation on terminations which is similar to that adopted by France.

In general, there is a wide degree of discretion allowed to States by universal international texts, regional texts and particularly by European texts. But there is far from uniformity at European level insofar as two different competing visions exist given the sensitive nature of the subject. The IACHR leaves States with the problem of choosing their own model depending on their ethical considerations.

### 3.2 THE CASE OF EUTHANASIA

As we mentioned above, international law does not generally offer definitions of the right to live. It should however be noted that euthanasia is essentially a European concern, because this practice is, effectively, largely prohibited on all other continents<sup>277</sup>. In European case law at the present time, there is a total reluctance on the part of judges to take a position. The Court clearly prohibits active euthanasia, but it scarcely says a word on passive euthanasia.

With the Pretty case of 2002 (ECHR, 29 April 2002, Ms Pretty v. United Kingdom) the Court ruled on the controversial matter of active euthanasia. In this case, the ECHR was called to decide on a case of assisted suicide. Diane Pretty, paralysed and the victim of an incurable

275. Cf. M. Casini, *Il diritto alla vita del concepito*, Padua's, 2001; M. L. Di Pietro, *Quale statuto per l'embrione umano?*, in *Dir. Fam.*, 1990, p. 851 et seq.; C. Casini, *Lo stato giuridico dell'embrione*, in *"Iustitia"*, 2001, p. 557 et seq.; C.M. Mazzoni, *I diritti dell'embrione e del feto nel diritto privato. Rapporto sull'Italia*, in *"Nuova giur. civ."*, 2002, II p. 119 et seq.; R., Lanzillo, *Fecondazione artificiale, locazione dell'utero, Diritti dell'embrione*, in *Corr. Giur.* 1988; S. Morelli and M. R. Morelli, *Il diritto alla identità personale del nato da fecondazione eterologa al duplice vaglio della Corte costituzionale e della Cassazione*; in *Giur. it*, 2000, p. 275 et seq.; P. Morozzo della Rocca, *Il danno morale al concepito, ovvero il "già e non ancora" nella responsabilità civile*, in *Corr. giur.*, 2001.

276. Annual report of the Inter-American commission on Human Rights, [Resolution 23/81, case 2141](#).

277. M. Cavina, *Andarsene al momento giusto: culture dell'eutanasia nella storia europea*, Bologna, Il Mulino, 2005; S. Spinsanti and F. Petrella, *Scelte etiche ed eutanasia*, Milan, Edizioni Paoline, 2003.

degenerative disease but in full possession of her intellectual faculties, cited a violation of rights guaranteed under Articles 2, 3, 8 9 and 14 of the Convention by the “Director of Public Prosecutions” for having refused to offer immunity to her husband if he helped her to kill herself. For the ECHR, the refusal by the English courts to grant this protection does not violate the rights guaranteed by the Convention. The ECHR prohibits assisted suicide or active euthanasia both at the hand of a third party and with the assistance of a public authority.

Very recently, in Italy, in the case of Elena Englaro, the Court would appear, almost tacitly, to allow passive euthanasia. In 1992, this young woman was in a coma after an accident. Suddenly her health condition developed into a vegetative state. In 1999, her family launched internal legal proceedings to withdraw artificial nutrition and hydration from their daughter. At the end of lengthy proceedings, in June 2008, the father and guardian obtained permission from the Italian courts to withdraw artificial nutrition and hydration from his daughter, partially based on her vegetative state and partly on a clear mandate, based on clear, consistent and persuasive proof of the will of the patient inferred from an analysis of her lifestyle, beliefs and conception of personal dignity before she lost consciousness. In December, opponents of euthanasia referred to the European Court (ECHR, *Ada Rossi et al. v. Italy*, 16 December 2008) arguing that the Italian decision would harm the position of people who found themselves in these circumstances. The claimants invoked, in particular, a violation of the right to life of persons in a vegetative state (Article 2). The Court stopped at the conditions of admissibility and declared the claim inadmissible.

The question of passive euthanasia therefore remains – does the ECHR authorise this practice implicitly? Or does it note that it is neither prohibited nor guaranteed by the Convention. Once again, as in the case of terminations, the European judge leaves the States a very wide degree of discretion.

In terms of domestic law, and more particularly constitutional law, alongside individual progressive positions, the attitude of European legislators is every bit as ambiguous as it is at European level. Belgium and Holland are two of the rare countries which dare to tackle this problematic practice by offering regulations and thereby setting themselves in opposition to the traditional, conservative position defended by most European countries, including Spain and France.

## 4. GENOCIDE

To understand the origins of the term genocide, we should go back to Raphael Lemkin, a professor of American law of Polish-Jewish origin, who mentioned genocide for the first time in his book, *Axis Rule in Occupied Europe*, in 1944, to define the crimes perpetrated by the Young Turks of the Ottoman Empire against the Armenian community during the First World War. According to Lemkin’s study, extermination is based on the idea of a distinction between a population considered to be superior and another considered to be inferior.

Legally, the term genocide should be understood to be part of the expression “atrocities crimes” which covers three different international crimes: i) genocide; ii) crimes against humanity; and iii) war crimes<sup>278</sup>. In international law, genocide is understood to be a crime committed against the members of the national, ethnic, racial or religious group<sup>279</sup>. Although the victims of the crimes are individuals, they are targeted on the grounds of their real or perceived membership of one of these groups.

The crime of genocide is specifically defined in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, of 1948 and genocide has acquired the value of a

278. Cf. P. Currant, *Les crimes contre l’humanité dans le statut de la Cour pénale internationale*, Brussels, Bruylant, 2006; Peyro Llopis Ana, *La compétence universelle en matière de crimes contre l’humanité*, Brussels, Bruylant, 2003; M. Flores (ed.), *Storia, verità, giustizia: i crimini del XX secolo*, Milan, Mondadori, 2001.

279. United Nations High Commissioner, the [Convention on the Prevention and Punishment of the Crime of Genocide](#) (1948); United Nations High Commission, [Framework of Analysis for Atrocity Crimes. A Tool for Prevention](#) (2014)

standard in customary international law<sup>280</sup>. *This definition has been used in other instruments of international law: Article 6 of the Rome Statute of the International Criminal Court, 1998; in paragraph 2 of Article 4 of the Statute of the International Criminal Tribunal for the former Yugoslavia and in paragraph 2 of Article 2 of the Statute of the International Criminal Tribunal for Rwanda.*

Article 7 of the [Rome Statute](#) provides a list of crimes defined as crimes against humanity:

“For the purpose of this Statute “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with a knowledge of the attack:

- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer of population;
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity;
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious or gender grounds;
- Enforced disappearance of persons;
- The crime of apartheid;
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

The responsibilities incumbent on States involve the obligation not only to punish but also to prevent criminal atrocities. The obligation to prevent established by the Convention on the Prevention and Punishment of the Crime of Genocide has acquired the value of a rule in customary international law, in other words, all States are bound by it, whether they have ratified the Convention or not. The obligation to “respect and ensure respect for international humanitarian law”, as laid down in Common Article 1 to the Geneva Conventions, is also deemed to be a rule in customary international law. On 27 February 2007, the International Court of Justice, in a major halt to the affair relating to the application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), indicated that the obligation “to prevent” under the Convention on the Prevention and Punishment of the Crime of Genocide imposes an obligation which is not necessarily territorially limited.

After the massacres of Armenia, Auschwitz, Rwanda, East Timor and Bosnia and Herzegovina, we all share the responsibility of asking ourselves what we can do to protect populations against the most serious international crimes (genocide, crimes against humanity, war crimes and ethnic cleansing) which continue to be perpetrated in many places throughout the world<sup>281</sup>. We must prevent danger, promote the action of decency against these criminal atrocities, improve monitoring and early-warning mechanisms and help Member States to

280. Other definitions of crimes against humanity can be found in the *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 and the *Geneva Conventions* of 1949, and their *Additional Protocols* of 1977.

281. Cf. W. Charny Israel (ed.), *Livre noir de l'humanité. Encyclopédie mondiale des génocides*, Toulouse, Publ. Américaine 1999, 2001; Bruneteau Bernard, *Le siècle des génocides: Violences, massacres et processus génocidaires de l'Arménie au Rwanda*, Paris, Armand Colin, 2004.

identify gaps in their measures and strategies for preventing atrocities. We are resolved to honour the promise of “Never again!” and draw lessons from the failures of the past, and, in practice, place human rights, the protection of populations and the prevention of criminal atrocities at the centre of our action.

There will be a greater likelihood of avoiding these crimes if we can identify risk factors very early on. The UN Special Advisers on the Prevention of Genocide and the Responsibility to Protect work closely to promote national and international initiatives to protect populations against criminal atrocities.

## 5. EXTRAJUDICIAL OR SUMMARY EXECUTION

An extrajudicial or summary execution is an assassination in which an individual charged, accused or suspected of criminal activities is killed. In most occasions, this practice occurs at the place and moment of capture. For example, troops facing hostile groups on the battlefield have used their position of strength to kill soldiers and civilians, without fair trial<sup>282</sup>. These summary executions are consequently serious violations of indecipherable and unverifiable rights. Summary executions are frequently used in civil wars, guerrilla actions, by dictatorships or death squadrons to eliminate adversaries or to create psychological terror.

During conflict, the winning side frequently carries out the summary execution of enemies who surrender instead of treating them as prisoners of war and handing them over to military police units, in line with international law.

The perpetrators of these executions often escape all pursuit as these excesses are tolerated by superior officers if they are not effectively the result of the direct orders: soldiers are trained to hate the enemy and to try and kill as many of them as possible. These practices take place without allowing a fair preliminary trial to take place and the time between capture and execution is extremely short. Furthermore, it is not possible to launch an enquiry and that is why extrajudicial executions are deemed to be unjustified murder or assassination.

Summary executions are regularly committed by expeditious means including hanging, firearms, knifing and stoning. However, in all cases, it is possible to identify factors favouring summary executions, for example:

- difficult fighting conditions as they do not have sufficient water or supplies;
- combatants who are driven by opposing ideologies;
- winners who refuse the losers the status of combatant and consider them to be criminals or terrorists.

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282. Cf. C. Mandiroli and A. Carratta, *L'esecuzione forzata. I procedimenti sommari, cautelari e possessori. Il nuovo procedimento sommario cognitorio. La giurisdizione volontaria*, Turin, Giappichelli, 2011; C. Meloni, *Fare la guerra con omicidi mirati tra questioni morali e aspetti giuridici*; in “Rivista il Mulino”, Vol. 469, No 5 September-October 2013, pp. 852-860. See also, United Nations, [Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions](#); United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and protocol for investigations, 1991.

For protection against extrajudicial summary executions, we should look to the [Geneva Convention relative to the Treatment of Prisoners of War](#) adopted on 12 August 1949 which protects prisoners of war and prohibits all summary executions. The mandate of the Special Rapporteur on summary or arbitrary executions, set up by resolution 1982/35 of the Economic and Social Council, covers all countries whether they have ratified the relevant international conventions or not. Furthermore, we should bear in mind the Geneva Conventions and their Additional Protocols<sup>283</sup> which contain rules which set limits to the barbarism of war.

## 6. PROHIBITION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT

International and European texts referring to the notion of torture habitually use the expression “torture and inhuman or degrading treatment”. However, the distinction between the notion of torture and that of inhuman or degrading treatment is not particularly clear, evident or precise<sup>284</sup>.

In case law on torture, a distinction is made between its essential components, including:

- severe physical or mental pain or suffering;
- the intentional or deliberate infliction of this pain;
- the pursuit of a precise aim, such as obtaining information;
- and the participation of a person acting in an official capacity.

However, when we refer to degrading treatment, it could be said that:

- the pain or suffering does not have the same degree of intensity as in torture;
- its purpose is not precisely to inflict acts of torture, indeed there is no precise aim;
- and there is no clear participation of a person acting in an official capacity.

International law and European law have not drawn up exhaustive lists of acts of torture but instead determine thresholds of severity of suffering based on particular circumstances such as: the duration of the acts, their physical and psychological effects, the sex, age and health of the victim. In any case, the prohibition of torture is absolute and admits of strictly no exceptions.

Internationally, the [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), crafted by the United Nations, defines torture and other cruel, inhuman or degrading treatment or punishment, in Article 1, as: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.

283. The first Geneva Convention protects wounded and sick soldiers on land during war; the second protects wounded, sick and shipwrecked military personnel at sea during war; the third applies to prisoners of war and the fourth affords protection to civilians, including in occupied territory. Of particular note is Article 3, common to all four Conventions, which requires all persons in the hands of the enemy without distinction to be treated humanely. Murder, mutilation, torture, cruel, humiliating and degrading treatment and unfair trials are prohibited.

284. P. Garofalo, S. Fleres, P. Marcenaro, *Diritti umani e tortura: potenza e prepotenza dello stato democratico*, Troina, Città Aperta, 2009; M. Lalatta Costerbosa, *Per una storia critica della tortura*, in *Materiali per una storia della cultura giuridica*, No 1, in “Rivista il Mulino”, 2011, pp. 3-34; L. Zafato and S. Pinton, *La tortura del nuovo millennio. La relazione del diritto*, Milan, Cedam, 2010.



The authors of this text evidently wish to give this expression a broad meaning so as to provide maximum protection against physical and psychological violence.

In Europe, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, a body created by the Council of Europe (CE) seeks to prevent cases of torture and other abuses on the territories of those States which have signed the [European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment](#)<sup>285</sup> Article 3 of the European Convention on Human Rights clearly prohibits the use of torture but provides no clear definition thereof and states that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Furthermore, the European Court of Human Rights makes a distinction between the notion of torture and that of inhuman or degrading treatment or punishment, without providing any official definition. It is possible, for the European Court of Human Rights case law to define inhuman treatment as treatment not inflicted directly nor with a precise purpose but rather as a result of the situation in which the victim is immersed.

## 7. CONDITIONS OF DETENTION

Generally speaking, in all countries in the world, conditions of detention in prisons are deemed to be terrible. In 1957, a resolution of the United Nations set minimum rules for the treatment of prisoners which was adopted by the first United Nations Congress held in Geneva in 1955 and approved by the Economic and Social Council in resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

Nowadays, according to the *World Prison Population List* (11th edition), more than 10.35 million persons are detained in prisons throughout the world. Figures for Eritrea, Somalia and the Democratic People’s Republic of Korea are not available and those for China and Guinea-Bissau are estimates. There are more than 2.2 million prisoners in the United States; more than 1.65 million in China; 640,000 in the Russian Federation; 607,000 in Brazil; 418,000 in India; 311,000 in Thailand; 255,000 in Brazil and 225,000 in Iran. The countries with the highest detention rates are the Seychelles (799/100,000), followed by the United States (698), St Kitts and Nevis (607, Turkmenistan (583), the US Virgin Islands (542), Cuba (510), El Salvador (492), one (469), Thailand (461), Belize (449), Russian Federation (445), Rwanda (434) and the British Virgin Islands (425).<sup>286</sup>

If we just take the case of California, we can see that most of its 33 prisons are overcrowded. They have a reception capacity of 100,000 prisoners but currently hold more than 170,000. In 1971, the riot at Attica prison, in New York State, became one of the most significant protest movements against prison conditions. The riot started with the anger whipped up by the killing of George Jackson and quickly led to questions about prison conditions.

A number of different organisations and associations combatting brutality in prisons were set up to respond to prison violence. International Prison Watch ([Observatoire International des Prisons](#) (OIP)) was created in Lyon in 1990 with the aim of promoting respect for prisoners in international instruments on human rights. This organisation was granted consultative status to the UN and gradually started to create regional and national branches. FARAPEJ, a Federation of French associations working in prisons called [Fédération des Associations Réflexion Action Prison et Justice](#) is a French group, created on 6 April 1991, with the aim of bringing these associations into a Federation with a view to improving, the working of the courts and limiting the destabilising effects of prison. [Ban Public](#) it is another French association which claims to be non-religious, not dogmatic and apolitical, which seeks to improve communication on issues relating to imprisonment and remand and help the reintegration of prisoners. It is made up of former prisoners (men and women), journalists,

285. The Convention was adopted in 1987, came into force in 1989 and was ratified by 47 Member States of the Council of Europe.

286. For further statistics, visit: [http://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_prison\\_population\\_list\\_11th\\_edition.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_prison_population_list_11th_edition.pdf)



university staff, artists, associations and citizens. Just Detention is an association which combats violence, particularly sexual violence in prison.

In August 2003, an article in *Harper's Magazine* estimated that 20-40% of the entire American prison population was infected with hepatitis C, and, in the same year, in a survey by *Prison Journal* of 1788 prisoners, 20% of the male prisoners said that they had been forced to have sexual intercourse during their detention and 7% said that they had been raped. The importance of sexual aggression in prison, including when prisoners are held on remand, led to the adoption, in 2003, of the *Prison Rape Elimination Act*.

## 8. THE PROHIBITION OF SLAVERY

The definition of slavery is controversial and disagreements and tensions have always existed regarding the strategies adopted to eliminate this practice<sup>287</sup>. This debate about slavery essentially revolves around two main points. Firstly, disagreement exists over which practices can be described as slavery and how these practices can be eliminated. Secondly, these definitions are often accompanied by State obligations, namely the application of certain remedial action.

It should be noted that, in case law, slavery, slavery-like practices and forced labour have different definitions, such as:

- “war crimes” when these crimes are committed by a belligerent against nationals of another belligerent;
- “crimes against humanity” when these misdeeds are committed by public officials against any individual, independently of circumstance and nationality;
- “ordinary international crimes” when these practices are committed by public officials or State affiliates against any person.

Historically, the Declaration relating to the Universal Abolition of the Slave Trade, adopted in 1815, was the first international instrument to condemn slavery. The abolitionist movement was born of a determination to put an end to the transatlantic trade in African slaves and to free prisoners in the colonies of the European countries and in the United States. During the 19th century, numerous multilateral and bilateral agreements approved provisions which prohibited these practices both in war time and in times of peace. It is estimated that, between 1815 and 1957, more than 300 international instruments were implemented to abolish slavery, none of which has been completely effective<sup>288</sup>.

The first definition of slavery contained in an international agreement can be found in the [Slavery Convention](#), adopted by the League of Nations on 25 September 1926. In paragraph 1, Article 1, slavery is defined as “the status or condition of the person over whom any or all of the powers attaching to the right of ownership are exercised”. In the same Article, in paragraph 2, the slave trade is defined as “all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him, and, in general, every act of trade or transport in slaves”.

Article 5 makes a distinction between forced labour and slavery, stipulating that “compulsory or forced labour may only be exacted for public purposes” and obliging Member States “to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery”.

287. H. Friedrich August, *La via della schiavitù*, Milan, Rusconi, 1995; S. Aprile, *I delitti contro la personalità individuale: schiavitù e sfruttamento dei minori*, Padua, Cedam, 2006.

288. Cf. G. Venegoni, *Ribellioni e schiavitù africane nell'Atlantico secondo Marcus Rediker*, in “Altre Modernità. Rivista di studi letterari e culturali”, 2011, No 6, pp. 298-303; G. Fiume, *La schiavitù nel Mediterraneo*, Bologna, Il Mulino, 2001; C. Meillassoux and A. Triulzi, *Antropologia della schiavitù: il parto del guerriero e del mercante*, Milan, Mursia, 1992.

Although the Slavery Convention prohibited slavery and practices analogous to slavery, it did not make any provisions for actions which would enable the extent of slavery in the Member States to be assessed or for the creation of an international body to examine allegations of infringements. Despite these shortcomings, the League of Nations encouraged the application of laws abolishing slavery in countries such as Nepal (1926) and Burma (1928). In 1931, the League of Nations created expert committees to consider issues relating to slavery, but the work of these committees ceased on the outbreak of the Second World War.

The [Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery](#) of 1956 went further than the 1926 Document and its scope of application effectively became wider. Effectively, it obliged Member States to abolish:

- **debt bondage**, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;
- **serfdom**, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;
- **any institution or practice** whereby:
  1. A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group;
  2. The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise;
  3. A woman on the death of her husband is liable to be inherited by another person;
- **any institution or practice** whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

The definition of slavery, put forward in the 1926 Convention and in the 1956 Supplementary Convention, has remained unchanged to this day<sup>289</sup>. On a number of occasions, the United Nations has reformulated this definition but its content has not changed a great deal since 1926

## 9. LIBERTY AND SECURITY OF PERSON

Personal liberty is a basic entitlement and deprivation of this liberty is likely to have a direct negative effect on the enjoyment of numerous other rights, ranging from respect for private and family life to freedom of expression, assembly and association and freedom of movement<sup>290</sup>. Each deprivation of liberty invariably puts the affected person in an extremely

289. Cf. P. Scevi, *Nuove schiavitù e diritto penale*, Milan, Giuffrè, 2014; L. Milazzo, *Cecità morale e schiavitù naturale nel discorso giuridico della Conquista*, in "Ragion pratica", Vol. 35, No 2, December 2010, pp. 345-360.

290. Cf. P. Caretti and G. Tarli Barbieri, *I diritti fondamentali: libertà e diritti sociali*, Turin, Giappichelli, 2001; Z. Bauman, *Intervista sull'identità*, Bari-Rome, 2006; 2001; A. De Cupis, *Il diritto all'identità personale*, Milan, 1949, F. Modugno, *I nuovi diritti nella giurisprudenza costituzionale*, Turin, 1995.

## Convention for the Protection of Human Rights and Fundamental Freedoms

### Article 5 – Right to liberty and security

1. Everyone has the right to life, liberty and security of person. "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- the lawful detention of a person after conviction by a competent court;
- the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition

vulnerable position and exposes him/her to several risks. Justice must therefore always ensure that all detentions are objectively justified, strictly necessary and do not last longer than is absolutely essential so as not to render this guarantee of freedom meaningless.

Under the rule of law, individuals are citizens and must respect the law to become a valued player in security and it is important to remain righteous, to respect the ethics of criminal justice and the rule of law. However, justice cannot be associated to practices based on fear and coercion. Security and the search for security should not become political responses to contemporary issues. The rule of law, which seeks to reconcile freedoms and security, must not be turned into a police state that sacrifices freedoms to a false sense of security. The tasks of justice are not the same as those of the police, who are responsible for maintaining order. Our penal code must not become dehumanised into a security code.

Over recent decades, new technologies have heightened the need to control everything: we are observed, captured and analysed by intrusive systems which hound our personal privacy. We are witnessing types of surveillance which change our view of traditional police surveillance. We go beyond simply seeking out offenders in controlling the entire population in the hope of preventing crimes, attacks and disruption. Surveillance,

monitoring and grading techniques use data-processing methods which lead to definitions of average behaviours, activities, physical appearance. Any deviations from these means are quickly interpreted less as difference than as deviance. What does "security of person" mean? What risks are we really seeking to prevent or cover? Has absolute security not become a form of coercion to which we should sacrifice our freedoms.

Obviously, the term "security of person" should be understood in its physical meaning, entailing an obligation on the State to ensure the physical protection of an individual against attacks and the importance of this safeguard was underlined by the Judges in Strasbourg as part of their jurisprudence on Article 5 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. Paragraph 1 of Article 5 of the Convention defines the right "to the presumption of liberty" as a right of which no one shall be deprived save in exceptional circumstances. It states that: "Everyone has the right to liberty and security of person" and that "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law". Furthermore, this Article requires that each deprivation of liberty is carried out "with a procedure prescribed by law".

## 10. FORCED DISAPPEARANCE

An individual is a victim of a forced disappearance when he or she is arrested, detained or abducted by the State or by representatives operating on behalf of the State, who refuse to reveal where this person is.

Inter-American Convention on Forced Disappearance of Persons, adopted at Belém do Pará, Brazil, on 9 June 1994.

The Member States of the Organisation of American States

- **Disturbed** by the persistence of the forced disappearance of persons;
- **Reaffirming** that the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in this Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights;
- **Considering that the forced disappearance of persons is an affront** to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States;
- **Considering that the forced disappearance of persons violates numerous non-derogable and essential** human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights;
- **Recalling** that the international protection of human rights is in the form of a convention reinforcing or complementing the protection provided by domestic law and is based upon the attributes of the human personality;
- **Reaffirming** that the systematic practice of the forced disappearance of persons constitutes a crime against humanity;
- **Hoping** that this Convention may help to prevent, punish, and eliminate the forced disappearance of persons in the Hemisphere and make a decisive contribution to the protection of human rights and the rule of law,

Resolve to adopt a document with 22 articles on the forced disappearance of persons.

The legal term “forced disappearance” is ambiguous but historically, and in reality, it is clearer: some persons literally disappear from society and the lives of their loved ones when public officials, or persons acting with the consent of the State, arrest them in the street or in their homes and refuse to say where they are. Often, victims are tortured and constantly threatened with death, they are never freed and do not know what the future holds for them. They know that their families have no idea where they are held and that it is very probable that no one will come to help them. Even if they escape death and are released, they retain physical and psychological scars throughout their lives. The insecurity and fear generated by forced disappearances not only affect the direct victims and their loved ones but also different communities and civil society. This is inevitably a global problem and a crime covered by international law.

Forced disappearances are frequently used to sow terror in society and are particularly commonly used by military dictatorships to intimidate their political opponents.

Each forced disappearance violates a series of human rights, including:

- the right to security and dignity;
- the right not to be subjected to torture or other cruel, inhuman or degrading treatment for punishments;
- right to humane detention conditions;
- right to a legal personality;
- right to a fair trial;
- right to a family life;
- right to a life (when the disappeared person has been killed or it is not known what has become of them).

If the government is unaware of where certain persons are held prisoner, it should make greater efforts to find out. If it finds them, it should release them and ensure their security, or provide information if they are dead.

Governments must:

- investigate and prosecute the alleged perpetrators, with a fair trial;
- Legislate so that the *International Disappearances Convention*<sup>291</sup> is transposed into domestic law;
- apply the *International Disappearances Convention* and recognise the competence of the Committee on Forced Disappearances;
- honour their commitments under international law;
- ensure that victims and persons who have lost a loved one receive reparation – compensation, rehabilitation, restitution and the guarantee that it will not be repeated ever again.

The parents and friends of persons with disappeared who do not know whether their mother or father, son or daughter are still alive. Who do not know where they are held or how they are being treated. The search for the truth places the entire family in danger and loved ones are exposed to the risk of threats, persecution and violence. Furthermore, when a family member disappears, the financial security of the family unit disintegrates given that generally the disappeared person main breadwinner for the family. The situation may be aggravated by domestic laws which do not allow benefit to be given without a death certificate. They do not know whether their loved one will return one day and suffer from anxiety and stress<sup>292</sup>.

## 11. PROLONGED SECRET DETENTION

Secret detention consists of depriving a detainee of all contact with the outside world, particularly with his or her family, lawyers, judicial authorities and doctors. The use of secret detention breaches basic human rights and promotes the use of ill treatment, such as torture. Prolonged secret detention becomes a violation of human rights because, during the period of detention, many other rights are frequently violated: the right to be brought before

291. In 2010, the International Disappearances Convention came into force and every year Amnesty International supporters send personal letters to families or make appeals to governments.

292. N. Napolitano, "Extraordinary renditions", *tortura, sparizioni forzate e "diritto alla verità": alcune riflessioni sul caso "El-Masri"*, in "Diritti umani e diritto internazionale", Vol. 8, No 2, May-August 2013, pp. 331-364; A. Marchesi, *Diritti umani e Nazioni Unite. Diritti, obblighi e garanzie*, Milano, Franco Angeli, 2007.

a judge; the right to counsel; the right to be treated with humanity and dignity, and the right not to be subjected to torture or other cruel, inhuman or degrading treatment.

Throughout the world, there are many cases of this type of behaviour. For example, in Vietnam, Article 58 of the *Criminal Procedure Code* provides for the suspension of the assistance of a defence counsel in cases that include accusations of infringing national security right up to termination of investigation. This clearly breaches the right to consult counsel provided for under international human rights legislation, and deprives victims of essential protection. However, United Nations forms of protection, for persons subject to detention or imprisonment, provide that any individual placed in detention may not be deprived of communicating with his or her counsel or family for more than a few days.

In another case, in Tunisia, persons arrested on the allegation of having participated in terrorist-related misdeeds, and indeed returned to Tunisia by other countries, were kept in prolonged secret detention by officials from the State Security Division. During the period of imprisonment, which lasted for weeks or months, the authorities refused to recognise that the person was a prisoner or to issue any information about the place or conditions of detention.

The case files for these persons rarely contained any document mentioning their return. Loved ones and lawyers who approached the Ministry of the Interior to obtain clearer information, stated that the authorities had refused to provide any information such as grounds for arrest or place of detention. Arrest dates were frequently falsified by law enforcement officers, to suggest that the person was arrested several days later than the real date. This is how the security services were able to keep individuals in illegal detention for several weeks, while giving people to believe that they were acting lawfully.

## 12. SECRET DETENTION CENTRES

Secret detention centres are not normal detention centres or places of deprivation of liberty such as prisons, internment centres and detention centres for illegal immigrants, because they escape the control of the authorities and their existence is not officially recognised, despite numerous witness statements.

Today, the case of America is one of the most significant because, as part of the “war on terror”, the United States of America created the Abu Ghraib camp to imprison foreigners captured in Afghanistan and Iraq without recognising their status as prisoners of war, common-law prisoners or political prisoners, but instead creating a new status of “enemy combatant”.

The secret prisons of the *Central Intelligence Agency* (CIA) are “clandestine prisons” which can be found in different countries throughout the world: Europe, the Middle East and Asia. Amnesty International, which suspected their existence, spoke of a “gulag archipelago” in its 2005 report. In January 2006, Dick Marty, a member of the Swiss Council of States<sup>293</sup>, released a pre-report commissioned by the Council of Europe which established that around a hundred persons had been abducted by the CIA and transferred to secret detention centres or sent to Middle Eastern or Asian countries as part of procedures known as “extraordinary rendition”.

On 6 April 2006, President George W Bush recognised for the first time the existence of secret CIA prisons outside the United States and implicitly recognised that harsh interrogation methods were used there. On 17 October 2006, the US President signed and promulgated the [Military Commissions Act](#), authorising harsh interrogation techniques against terrorist suspects, their detention in secret prisons abroad and trial by military commission.

293. Dick Marty was a member of the Parliamentary Assembly of the Council of Europe and in 2005 he was appointed to lead an investigation into alleged CIA secret prisons. In a report dated January 2006, he indicates the existence of a system for outsourcing and subcontracting torture. For further information see Dick Marty’s report, [Secret detention and illegal transfers of detainees involving Council of Europe member state: second report](#), Council of Europe, June, 2007.



Torture and cruel and degrading treatment during interrogation were formally prohibited, nonetheless leaving it to the President to specify the interrogation methods which would be used under the Geneva Conventions. This law authorised the creation of special military commissions, with a view to trying some of the detainees captured in the war against terror. It introduced the term “enemy combatant” for an individual suspected of having supported terrorists engaged in action against the United States.

This law came under fierce criticism from NGOs because it constituted one of the worst violations of individual liberties ever promulgated in American history. The President could, with the approval of Congress, detain persons indefinitely without charge and authorise trials which could lead to a death penalty for the individuals based on witness statements obtained by force.

In October 2006, the Council of Europe decided to open an investigation to understand what was really going on in the secret CIA prisons and, in a report published on 8 June 2007, Dick Marty stated that secret detentions and illegal movement of detainees were commonplace in Poland and Romania.

In January 2009<sup>294</sup>, President Barack Obama called for the closure of these clandestine detention centres and announced that the United States were prepared to respect the Geneva Convention in the fight against terrorism. Furthermore, in 2011, the Obama administration started to interrogate important terrorists on board United States Navy battleships, this detention at sea potentially lasting for several months before the detainees were brought to justice. They were interrogated by the *High-Value Detainee Interrogation Group*, a group comprising members of the intelligence services, the armed forces and the Department of Justice. Today, despite a drop in the number of detainees, the Guantánamo centre remains open.

In 2009, in Iraq, there were more than 400 secret detention centres, some under US administration and others under joint US and Iraqi administration (the Al-Dial, Al-Karmiya and Sahat al-Usur centres). In China, there are “black jails” which are apartments, hotels, cellars or abandoned offices which have been turned into “illegal prisons” by the local authorities. *Human Rights Watch* indicates that, since 2003, numerous Chinese citizens have been secretly incarcerated with no contact with the outside world in these illegal detention centres. *Amnesty International* notes that the Tibetan amateur filmmaker Dhondup Wangchen, arrested in March 2008, spent part of his detention in a hotel in the town of Xining, which was a secret detention centre.

### 13. ARBITRARY ARREST AND DETENTION

Arbitrary arrest and detention are crimes whereby a public official deprives a person of their liberty, without just legal grounds. These practices are more frequent in dictatorships, but they can also be found in the penal codes of “democratic countries”, where they are associated with sequestration.

In cases prescribed by law, the police may be led, in the course of their duties, to deprive a person of his or her liberty and if they do not comply with legal regulations, this constitutes a case of arbitrary arrest. The author of this arbitrary arrest, a figure of public authority, has criminal liability for all his or her actions. In case law, detention does not directly constitute a violation of human rights. However, over time, international law has gradually made efforts to establish limits beyond which both administrative and judicial detention can be deemed to be arbitrary. Arbitrary detention is officially prohibited by Article 9 of the International Covenant on Civil and Political Rights.

294. The Obama administration, on 13 March 2009, declared that it had abandoned the expression “combatant enemy” and the Ministry of Justice further stated that it had submitted to a federal court new standards justifying state detention of prisoners at Guantánamo.



In December 1988, the United Nations General Assembly adopted the [Body of Principles for the Protection of Persons under Any Form of Detention or Imprisonment](#) and, in 1991, the Human Rights Commission created the Working Group on Arbitrary Detention whose mandate was to:

- to investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned, provided that no definitive decision had been taken by domestic jurisdictions and in accordance with national legislation;
- to gather information from Governments and intergovernmental and non-governmental organizations about families or their representatives;
- to present a full report to the Commission during its annual meeting.

The Working Group on Arbitrary Detention is the only non-conventional mechanism with a mandate specifically providing for examination of individual complaints. This means that its activities are founded on the principle whereby persons, wherever they are in the world, have the right to bring complaints. Its mandate specifies that the Group must carry out its task with discretion, objectivity and independence. In furtherance of this spirit, the Group has adopted the rule whereby, when a particular case concerns a country of which one of the Group members is a national, this person does not participate in the discussion.

The Working Group comprises five independent experts appointed by the President of the Human Rights Commission. The first Group meeting took place in September 1991.

## 14. CHILDREN AND ARMED CONFLICT

Thousands of girls and boys are currently fighting in armed conflict in several countries throughout the world. They are used to soldiers and participate directly in hostilities, or as porters, couriers and spies in the worst types of forced labour or for sexual purposes. Conflicts affect children disproportionately as they are victims of abductions, rape, are forcibly conscripted, killed, wounded, or exploited in a multitude of different ways.

Over the last ten years, efforts seeking to end the recruitment of minors by armed forces and groups have intensified and release and reintegration programmes have been implemented to allow children to return to normal life, and assume a positive role in their families and communities as part of local and national security programmes.

The Optional Protocol to the [Convention on the Rights of the Child](#), on the involvement of children in armed conflicts prohibits all forced or voluntary recruitment of children of under the age of 18 years by armed forces and groups. The Rome Statute of the International Criminal Court states that conscripting or enlisting children under the age of 15 years into armed forces or groups is a war crime. In 2000, since [Convention No 182 on the Worst Forms of Child Labour](#), the International Labour Office (ILO) has sought to prevent the recruitment of at-risk children, ensuring long-lasting reintegration, offering long-term opportunities to minors old enough to work and economic reintegration in the most difficult circumstances.

The International Labour Organisation (ILO) has developed capacity-building plans to train child welfare agencies and other key partners. In a UN peacekeeping mission, everyone has their role to play to shelter children from the effects of war and child protection advisers are specialists who are assigned to missions to help them protect children.

The military play a crucial role in signalling children's rights violations; the United Nations police collaborate with domestic police services to protect children; judicial affairs specialists ensure that national legislation safeguards children's rights; the head of the operation seeks to ensure that child protection is one of the priority goals of the peace process.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 110m****Subject****2.4.2.** Freedom of thought, conscience and religion**Lecturer:**

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## SUMMARY OF THE TOPIC

This subject focuses on developing the content of the right to religious freedom and on the conflicts its legal implications entail. The United Nations guidelines are followed herein by avoiding personal opinions and constructions.

1. First, freedom of religion or belief includes three aspects that are developed in this topic: the freedom to adopt, change or renounce a religion or belief as well as the freedom from coercion and the right to display one's own religion or beliefs.
  - 1.1. In relation to the first point, the most controversial aspect has been whether religious freedom covers the right to renounce or change religion or beliefs, with the Human Rights Committee deciding in favour. In any case, it is not a question that is peacefully taken on or recognised by all States.
  - 1.2. As regards freedom from coercion, it refers to the topic of proselytising using illegitimate means: violence, force, abuse of authority, psychological pressure, etc. It is also related to discrimination on the basis of religion, which may also be considered a form of indirect pressure.
  - 1.3. Finally, freedom of religion or belief not only includes the right to have beliefs in private, but to manifest them and practice them (or not) within the limits of public order. The main problems in terms of manifesting beliefs starts off when the religious manifestation or worship collides with other legal items: for example, with certain labour obligations or otherwise. Thus, the generally accepted criteria are those of weighting and proportionality among the items in conflict.

Following the outline from the United Nations, in this topic we itemize the different aspects of this manifestation of beliefs and the main norms regulating them: freedom of worship, places of worship, religious symbols, observance of holidays and days of rest, appointment of ministers of worship, teaching and materials for dissemination (including missionary

work), the parents' right to ensure the religious and moral education of their children, the legal recognition of entities, the right to communicate with individuals and communities on religious affairs on the national and international level, the right to establish and maintain charitable and humanitarian institutions, to request and receive financing and to conscientious objection.

2. Non-discrimination on the basis of religion or beliefs. In relation to non-discrimination on the basis of religion, conflicts are most of all suffered by the members of religious minorities who sometimes do not enjoy equal rights as citizens. The United Nations alerts against this, including in cases in which certain States have an official religion. Confessionality, in countries where it exists, should not turn into discrimination against citizens who profess a different religion than that of the State.

Discrimination is especially felt by the most vulnerable groups, among which the United Nations mentions women, persons deprived of their freedom, refugees, children, minorities and migrant workers.

3. Guardianship of freedom of belief is particularly complex when it clashes with that of other rights. The United Nations mentions several: freedom of expression, the right to life and liberty, prohibition of torture and other cruel, inhuman or degrading punishments or treatments.

Particularly noteworthy today is the relation between religious freedom and equality on one hand and freedom of expression on the other; specifically, the legal treatment of defamation of religion and of *hate speech*.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

### GENERAL:

- **Appreciate diversity and multiculturalism:** understand and accept social and cultural diversity as an enriching personal and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** to be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

## SPECIFIC:

- Suitable identify, interpret and apply the international, regional and national norms on cultural rights applicable to the different assumptions posed in their respective disciplines and professional areas.
- Identify the specific obligations of respect, protection and realisation of minority rights and the minimum normative content needed for their realisation and for questioning their fulfilment in a particular situation.
- Identify, analyse, argument and evaluate the critical deviations and gaps in the capability and responsibility of the minority rights-holders as well as the obligations that hinder the action or transformation of a particular situation in which those rights are being violated.
- Contrast and evaluate situations, practices, legislation, local and national policies in accordance with the legal instruments on minority rights ratified in your country, and suggest and plan out some efficient alternatives.
- Identify and apply the international and regional protection mechanisms for minority rights.
- Seek out, select and analyse information from a variety of sources (legal, social, financial, etc.). Plan and document this task appropriately.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

United Nations, Human Rights, Office of the High Commissioner, [International standards on freedom of religion or belief](#)

OSCE-ODIHR, [Guidelines for review of legislation pertaining to religion or belief](#)

[Special Rapporteur on freedom of religion or belief](#) :

- [Annual Reports](#)
- [Country visits](#)
- [Issues in Focus](#)
- [Documents](#)

Office of the High Commissioner for Human Rights: [The inclusion of religious minorities in consultative and decision-making bodies](#)

Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities [E|F|R|S|C|A](#)

Commentary on the Declaration [E|F|R|S|C|A](#)

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- [Annual Report to Congress on International Religious Freedom: written by the United States Department of State.](#)
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## LEARNING PROCESS RESULTS

At the end of the topic, the student will be able to:

- Knowing what the main United Nations documents are on this matter.
- Identifying the content of freedom of beliefs as recognised in the United Nations.
- Identifying the main obstacles to enforcement of the right that currently exist, and the justifications on which they are founded.
- Differentiating between legitimate restrictions on the right and illegitimate ones in light of the parameters of international human rights law.
- Counter arguments on unjustified restrictions on the right to religious freedom.

## METHODOLOGY

Methodology:	Teaching tools
Expository method	Reading the corresponding lesson
Problem-solving	Carry out the activity described: study one of the Reports from the United Nations Special Rapporteur.
Group discussions	As noted in the activity, present your report to the class. As noted in the activity, ask questions and raise objections to your classmates' presentations.

## DESIGNING A SYLLABUS OF LEARNING ACTIVITIES

### Activity 1:

1. Choose one of the reports from the United Nations Special Rapporteur on freedom of religion and beliefs (among the reports from the last ten years) that interests you.
2. Read the report and summarise: the problems the Rapporteur detects and the recommendations he proposes accordingly.

### Activity 2: Presentation in the classroom and debate

Each student shall briefly present his report (acting as the Rapporteur) to the class, for no more than 10 minutes. At the end, the other students shall ask questions and raise objections.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Assessment criteria
<b>Activity 1:</b> the student's personal work: reading and summarising his chosen Report.	90 minutes	
<b>Activity 2:</b> Presentation in the classroom and debate	Per student: 10 minutes of presentation followed by another 10 minutes of debate.	In addition to the individual presentation itself, the participation of the students during the question and answer and proposal period will also be assessed.



## SUBJECT 2.4.:

# 2.4.2.FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

## INTRODUCTION

### International standards on freedom of religion or belief

The main sources from the United Nations regarding the content of religious freedom are as follows:

- *Universal Declaration of Human Rights* (UDHR), Adopted and proclaimed by the General Assembly of the United Nations, 10 December 1948 (article 18).
- *International Covenant on Civil and Political Rights* (ICCPR), Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 and entered into force on 23 March 1976 (article 18).
- General Assembly *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, Resolution 36/55 of 25 November 1981.
- General Assembly *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Resolution 47/135 of 18 December 1992.
- Commission on Human Rights *Resolution on Elimination of all forms of intolerance and of discrimination based on religion or belief*, Resolution 2005/40 of 19 April 2005.
- General Comment No. 22 on The right to freedom of thought, conscience and religion (Art. 18), Human Rights Committee, 30 July 1993.

In this lesson we shall detail what these sources say regarding, first, freedom of religion or beliefs and the different aspects their legal guardianship requires as well as the existent problems. Secondly, we shall focus on equality and non-discrimination on the basis of religion and, at the end of the topic, we shall briefly refer to the conflicts between freedom of beliefs and other rights.

## 1. FREEDOM OF RELIGION OR BELIEF

Freedom of religion or beliefs, as guaranteed by the United Nations, includes the freedom to adopt, change or renounce a religion or belief. It therefore comprises immunity from coercion on religious matters and the right to manifest one's own religion and beliefs both individually and collectively, in public or in private. Below we shall develop the content of each of these three aspects, presenting for each what is prescribed in the main documents from the United Nations.

### 1.1. FREEDOM TO ADOPT, CHANGE OR RENOUNCE A RELIGION OR BELIEF

The main texts from the United Nations on this matter are the following:

#### a) UDHR

Art. 18 (1): "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief [...]."

**b) ICCPR**

Art. 18 (1): “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice [...].”

**c) 1981 Declaration of the General Assembly**

Art. 1 (1): “Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice [...].”

**d) Human Rights Committee general comment 22**

Para. 3: “Article 18 does not permit any limitations whatsoever on the freedom of thought and conscience or the freedom to have or adopt a religion or belief of one’s choice”.

Para. 5: “The Committee observes that the freedom to ‘have or to adopt’ a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one’s current religion or belief with another or to adopt atheistic views, as well as the right to retain one’s religion or belief.”

As regards the freedom to adopt, change or renounce one’s religion or beliefs, the most controversial question, as noted in the different writings of the texts, has been whether religious freedom includes the right to renounce or change one’s religion or beliefs. Even though the international texts are clear in this regard and the Committee has expressly stated its stance, it is a matter that is not taken peacefully. Especially, some States in the Islamic world do not recognise renunciation of the Muslim faith as part of the right to religious freedom. This is the reason why the writing of the International Covenant on Civil and Political Rights moved away from this point in the text of the Universal Declaration, to end up with a more ambiguous wording that would be acceptable to the greatest possible number of States.

Apostasy (renouncing one’s faith) is still a crime in some countries. Others do not sanction it criminally but restrict the rights of those who have given up their faith, with consequences on the custody of their children, inheritance rights, etc.

**1.2. FREEDOM FROM COERCION**

Immunity from coercion in religious matters is expressly prescribed in the following texts, among others, from the United Nations.

**a) UDHR**

“Everyone has the right to freedom of thought, conscience and religion; this right includes freedom [...] either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”

**b) ICCPR**

Art. 18 (2): “No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.”

**c) 1981 Declaration of the General Assembly**

Art. 1 (2): “No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.”

**d) Human Rights Committee general comment 22**

Para. 5: “Article 18.2 bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18.2. The same protection is enjoyed by holders of all beliefs of a non-religious nature.”

Coercion regarding religion is related to a proselytism that uses illegitimate means: violence, force, abuse of authority, psychological pressure, etc. It is also related to discrimination on the basis of religion, which is also a form of indirect pressure.

### 1.3. THE RIGHT TO MANIFEST ONE'S RELIGION OR BELIEF

Not only does the right to religious freedom cover the internal dimension of the individual (having or not having particular beliefs) but rather, it also extends to the freedom of manifesting (or not) these beliefs. However, while the internal dimension of the freedom of beliefs is legally unlimited, the external manifestation of these beliefs does have limits, and it is here, at these limits, that the biggest difficulties arise in guaranteeing the right to religious freedom. Below we shall see the main texts from the United Nations on the right to manifest beliefs or not manifest them, and on the limits to exercising this dimension of the right.

#### a) CCPR

Art. 18 (1): "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom [...] either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. (3): "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

#### b) 1981 Declaration of the General Assembly

Art. 1 (1): "Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. (3): "Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

#### c) Human Rights Committee general comment 22

Para. 4: "The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae, and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language, customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."

Freedom of religion or beliefs includes not only the right to have some beliefs in private, but also to manifest and practice them, provided that, as with all rights and freedoms, it remains within the limits of public order.

The main problems in this regard begin when the religious manifestation or practice clashes with other legal goods: for example, with certain labour obligations or otherwise. Thus, the criteria generally accepted are the ones of weighting between the conflicting goods that may legitimise the restriction of the right but only in accordance with the judgement of proportionality. In other words, in order for the restriction of a right (in this case, religious freedom) to be legitimate, it must first be ensured that the restrictive measure is (a) suitable for protecting the legal good with which it clashes, (b) necessary, i.e., that there is no other way to achieve the protection of this good, and also that (c) the restriction is proportional, i.e., that it only restricts to the extent necessary but goes no further than that.

Also noteworthy in this matter are the conflicts that public manifestation of beliefs is generating from certain mind-sets. These stances tend to identify laicism or non-

confessionalism of the State and public institutions with the confinement of religion to the private domain, restricting public manifestations of it by individuals or particular groups. This forgets that the ones who must remain neutral in religious matters are the public powers but not the citizens, and that the laicism of the State is meant to promote freedom and equality of all individuals and groups on matters of religion.

Below we list the different aspects of the manifestation of beliefs and the main precepts from the United Nations that guarantee them

### 1.3.1. FREEDOM TO WORSHIP

The practice of acts of worship, ceremonies and rituals is part of the essential content of the right to religious freedom. It is thus prescribed in, inter alia, the following texts.

#### a) 1981 Declaration of the General Assembly

Art. 6 (a): The right to freedom of thought, conscience, religion or belief includes the freedom, "To worship or assemble in connection with a religion or belief [...]; (c): The right to freedom of thought, conscience, religion or belief includes the freedom, "To make, acquire and use the necessary articles and materials related to the rites or customs of a religion or belief".

#### b) Commission on Human Rights resolution 2005/40 (paragraph 4 (d)) and Human Rights Council resolution 6/37 (paragraph 9(g)) and General Assembly resolution 65/211 (paragraph 12 (g))

Urges States "To ensure, in particular, the right of all persons to worship or assemble in connection with a religion or belief [...]."

#### c) Human Rights Committee general comment 22

Para. 4: "The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including [...] the use of ritual formulae, and objects [...]."

### 1.3.2. PLACES OF WORSHIP

To be able to hold religious worship, it is essential to have places of worship without any further restrictions than the ones legitimately prescribed. It is thus established in, inter alia, the following texts.

#### a) 1981 Declaration of the General Assembly

Art. 6 (a): The right to freedom of thought, conscience, religion or belief includes the freedom, "To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes".

#### b) Human Rights Council resolution 6/37

Par. 9 (e): The Human Rights Council urges States, "To exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights and humanitarian law, to ensure that religious places, sites, shrines and symbols are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction; (g): The Human Rights Council urges States, "To ensure, in particular, the right of all persons to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes [...]."

#### c) Human Rights Committee general comment 22

Para. 4: "The concept of worship extends to [...] the building of places of worship."

In some cases, public authorities impose restrictions on the construction of places of worship, especially those of minority confessions in the country, in that they are not duly justified by the regulations governing zoning and urban planning, and as a result they violate the right to religious freedom.

### 1.3.3. RELIGIOUS SYMBOLS:

The topic of religious symbols, both static and dynamic, is one of the most controversial topics today, especially in Western societies. Wearing or using religious symbols is part of the content of the right. Therefore, its restriction must be duly justified by reasons deriving from public order as appropriate of a democratic society. Some of the texts from the United Nations that protect this manifestation of the right to religious freedom are the following.

#### a) 1981 Declaration of the General Assembly

Art. 6 (c): The right to freedom of thought, conscience, religion or belief includes the freedom, "To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief".

#### b) Commission on Human Rights resolution 2005/40

4 (b): The Commission on Human Rights urges States, "To exert the utmost efforts, in accordance with their national legislation and in conformity with international human rights law, to ensure that religious places, sites, shrines and religious expressions are fully respected and protected and to take additional measures in cases where they are vulnerable to desecration or destruction".

#### c) Human Rights Committee general comment 22

Para. 4: "The concept of worship extends to [...] the display of symbols. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as [...] the wearing of distinctive clothing or head coverings [...]."

### 1.3.4. OBSERVANCE OF HOLIDAYS AND DAYS OF REST

Observance of religious holidays is part of the right to religious freedom. The exercise of this manifestation of the right features special difficulties for people who belong to a religious minority whose holidays do not usually coincide with the traditional majority holiday recognised in the country as rest from work.

The topic of observance of holidays, along with that of clothing, is one of the causes of indirect discrimination on the basis of religion in the workplace, as pointed out by the Special Rapporteur on freedom of religion or belief (Heiner Bielefeldt) in August 2014 on this issue. The criterion recommended in this matter is that of reasonable adjustment; i.e., the obligation to accommodate as long as it does not become a disproportionate burden.

Some of the texts on this matter are as follows:

#### a) 1981 Declaration of the General Assembly

Art. 6 (h): The right to freedom of thought, conscience, religion or belief includes the freedom, "To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief".

#### b) Human Rights Committee general comment 22

Para. 4: "The concept of worship extends to [...] the observance of holidays and days of rest."

### 1.3.5. APPOINTING CLERGY

Religious freedom demands that the public authorities respect the legitimate autonomy of churches, confessions and religious communities without interfering in their private affairs. Among such affairs, one that is the competence of confessions is that of designating and training its ministers of worship. This is recognised in the United Nations documents.

#### a) 1981 Declaration of the General Assembly

Art. 6: The right to freedom of thought, conscience, religion or belief includes the freedom: (g) to train, appoint, elect or designate by succession appropriate leaders [...]."

**b) Human Rights Committee general comment 22**

Para.4: "In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers [...]."

**1.3.6. TEACHING AND DISSEMINATING MATERIALS (INCLUDING MISSIONARY ACTIVITY)**

The right to teach and disseminate one's own beliefs is part of the right to religious freedom, provided, as we have noted elsewhere, that it takes place by means of legitimate means that do not involve coercion, directly or indirectly. This is recognised in the following texts.

**a) 1981 Declaration of the General Assembly**

Art. 6 (d): The right to freedom of thought, conscience, religion or belief includes the freedom, "To write, issue and disseminate relevant publications in these areas; (e): The right to freedom of thought, conscience, religion or belief includes the freedom, "To teach a religion or belief in places suitable for these purposes."

**b) Commission on Human Rights resolution 2005/40 (paragraph 4.d) and Human Rights Council resolution 6/37 (paragraph 9.g)**

Urges States, "To ensure, in particular, [...] the right of all persons to write, issue and disseminate relevant publications in these areas".

**c) Human Rights Committee general comment 22**

Para. 4: "In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, [...] the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."

**1.3.7. THE RIGHT OF PARENTS TO ENSURE THE RELIGIOUS AND MORAL EDUCATION OF THEIR CHILDREN**

Every person, including minors, is a rights-holder of religious freedom on account of it being a right residing in human dignity. However, exercise of this right depends on the capacity and maturity of the minor. Parents have the right and the duty to guide the minor in this exercise and therefore have the right to give their children whatever religious or moral education they deem fit. Conflicts in this regard shall always be settled in the minor's highest interest.

**a) CCPR**

Art. 18 (4): "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

**b) CRC**

Art. 14 (2): "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child [...] (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;"

**c) ICESCR**

Art. 13 (3): "The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to [...] ensure the religious and moral education of their children in conformity with their own convictions."

**d) Migrant Workers Convention**

Art. 12 (4): "States Parties to the present Convention undertake to have respect for the liberty of parents, at least one of whom is a migrant worker, and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."



### e) 1981 Declaration of the General Assembly

Art. 5: « 1. The parents or, as the case may be, the legal guardians of the child have the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up. 2. Every child shall enjoy the right to have access to education in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians, and shall not be compelled to receive teaching on religion or belief against the wishes of his parents or legal guardians, the best interests of the child being the guiding principle. 4. In the case of a child who is not under the care either of his parents or of legal guardians, due account shall be taken of their expressed wishes or of any other proof of their wishes in the matter of religion or belief, the best interests of the child being the guiding principle ».

### f) Human Rights Committee general comment 22

Para. 4: "In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, [...] the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications."

#### 1.3.8. REGISTRATION

Along with the individual dimension, the right to religious freedom also has a significant collective dimension in which the right-holders are churches, confessions and religious communities. This right may be unduly restricted when the public authorities place special hardships on the civil recognition of certain entities. For information on this matter, see [Guidelines on the Legal Personality of Religious or Belief Communities](#).

*The Commission on Human Rights resolution 2005/40 (paragraphs 4 (c) and 4 (e)) and Human Rights Council resolution 6/37 (paragraphs 12 (e) and 12 (h)), urges States:*

- "To review, whenever relevant, existing registration practices in order to ensure the right of all persons to manifest their religion or belief, alone or in community with others and in public or in private;"
- "To ensure that, in accordance with appropriate national legislation and in conformity with international human rights law, the freedom for all persons and members of groups to establish and maintain religious, charitable or humanitarian institutions is fully respected and protected."

#### 1.3.9. COMMUNICATE WITH INDIVIDUALS AND COMMUNITIES ON RELIGIOUS MATTERS AT THE NATIONAL AND INTERNATIONAL LEVEL

This right is expressly recognised in the **Declaration of the General Assembly (1981)**: "The right to freedom of thought, conscience, religion or belief includes the freedom, "To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels." (art. 6 (i))

#### 1.3.10. ESTABLISH AND MAINTAIN CHARITABLE AND HUMANITARIAN INSTITUTIONS/ SOLICIT AND RECEIVE FUNDING

This right is recognised in the following texts from the United Nations:

### a) 1981 Declaration of the General Assembly

Art. 6: "The right to freedom of thought, conscience, religion or belief includes the freedom: (b): To establish and maintain appropriate charitable or humanitarian institutions; (f): "To solicit and receive voluntary financial and other contributions from individuals and institutions."

### b) Commission on Human Rights resolution 2005/40 (paragraph 4 (e)) and Human Rights Council resolution 6/37 (paragraph 12 (h))

Urges States, "To ensure that, in accordance with appropriate national legislation and in conformity with international human rights law, the freedom for all persons and members



of groups to establish and maintain religious, charitable or humanitarian institutions is fully respected and protected.”

### 1.3.11. CONSCIENTIOUS OBJECTION

Part of the right to freedom of religion and belief is the freedom to act in accordance with the dictates of one’s own conscience. The legal problem ensues when that conscience clashes with a legal imperative, in which case it may lead to a supposition of conscientious objection. The individual is forced to choose between obeying the legal mandate against his conscience or following the dictates of his conscience against the legal rules. In some cases, the orders themselves dispense of compliance with certain legal obligations (recognition of objection to military service, abortion, jury duty, etc.) for reasons of conscience. In other cases, there is no option expressly given for the “objector”, which raises the legal question of whether or not the objection is legal by directly invoking the right to freedom of conscience. Although it is undeniable that said freedom is legitimate for acting in accordance with one’s own convictions, it is also true that it is not an unlimited freedom, and that when it clashes with other rights or legally protected goods, the conflict must be settled through weighting. For conscientious freedom to be legitimate, its limitation for protecting the other good must be suitable, necessary and proportional.

Cases of conscientious objection are many: in the fields of healthcare, work, education, etc. the paradigmatic case that made International Law and national laws settle this question was the conscientious objection to military service. The following pronouncement from the United Nations is of interest here.

*The Human Rights Committee general comment 22* states: “Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one’s religion or belief. When this right is recognized by law or practice, there shall be no differentiation among conscientious objectors on the basis of the nature of their particular beliefs; likewise, there shall be no discrimination against conscientious objectors because they have failed to perform military service. The Committee invites States parties to report on the conditions under which persons can be exempted from military service on the basis of their rights under article 18 and on the nature and length of alternative national service” (Para. 11).

## 2. DISCRIMINATION ON THE BASIS OF RELIGION OR BELIEF/ INTER-RELIGIOUS DISCRIMINATION/TOLERANCE

Freedom of religion and belief is inseparable from equality. In other words, all persons and groups are equally holders of the same right to religious freedom without it justifying any discrimination at all in this matter. Religious discrimination poses various different problems. Along with the more obvious problem of direct discrimination are more subtle and complex cases of indirect discrimination derived from applying seemingly neutral rules that apply equally to everyone, but that produce a particularly negative effect on certain persons or groups, normally belonging to minorities (for example, in the area of labour or education with particular prescriptions for dress, food, rest days, etc.). It is advisable not to confuse equality for uniformity and to take into account that uniformity may be discriminatory as it does not take differences into account. Another matter posed by equality in religious affairs is its compatibility with the existence of an official or State religion.

United Nations texts abound prescribing non discrimination on the basis of religion. Noteworthy among them are the following.

**a) ICCPR**

Art. 2 (1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as [...] religion [...]."

Art. 5 (1): "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."

Art. 26: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as [...] religion [...]."

**c) ICESCR**

Art. 2 (2): "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind such as [...] religion [...]."

**e) 1981 Declaration of the General Assembly**

Art. 2 (1): "No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief."

Art. 3: "Discrimination between human beings on the grounds of religion or belief constitutes an affront to human dignity and a disavowal of the principles of the Charter of the United Nations, and shall be condemned as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and enunciated in detail in the International Covenants on Human Rights, and as an obstacle to friendly and peaceful relations between nations."

Art. 4 (1): "All States shall take effective measures to prevent and eliminate discrimination on the grounds of religion or belief in the recognition, exercise and enjoyment of human rights and fundamental freedoms in all fields of civil, economic, political, social and cultural life. (2): "All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or other beliefs in this matter."

**f) Commission on Human Rights resolution 2005/40**

4 (g): The Commission on Human Rights urges States, "To ensure that all public officials and civil servants, including members of law enforcement bodies, the military and educators, in the course of their official duties, respect different religions and beliefs and do not discriminate on the grounds of religion or belief, and that all necessary and appropriate education or training is provided;"

7: The Commission on Human Rights, "Expresses concern at the persistence of institutionalized social intolerance and discrimination practised in the name of religion or belief against many communities;

8: The Commission on Human Rights urges States to step up their efforts to eliminate intolerance and discrimination based on religion or belief, notably by: **a** ) Taking all necessary and appropriate action, in conformity with international standards of human rights, to combat hatred, intolerance and acts of violence, intimidation and coercion motivated by intolerance based on religion or belief, with particular regard to religious minorities, and also to devote particular attention to practices that violate the human rights of women and discriminate against women, including in the exercise of their right to freedom of thought, conscience, religion or belief; **b** ) Promoting and encouraging, through education and other means, understanding, tolerance and respect in all matters relating to freedom of religion or belief; **c** ) Making all appropriate efforts to encourage those engaged in teaching to cultivate

respect for all religions or beliefs, thereby promoting mutual understanding and tolerance;

- 9: The Commission on Human Rights, “Recognizes that the exercise of tolerance and non-discrimination by all actors in society is necessary for the full realization of the aims of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and invites Governments, religious bodies and civil society to continue to undertake dialogue at all levels to promote greater tolerance, respect and understanding;
- 10: The Commission on Human Rights, “Emphasizes the importance of a continued and strengthened dialogue among and within religions or beliefs, encompassed by the dialogue among civilizations, to promote greater tolerance, respect and mutual understanding”.

As regards non-discrimination based on religion, the conflicts are mostly suffered by members of religious minorities who, in some places, are persecuted for their beliefs or at least do not enjoy equal civil rights as everyone else. Listed below are some of the many texts that make special mention of non-discrimination against minorities:

**a) ICCPR**

Art. 27: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

**b) ICERD**

Art. 5: “[...] States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: [...] (d) Other civil rights, in particular: [...] (vii) The right to freedom of thought, conscience and religion”.

**c) CRC**

Art. 30: “In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.”

**d) Human Rights Committee general comment 22**

Para. 2: “The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.”

## 2.2. EQUALITY IN RELIGIOUS MATTERS AND STATE RELIGIONS

The United Nations document on human rights do not address State religions but they do expressly prescribe that, in cases where the State acknowledges a religion as the official religion, it must not be done to the detriment of equal enjoyment of the rights and freedoms of all citizens, who in no case shall be discriminated against or subject to a less advantageous legal statute on the basis of their beliefs. This is expressly stated as such by the Human Rights Committee in General Comment 22:

“The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers. In particular, certain measures discriminating against the latter, such as measures restricting eligibility for government service to members of the predominant religion or giving economic

privileges to them or imposing special restrictions on the practice of other faiths, are not in accordance with the prohibition of discrimination based on religion or belief and the guarantee of equal protection under article 26. The measures contemplated by article 20, paragraph 2, of the Covenant constitute important safeguards against infringement of the rights of religious minorities and of other religious groups to exercise the rights guaranteed by articles 18 and 27, and against acts of violence or persecution directed towards those groups. The Committee wishes to be informed of measures taken by States parties concerned to protect the practices of all religions or beliefs from infringement and to protect their followers from discrimination. Similarly, information as to respect for the rights of religious minorities under article 27 is necessary for the Committee to assess the extent to which the right to freedom of thought, conscience, religion and belief has been implemented by States parties. States parties concerned should also include in their reports information relating to practices considered by their laws and jurisprudence to be punishable as blasphemous. If a set of beliefs is treated as official ideology in constitutions, statutes, proclamations of ruling parties, etc., or in actual practice, this shall not result in any impairment of the freedoms under article 18 or any other rights recognized under the Covenant nor in any discrimination against persons who do not accept the official ideology or who oppose it" (Paras. 9-10).

**Lastly, it should be noted that discrimination, also in the enjoyment of religious freedom, is felt especially acutely by** the most vulnerable groups, among whom the United Nations mentions women, people deprived of their liberty, refugees, children, minors, and migrant workers. We will not develop this matter further, but refer it to topics in the program that expressly consider the rights of minorities and vulnerable groups.

### 3. CLASHES OF FREEDOM OF RELIGION AND BELIEF WITH OTHER HUMAN RIGHTS

The topic of a clash between fundamental rights is undoubtedly one of the most delicate tasks facing the jurist. We have already pointed out that guidelines to follow in a democratic society are weighting and proportionality should one of them need to be restricted to safeguard the other. The following [website of the United Nations](#) makes a reference to the conflict between religious freedom and the following rights: freedom of expression, the right to life and to liberty, the prohibition of torture and other cruel, inhuman or degrading punishments.

Especially relevant in current contexts is the conflict between freedom of expression and freedom of religion. In this regard, legal distinction must be made between defamation or offence against religion and the discourse that is not merely offensive but rather, incites violence, discrimination or hate on the basis of religion. In this second case, the international community clearly points out that it is outside the boundaries of protection of the right to freedom of expression. Listed below are the most relevant texts from the United Nations on this matter.

#### a) ICCPR

Art. 19:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals."

Art. 20: "1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

### b) Commission on Human Rights resolution 2005/40

- 5 (a): In which the Commission on Human Rights invites the Special Rapporteur to address the rise of religious extremism affecting religions in all parts of the world.
- 5 (c): In which the Commission on Human Rights invites the Special Rapporteur to address the issue of the use of religion or belief for ends inconsistent with the Charter of the United Nations and other relevant instruments of the United Nations.
- 6: The Commission on Human Rights, "Recognizes with deep concern the overall rise in instances of intolerance and violence directed against members of many religious communities in various parts of the world, including cases motivated by Islamophobia, anti-Semitism and Christianophobia";

In these contexts, as a suitable step toward fighting against discrimination and religious hate, the Human Rights Commission proposes a dialogue between public authorities, religious institutions and civil society aimed at promoting tolerance, respect and understanding:

- 9: The Commission on Human Rights, "Recognizes that the exercise of tolerance and non-discrimination by all actors in society is necessary for the full realization of the aims of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and invites Governments, religious bodies and civil society to continue to undertake dialogue at all levels to promote greater tolerance, respect and understanding;
- 10: Emphasizes the importance of a continued and strengthened dialogue among and within religions or beliefs, encompassed by the dialogue among civilizations, to promote greater tolerance, respect and mutual understanding;
- 11: Also emphasizes that equating any religion with terrorism should be avoided as this may have adverse consequences on the enjoyment of the right to freedom of religion or belief of all members of the religious communities concerned".

### c) Human Rights Committee general comment 22

Para. 7: "In accordance with article 20, no manifestation of religion or belief may amount to propaganda for war or advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. As stated by the Committee in its general comment 11 [19], States parties are under the obligation to enact laws to prohibit such acts."

## 3.2. RIGHT TO LIFE, RIGHT TO LIBERTY

### a) ICCPR

Art. 6: "1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life. 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court."

Art. 9 (1): "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

### b) Commission on Human Rights resolution 2005/40 (paragraph 4 (f)) and Human Rights Council 6/37 (paragraph 9 (ii))

Urges States to ensure that on account of religion or belief "no one within their jurisdiction is deprived of the right to life, liberty, or security of person, [...] subjected to torture or arbitrary arrest or detention [...] and to bring to justice all perpetrators of violations of these rights;"

**c) Economic and Social Council resolution 1984/50**

Para. 1: "In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences."

### 3.3. PROHIBITION ON TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

**a) Convention against Torture**

Art. 1: " For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as [...] punishing him for an act he or a third person has committed or is suspected of having committed, [...] or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Art. 16: " Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. "

**b) CEDAW**

Art. 5 (a): States Parties shall take all appropriate measures, "To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."

**c) Commission on Human Rights resolution 2005/40**

4.f: The Commission on Human Rights urges States, "To ensure that no one within their jurisdiction is deprived of the right to life, liberty, or security of person because of religion or belief and that no one is subjected to torture or arbitrary arrest or detention on that account, and to bring to justice all perpetrators of violations of these rights".

**d) Commission on Human Rights resolution 2005/39**

7: The Commission on Human Rights, "Reminds Governments that corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture".

**e) Commission on Human Rights resolution 2003/32**

5: The Commission on Human Rights, "Reminds Governments that corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture".

**f) General Assembly Declaration 48/104**

Art. 4 (c): States should, "Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons."

**g) Human Rights Committee general comment 22**

Para. 5: "In the Committee's view, moreover, the prohibition [of torture] must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure."



## 4. LIMITS TO RELIGIOUS FREEDOM

The right to religious freedom is not an absolute right. Nevertheless, any application of limits on this right requires differentiating between the two dimensions of religious freedom: internal and external. What is known as the *forum internum*, i.e., the right a person has to form his own thoughts, opinions, conscience, convictions and beliefs, is an absolute right protected against all forms of State interference or indoctrination. However, the public manifestation of religious beliefs or conditions may be restricted for legitimate reasons.

Given that the manifestation of religion or beliefs is necessarily active, it may affect the enjoyment of some rights of other people, and in extreme cases, even put society at risk. In virtue of article 18 3) of the ICCPR, therefore, it may be subject to particular limitations.

The limitations to the right to manifest religion or beliefs are subject to strict, specific conditions, and are permitted only if:

- they are mandated by law and
- they are necessary to protect public safety, order, health or moral order or the fundamental rights and freedoms of others.

An example of an allowable reason for limiting the right to manifest one's own religion or belief is when the manifestations involved constitute propaganda in favour of war or national, racial or religious hate that entail the inciting of discrimination, hostility or violence. Too often religious intolerance is the source of violent conflicts between ethnic and religious groups.

Under no circumstances can a person be obliged by the use or the threat of use of physical force or criminal sanctions to embrace, join, or abjure any particular religion or belief. The prohibition also applies to policies and steps that have that same outcome. For example, belonging to a religious group cannot be a reason in and of itself to remove someone from a public sector job.

The regulations on these limits are featured in numerous international and regional texts on human rights:

### a) ICCPR

Article 18 : « 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others ».

### b) CRC

Art. 14.3: "3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others".

### c) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

Art. 12.3: "3. Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".

### d) Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

Art. 9.2 "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others".



**e) American Convention On Human Rights, 1969**

Art. 12: " 2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.

3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others".

**f) African Charter on Human and Peoples' Rights**

Art. 8: "No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms".

**g) Commission on Human Rights resolution 2005/40 (paragraph 12) and Human Rights Council 6/37 (paragraph 14)**

"Further emphasizes that, as underlined by the Human Rights Committee, restrictions on the freedom to manifest religion or belief are permitted only if limitations are prescribed by law, are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others, and are applied in a manner that does not vitiate the right to freedom of thought, conscience and religion ».

**h) Human Rights Committee general comment 22, par. 8:**

« Article 18.3 permits restrictions on the freedom to manifest religion or belief only if limitations are by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others. The freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted. In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified in articles 2, 3 and 26. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. The Committee observes that paragraph 3 of article 18 is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition. Persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint. States parties' reports should provide information on the full scope and effects of limitations under article 18.3, both as a matter of law and of their application in specific circumstances ».

## 5. DEROGATION

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The right to free thought, conscience and religion is so basic that it cannot be derogated even in states of emergency.

ICCPR: Article 4 : « 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles (...)".

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 25**

**Subject**

**2.4.3.** Freedom of opinion and expression. Rights and mass media

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## SUMMARY OF THE TOPIC

**Importance:** Freedom of expression is a key issue not only because it seems to be linked to a fundamental right and therefore to the protection of human dignity, but because it is a necessary element in a society that seeks to organize itself based on democratic parameters.

The right to freedom of expression is protected in numerous international and regional human rights treaties, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), which protect the right to freedom of expression in their respective Articles 19. These different sources coincide on the significance of this right but the difference lies mainly in the way this right is implemented.

It is important to note that freedom of expression is not only important in itself but also necessary for the exercise of other human rights: at individual level, freedom of expression is essential for the development, dignity and fulfilment of every individual. Freedom of expression strengthens the individual's ability to plan his or her life and engage in an occupational activity. At national level, freedom of expression is fundamental for good governance in different ways. To achieve this, it must be ensured that the State is administered by honest and competent people, allowing citizens to present their concerns to the authorities, ensuring that new policies and legislation are carefully considered and promoting the implementation of other human rights. For all these reasons, freedom of expression and freedom of information are recognized by the international community as fundamental human rights.

**Content of the right:** As regards the content of this right, the International Covenant on Civil and Political Rights is one such instruments that provides a minimum degree of content to the fundamental rights that can be accepted by all. Thus, if we were to exclude one of those elements constituting that core of minimum fundamental rights, it would become unrecognizable. German doctrine refers to a "substance" of fundamental rights. In terms of the substance of the freedom of expression, Article 19 paragraph 1 states that "everyone

shall the have the right to hold opinions without interference". This declaration is a limitation, not so much for those who exercise freedom of expression but for third parties (citizens and public authorities) who must respect the aforementioned right. Then, paragraph 2 states as follows: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". Many conclusions may be drawn from this paragraph, as we shall see.

**Right holders:** Another difference between the treatments of freedom of information is determined by the holder of those rights. Freedom of opinion corresponds equally to all citizens. This is a vested right, like other personality rights, for the mere fact that this is an individual right. In terms of the freedom of information, a distinction must be made between passive and active right holders. All citizens are passive right holders. Everyone has the right to be informed in order to participate actively and responsibly within the framework of a democratic system. However, this fundamental right to be informed requires there to be people who have the mission to inform. Professionals, journalists, are active holders of this right.

**Limitations:** No fundamental right is unlimited. The International Covenant establishes limitations on the freedom of expression that must be respected, as a threshold criterion, by all States parties. Article 19.1 refers to the extent to which they may hold opinions, or the minimum to be respected by States or public authorities regarding the exercise of the freedom of expression by others. First, as we have said, it proclaims, in absolute terms and without exception, that "Everyone shall have the right to hold opinions without interference." Secondly, paragraph 3 establishes three conditions to be met by restrictions on freedom of expression: a) it must be "prescribed by law"; b) these laws must be limited to ensure the reputational rights of others are respected); and c) it must be justified in protecting national security, public order or public health or morals. Finally, these limiting laws should be considered as "necessary" and proportionate to the objective pursued.

As part of the activities of the media, Article 19 also seeks to prevent governments from using regulations in order to control or restrict the actions of the media, which play a significant role in the exercise of freedom of information and freedom of expression.

## GENERAL AND SPECIFIC COMPETENCIES

In general for the three modules that make up the HRBA training programme, and in accordance with the guidelines of the action plan for the development of the UN's World Programme for Human Rights Education (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), at the end of the course participating teachers will be able to recognize the teaching potential of the *general and specific skills* described below to achieve meaningful human rights learning and to incorporate these skills into the planning of their courses through an inclusive approach oriented towards the effective implementation of the acquired knowledge.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

### GENERAL :

- **Team work:** Integrate and collaborate actively to achieve common goals with other people, branches and organizations. Integrate and work actively to understand certain practical situations, according to the context of their workflows.
- **Appreciate diversity and multiculturalism:** Understand and accept social and cultural diversity as an enriching personal and collective component to promote coexistence between people without falling into discrimination due to gender, age, religion, social status, or for political and/or ethnic reasons.
- **Critical reasoning:** Analyse and assess the consistency of approaches, including most notably affirmations or ideas that society accepts as true, in the immediate

context where human life takes place. Interpret, analyse and evaluate specific cases.

- **Ethical sense and commitment:** Embrace moral goodness for oneself or for others (i.e. toward all that is or means good, the experience of meaning, the self-fulfilment of the individual, the sense of justice) and pursue this moral good. Move toward all that is related with the code of conduct of journalistic practice to clearly distinguish between the holders of rights and the holders of obligations relating to journalistic practice.

#### SPECIFIC:

- Identify, interpret and properly implement international, regional and national human rights standards applicable to the different existing scenarios in their respective professional fields and disciplines.
- Define and clearly distinguish between the holders of rights and the holders of obligations relating to every human right in a given situation.
- Identify specific obligations for the respect, protection and fulfilment of all human rights and the minimum regulatory content necessary for their implementation, as well as to question their implementation in a given situation.
- Identify, analyse, argue and assess critical gaps, capacity gaps and gaps in terms of the responsibility of holders of rights and obligations which prevent actions from being taken or the transformation of a given situation in which human rights are violated.
- Compare and evaluate local and national situations, practices, laws and policies in the light of the legal instruments on human rights ratified by their country, as well as to propose and plan effective alternatives.
- Identify and implement international and regional human rights protection mechanisms.
- Understand the basic concepts of freedom of expression, their origins and applications in the context of the Maghreb.
- Acquire the analytical skills necessary for the identification of problems related with freedom of expression in Tunisia, Algeria and Morocco.

## BIBLIOGRAPHY AND OTHER COMPULSORY TEACHING RESOURCES

### International standards

- [Universal Declaration of Human Rights](#).
- [International Covenant on Civil and Political Rights \(ICCPR\)](#)
- [General Comment 10 \[19\] \[Article 19\] of the Human Rights Committee \(CCPR/C/21/Rev.1 of 19 May 1989\)](#)
- [General Comment 11 \[19\] \[Article 20\] of the Human Rights Committee \(CCPR/C/21/Rev.1 of 19 May 1989\)](#)
- [General Comment 34 \[19\] \[Article 19\] of the Human Rights Committee \(CCPR/C/34/Rev.1 of 12 September 2011\)](#)
- [International Covenant on Economic, Social and Cultural Rights \(ICESCR\)](#)
- [International Convention on the Elimination of All Forms of Racial Discrimination \(ICERD\)](#)
- [Convention on the Elimination of All Forms of Discrimination Against Women](#)

- [ILO Convention No. 135, Workers' Representatives Convention](#)
- [The public's right to know: Principles on Freedom of Information Legislation. Annex II Report E/CN.4/2000/63](#)

## Regional standards

- [American Convention on Human Rights "Pact of San José, Costa Rica" \(OAS\)](#)
- [Declaration on Principles of Freedom of Expression \(OAS\)](#)
- [African Charter on Human and Peoples' Rights](#)
- [Declaration of Principles on Freedom of Expression in Africa](#)
- [Amsterdam Recommendations. Freedom of the media and the Internet. Organization for Security and Co-operation in Europe \(OSCE\)](#)
- [Bishkek Declaration. Organization for Security and Co-operation in Europe \(OSCE\)](#)

## Specific:

International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 (XXI) of 16 December 1966, entry into force on 23 March 1976, in accordance with Article 49

## Article 18

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

## Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - a) For respect of the rights or reputations of others;
  - b) For the protection of national security or of public order, or of public health or morals.

## Article 20

1. Any propaganda for war shall be prohibited by law.

2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

[Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression:](#)

**It is also interesting to consult the following:**

- [Annual reports](#)
- [Recent activities of the Special Rapporteur](#)
- [Issues in focus](#)

[Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.](#) Conclusions and recommendations emanating from the four regional expert workshops organized by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012.

[UNESCO. Media Information Literacy for teachers:](#) This site provides access to the multimedia and multi-language media and information literacy (MIL), an international tool for teaching resources for educators, researchers and individuals. The tool contains interactive educational and intercultural resources proposed for use in formal and non-formal educational settings. The resources can be shared, adapted, used and re-uploaded by users at will.

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

### Webography:

- [UNESCO and Freedom of Expression](#)
- [The OSCE Representative on Freedom of the Media](#)
- [Organization of American States \(OAS\). The Special Rapporteur on freedom of expression](#)
- [Council of Europe, the protection of media freedoms](#)
- CUJAS library. Selected bibliography - [Liberté d'expression et liberté de la presse](#) - May 2015.
- OHCHR, the final OHCHR Expert Workshop on the prohibition of incitement to national, racial or religious hatred, 4 and 5 October 2012, Hotel Tour Hassan, Rabat, Morocco)
- OHCHR [Finding a balance between freedom of expression and prohibition of incitement to hatred](#)
- [Big6](#)
- [Media Development Indicators:](#) A framework for assessing media development Endorsed by the Intergovernmental Council of the International Programme for the Development of Communication (IPDC) at its 26th session (26-28 March 2008)
- [Journalisme.com](#)
- UNESCO: [Media Education. A Kit for Teachers, Students, Parents and Professionals.](#)
- UNESCO: [Toward information Literacy Indicators: conceptual framework paper](#)
- UNESCO: [La Maîtrise de l'Information et des médias](#)

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## LEARNING OUTCOMES

At the end of the topic, the student will be able to:



- Understanding the importance of freedom of expression, meeting and association and the right to vote to exercise other human rights and the right to construct a democratic system.
- Distinguishing between the two elements of freedom of expression: information and freedom of opinion.
- Identifying the minimum content of freedom of expression, which must be respected by all states and citizens.
- Understanding the limitations of freedom of expression, including those established in Articles 19 and 20 of the Covenant; and consequently identifying violations of this freedom.
- Describing the different ownership models of the media and control;
  - Discussing the work of the international economy, the emergence of new technologies, and how this affects the structure and models of media ownership;
  - Determining how ownership and control of the media influence media policies, methods, contents and broadcasting or distribution;
  - Demonstrating how media convergence facilitates new approaches to the development of editorial content (e.g. outsourcing, relocation and home-based teleworking);
- Understanding how existing international conventions and national laws and policies shape or regulate the structure of media ownership.
- Acquiring competences to participate in democracy and contribute to the creation of a culture of peace. These skills include:
  - Listening and active communication: being able to listen to different points of view, express and value own opinions and those of others based on the ethics of journalism;
  - Critical thinking: differentiate between facts and opinions, be aware of prejudices and preconceptions, recognize different forms of manipulation;
  - Cooperating and dealing with conflicts constructively;

## METHODOLOGY

Methodology	Teaching tools
Lecture format	Reading of texts and/or viewing of audio-visual material
Practical case studies	Blog/Forum
Problem solving	Blog/Forum/Wiki
Group discussions	Blog/Forum
Work groups	
Debates - conferences	

## PROGRAMMING OF LEARNING ACTIVITIES

Detailed description of activities to be developed by students, individually or in groups, specifying the expected results and, if appropriate, the evaluation criteria.

- 1) Activity 1: reading and guidance and the subject of personal study, focusing in particular on:
  - the concepts of freedom of expression, freedom of information and freedom of opinion.
  - the limitations on these freedoms, with particular reference to those established in Articles 19 and 20 of the Covenant.
  - legal requirements (as recommended by the European Court of Human Rights) used to settle cases of conflict between freedom of expression and other rights.
- 2) Discussion of the group responsible for specific court cases (the recommended case law of the European Court of Human Rights) in which a group defends (e.g. Skype) freedom of expression and other limitations.
- 3) Presentations on the most basic concepts: as they should give a lecture.
- 4) Reading of the texts of laws regulating the Tunisian, Algerian and Moroccan media with a summary.
- 5) Group discussions on cases relating to certain journalistic practices in the different media (print, television, radio. and electronic)
- 6) Present case studies and address cases of media abuse.
- 7) Assess the role of independent or alternative media in your community. Select an example and describe the main elements that make it independent. How would this allow people to participate in the democratic process? How is it different from traditional media?
- 8) Using Internet and library resources, determine who today owns and controls the large media groups and State monopolies. Make a list of their major acquisitions. What impact might this have on access, choice and freedom of expression? Search for the laws in force in your country or in your community that regulate media ownership and control.
- 9) Explain why the government should respect the media's right to editorial independence and, in particular, refrain from pressuring the media in order to respect their information and news coverage. In this context, discuss the following quote from Corazon Aquino, former President of the Philippines, who led the reform of her country in democracy.

*"Democracy is so closely linked to the concept of freedom of the press that a leader must consider very carefully any attempt to impose limitations on it, even the most legal ones. The risks are great, not only for his or her reputation as a democratic leader but also for his or her sincerity and commitment to democracy, since the temptation toward totalitarianism is strong and there will always be sycophants who would be only too willing to help us stretch the meaning of democracy to include a multitude of despotic sins".*

Broaden the debate to other potential influences on editorial independence and propose ways to avoid these unjustified influences.

- 10) Run a search for and discussion on the following points:
  - Information is a contribution to action or decision-making and not just for a transfer (for reference, see "Towards indicators of information literacy", UNESCO, 2008, page 14).
  - The provision of and access to information is a source of power and control in society.
  - Does the control of information require different ICT skills? For example, can people control information in the absence of ICTs?
- 11) Discussion on cultural attitudes vis-à-vis information. How is the information considered and valued in your company? How can points of view in printed

information (e.g. in major newspapers) be compared with information produced in electronic media? What is the relationship between information and power, printed media and electronic media? Who is behind the information produced? Is this important to know and why? Submit the following activities to teachers:

- Assess the value of the information produced by the written press (newspapers, magazines, etc.) and the costs associated with its storage, retrieval and use. It should also address the following issues: the value of information based on the benefits that are obtained from it, the realistic value of information based on its availability or non-availability, and the consequences for users if the information is unavailable.
- How does the control of information allow one to fight against disease, increase employment opportunities and improve the teaching practices of a teacher?
- Using the Internet, the school library or both, choose a subject matter in one of the following areas: civic education, sciences, social sciences, history or geography. Present the results of your search using a Power Point presentation. After the presentation, reflect on the following points: How did you choose the topic of your presentation from among the huge volume of information available on the subject? Would you like to obtain information which you were unable to access and how did that change your presentation? Finally, have you transformed the information you compiled in order to integrate it in your chosen context? How and why?

12] Have teachers read the following 6-step framework for information literacy and problem solving:

1. Definition of the task: what is the problem and what information is necessary?
  2. Information search strategies: what are all the possible sources and which ones are the best?
  3. Location and access: where can these sources and the information be found?
  4. Use of information: launch (e.g. read, listen, see, touch) and extract the relevant information.
  5. Summary: organize information from these multiple sources and present it.
  6. Assessment: judge the product (effectiveness) and the process (efficiency).
- Compare this with other taxonomies of the information cycle, such as the process proposed by Woody Horton Jr. (2007) or Bloom's Revised Taxonomy for Information Literacy. Do you think the six stages in the Big 6 are the essential elements of information literacy? If not, what has to be added and why? In reality, do you think these six steps occur in the exact order in which it is presented?
  - Now monitor teachers in each stage of the information problem solving processes using the table presented at the end of the unit, and make sure they spend enough time analysing all the topics/issues highlighted in the table.
  - The Big 6 and the resolution of information problems: use library resources to explore a local topic or news (such as the right to vote, democracy, HIV/AIDS, etc.). Use the stages of the Big 6 to explore this topic.

13] Consult a newspaper in print or electronic format in your university library or resource centre (or the municipal library) on education (teacher training, special education, comparative education, etc.). Identify in the newspaper a topic you want to examine in depth. Summarize the main findings/issues present in the articles. How useful is the information for your professional practice as a teacher? Is this information applicable in your national context? If so, how would you use it?

- 14) How does the use of the web radio or mobile phone technology change the production and use of information in your country? Write an essay on this subject and prepare a PowerPoint presentation.
- 15) Use already published texts mentioning the influence of media owners on the coverage of certain topics of political and economic interest. It will be necessary to identify the factors that determine the degree of influence or control.
- 16) Review CNN and Al Jazeera's coverage of a specific subject and on a particular day and compare angles and the processing of news items.
- 17) Conduct a study on the official owners of large media organizations (as recorded by an appropriate government agency) and investigate possible links with other business and political interests. The results can be presented in a table.

## TIMING OF TOPIC ACTIVITIES

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1 - Reading of the subject and documents on freedom of expression	6h	Self-assessment test
Activity 2 - Share and discuss what they have learned	3h	
Activity 3 - Work on the tutorial (toolbox) provided in literature	3h	
Activity 4	4h	
Activity 5	2h	
Activity 6	5h	

## SELF-EVALUATION TEST

1. A law of a country establishes that all members of a religious group who do not reject violence are considered terrorists and, consequently, mere membership of this group implies they can be sentenced by judges as "terrorists" or "instigators of terrorism." Does this constitute a permissible restriction of the freedom of expression in line with the provisions established in Article 20 of the Covenant?
  - a) Yes, because the State can impose limitations on freedom of expression, provided that this is done through a written law.
  - b) Yes, because the State has the power to decide arbitrarily, in accordance with the law, who is and who is not a terrorist.
  - c) It may constitute an unlawful violation of freedom of expression if this law does not clearly define the case of terrorism, to prevent the restriction being merely a punishment against a group critical of the government.
  - d) No, because freedom of expression includes the power to advocate terrorism.

2. The Government of a country decides to limit political polls one week before the elections. Does this constitute a restriction of the expression of political thought consistent with Article 19 of the Covenant?
  - a) Yes, because it respects the concept of proportionality.
  - b) No, because it constitutes a restriction of democracy.
  - c) Yes, because the International Covenant on Civil and Political Rights does not allow any restriction on the freedom of expression.
  
3. If a journalist asks a member of a religious group considered to be a terrorist [group] under a government decree, would the advocacy of terrorism be punishable?
  - a) Yes, because his or her work as a journalist would be contrary to the public interest.
  - b) No, provided he or she does not defend violent assumptions and reports in an exclusively neutral manner.
  - c) Yes, because the government can decide arbitrarily who and who are not terrorists.
  
- 4) Opinions regarding historical facts must be prohibited by the law of a State.
  - a) Only opinions considered to be erroneous by official State doctrine.
  - b) Only if they are accompanied by errors of form or substance.
  - c) They must only be prohibited to the extent that the denial of a demonstrated fact is so gross and disproportionate that it can be interpreted as an incitement to hatred towards a community (e.g. denial of the Holocaust).
  
- 5) Criticisms against a religious leader.
  - a) They are punishable by prison sentences because religious leaders are sacred.
  - b) They can be punished by the laws of a State party if this criticism can be interpreted as an offence of condoning or glorifying religious hatred, constituting incitement to discrimination.
  - c) They must always be admitted because freedom of expression means the right to insult anybody in any way.

## SELF-EVALUATION TEST

Question	Answer key
Question 1	C
Question 2	A
Question 3	B
Question 4	C
Question 5	B

## SUBJECT 2.4.:

# 2.4.3. FREEDOM OF OPINION AND EXPRESSION. RIGHTS AND MASS MEDIA

## 1. CONCEPT OF FREEDOM OF EXPRESSION

Sociological concept and legal concept of freedom of expression. Broadly speaking, the right to information relates to the facts, while the freedom of expression concerns the transmission of opinions.

As regards the delimitation of that right, the International Covenant on Civil and Political Rights is one of the instruments that seeks to establish a minimum level of fundamental rights acceptable to all in such a way that the suppression of any of these essential elements would distort this fundamental right, which would then become unrecognizable. German legal doctrine refers to a “core content” of fundamental rights. As regards the essence of freedom of expression, paragraph 1 of Article 19 of the Covenant declares that: “Everyone shall have the right to hold opinions without interference”. This proclamation is a limitation not on those who exercise freedom of expression but on citizens and public authorities who must respect it. Immediately after, in paragraph 2, the Covenant states:

“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice”.

Therefore, freedom of expression includes both policy and private and public affairs (*Coleman v. Australia*), door-to-door campaigns, cultural and artistic expression (*Shin v. the Republic of Korea*), religious thought (*Ross v. Canada*) or even commercial advertising. It is even necessary to admit expressions that may be considered disturbing and deeply offensive, provided they respect the limitations set forth in paragraph 3 of Article 19 and in Article 20.

One possible distinction between the right to information and freedom of expression is determined by their content:

- a) Freedom of expression: right to freely express and impart thoughts, ideas or opinions on any subject, by any means.
- b) Freedom of information: the right to freely communicate or receive truthful information by any means of communication. Information relates to a fact which, due to its importance, public interest and characteristic immediacy, constitutes a news item. This information must be truthful. Truthfulness is not necessarily identified with the absence of errors: a news item that contains errors may still be true, if it is proved that the information in question was prepared with the care and rigour that a “good journalist” should employ; in other words, the information has been verified and has been obtained from reliable sources.

The same distinction can also be made between right holders. Active (right) holders (journalists) may be distinguished from passive (right) holders (all citizens):

- a) All citizens are holders of the right to freedom of opinion. But only a few have the opportunity to impart their ideas through the media. The most important social,

political and religious groups should have the right to access public media to guarantee pluralism in society.

- b) Holders of the right to freedom of information. Paragraph 2 of Article 19 of the Covenant proclaims that “freedom of expression.....shall include freedom to seek, receive and impart information and ideas of all kinds”. These actions correspond specifically to the activities of journalists (who are the ones who seek information) and, in general, all those who express themselves through the media, whether journalists or not.

The forms of exercising the freedom to transmit news or ideas may vary: oral, written, signs, and non-verbal expressions, as well as images and artistic objects (*Shin v. the Republic of Korea*). Means of expression can refer to books, newspapers (*Zundel v. Canada*), brochures (*Shchetoko et al. v. Belarus*), posters, placards (*Kivenmaa v. Finland*) clothing and judicial pleadings (*Fernando v. Sri Lanka*) and other modes of audio-visual and electronic expression or through the Internet, in all their forms.

In any society, the existence of the press and other free media without censorship or barriers is essential to guarantee freedom of opinion and expression and the enjoyment of other rights. Thus, it constitutes a cornerstone of any democratic society. For this right to be effective, the State must promote and permit the existence of independent and diverse media (*Gauthier v. Canada*). The free communication of information and ideas regarding public and political affairs between citizens, candidates and elected representatives is essential. It includes the existence of free press and other media that are able to discuss public affairs without censorship or limitations, as well as inform public opinion. The public also has the corresponding right to access the results of the activities of the media (Communication no. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*).

Media regulatory systems should take into account differences between printed media, radio broadcasting and television and the Internet. States parties should not impose a system of licenses and expensive radio broadcasting and television rights. The criteria for implementing such system or the payment of such licenses must be reasonable and objective, clear, transparent and non-discriminatory. In the licensing regimes for broadcasting media with limited capacity, such as satellite or terrestrial audio-visual services, access and frequencies must be allocated fairly between public, commercial and community radio broadcasting and television companies. States parties are recommended to set up an independent public body responsible for the management of radio and television licenses, authorized to consider applications and grant licenses. The State must not exercise monopoly control over the media; on the contrary, it should encourage their plurality. Consequently, States parties should adopt measures to prevent dominance or excessive media concentration by privately controlled media groups in monopolistic situations.

On the other hand, the imposition of sanctions on a broadcasting medium, a media owner or journalist for simply criticizing the government or the socio-political system adopted by the latter can never be considered a restriction necessary for the freedom of expression.

States should take into account of the fact that the development of information and communication technologies, such as the Internet and electronic information transmission systems via mobile technology, has transformed communication practices in the whole world. States parties should adopt all necessary measures to promote the independence of these new media and guarantee individuals access to same. They should also ensure that public broadcasting services operate in a completely independent manner (Final remarks on the Republic of Moldova). To do this, they should provide them with funding in a non-discriminatory manner, without compromising their independence.

Any limitations on the operation of websites, *blogs* or other Internet-based, electronic or similar information delivery systems must be compatible with Article 19.3. In general, the permissible restrictions should focus on specific contents; generic bans on the operation of certain sites and systems are not compatible with Article 19. 3. It is also inconsistent with paragraph 3 to ban a website or a public information broadcasting system, for the sole reason that it would contain criticism against the government or the political system adopted by it (Concluding Remarks on the Syrian Arab Republic).



The freedom of expression proclaimed in Article 19 entails, as stated previously, the right to seek information, i.e. the right of access to information held by public authorities, such as that compiled in public registers, and the correlative right of citizens to access the results of media activity (communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*). To ensure the implementation of that right, States should ensure easy, fast and efficient access to information of public interest, for example by adopting laws on the freedom of information to guarantee the right of access to information in a timely and clear manner, and to ensure that refusals to provide the requested information on the part of the authorities must be properly justified and susceptible to administrative or judicial review.

It is also inconsistent with paragraph 3 regarding the limitation of the freedom of journalists and other individuals wishing to exercise freedom of expression (such as those who wish to travel to attend meetings on human rights), to travel abroad or restrict entry in the State of foreign journalists from certain countries, or limit the freedom of movement of journalists and investigators of human rights within the State party (e.g. in conflict areas, or areas that have suffered a natural disaster, or where abuses of human rights were reported). Freedom of expression includes the limited prerogative of journalists not to disclose their sources of information (Final remarks on Kuwait [CCPR/CO/69/KWT]<sup>295</sup>).

## 2. LIMITATIONS

No fundamental right is unlimited. The International Covenant envisages limitations on freedom of expression, as well as a minimum criterion, which must be respected by all States Parties. Article 19.1 establishes the eligible scope of these restrictions, or minimums that States or public authorities must respect in terms of the exercise of freedom of expression by others.

Firstly, it stipulates, in absolute terms and without exception, that: "Everyone shall have the right to hold opinions without interference". From this statement, it must be deduced that, firstly, the expression of an idea cannot be described as a crime (*Faurisson v. France*) and, secondly, it prohibits the harassment, intimidation, stigmatization and arrest of a person because of his or her ideas (*Mpaka-Nsusu v. Zaire*)

Secondly, it recognizes that freedom of expression has limitations ([it] "carries with it special duties and responsibilities") and that, therefore, we may assume certain restrictions of law in the interest of others or the whole community. However, these limitations or restrictions must not undermine the substantive content of this right. Paragraph 3 establishes the express condition that must be fulfilled such restrictions: they must be "provided by law" and can only be imposed where they are necessary "for respect of the rights or reputations of others" and "for the protection of national security or of public order, or of public health or morals." In any case, those restrictions must be justified; they must be "necessary" and "proportionate" to the legal right in question. In other words, these restrictions may never be used as justification to silence the defenders of democracy and human rights (communication No. 458/91, *Mukong v. Cameroon*, opinion approved on 21 July 1994). Therefore, these restrictions may include attitudes such as violence, arbitrary detention, torture, death threats and assassination (*Njaru v. Cameroon*) Journalists and human rights activists, including judges and lawyers, are frequently subjected to such threats.

As for the legal concept, the Human Rights Committee believes it must include the standards adopted in writing by a body with legislative power. This concept therefore differs from customary or religious norms, which are not valid to justify laws limiting the freedom of expression. Whereas any restriction of freedom of expression constitutes a serious violation of human rights, the Covenant does not permit restrictions enshrined in traditional law, religious law, or any other similar customary norm (communication No. 578/1994, *de Groot v. the Netherlands*)

295. On the importance and the risks of working in journalism, cf.: <http://www.ohchr.org/EN/NewsEvents/Pages/SafetyOfJournalists.aspx#sthash.iXmGsUFI.dpuf>

Secondly, this restrictive law must be formulated in a sufficiently clear and precise manner to enable everyone to adapt their behaviour in accordance with same. Laws must provide sufficient guidance to those responsible for their implementation for the latter to be able to distinguish expressions that can be correctly limited from those that would not tolerate restrictions. In any case, these restrictive laws can never be discriminatory nor impose penalties such as, for example, corporal punishment. The State has the burden of proof, i.e. it has the duty to prove that the restriction complies with the requirements established in Article 19.3.

Thirdly, when paragraph 3 states that such restrictions must respect “the rights or reputations of others”, the term “rights” refers to the human rights recognized in the Covenant and by international law.

Regarding the reputation of public figures, if they can also benefit from the provisions of the Covenant, simply offending such figures does not necessarily constitute a violation of the freedom of expression. All public figures, even those holding the most senior political positions, such as Heads of State or Government, can be a legitimate target of criticism and political opposition (Communication No. 1128/2002, *Marques de Moraes v. Angola*). Therefore, the Committee has expressed concern regarding laws on issues such as *treason (Aduayom and others v. Togo)*, contempt, disrespect for authority, flags and symbols, defamation of the Head of State and protection of the honour of public officials. In general, laws do not establish more severe penalties according to the personality the object of criticism. States parties should not prohibit the criticism of institutions, such as the army or the administration (final remarks on Tunisia [CCPR/C/TUN/CO/5]).

Defamation laws should include defence measures, such as evidence of the truth, and these should not be applied to forms of expression whose nature would prevent verification. At least as regards comments on public figures, consideration should be given to the possibility of not imposing penalties in the case of statements which, despite rigorous examination thereof, may simply constitute honest mistakes.

Fourth, the restrictions must aim to safeguard national security, public order, or public health or morals. As regards the protection of national security, States must ensure that laws on state secrets or that punish treason or sedition do not violate the minimum content of freedom of expression. For example, a bill blocking certain information that is not a threat to national security, allegedly to protect the public interest, would violate this content. In general, laws that withhold certain information to protect the public interest in the case of certain categories of information relating to the commercial sector, the banking industry and scientific progress, are also unacceptable. On the contrary, the protection of public order could be invoked to prevent the possibility of speeches being given in specific places not suitable for such activity for reasons of public interest. As regards the protection of public morals, the concept must be based on principles that are not exclusively matters of tradition.

In general, the restrictions should not be overly broad, and must be proportionate: they must be adapted to their protective function, and must be the least intrusive instrument of those established to achieve the desired result (general comment No. 27). The element of proportionality must be respected by both the law imposing the restriction and the actions of the administrative authorities and judges.

Among the restrictions on the expression of political thought that prompted concern on the part of the Committee, special mention must be made of the prohibition on door-to-door campaigns, restrictions on the amount and type of written materials that may be distributed during election campaigns, the blocking of access to sources of political debate, such as local and international media during election periods (final remarks on Tunisia [CCPR/C/TUN/CO/5]), and the restriction of access to the media by opposition parties and politicians. A State Party may nevertheless legitimately limit political polls during the days immediately preceding an election to preserve the integrity of the electoral process (*Kim v. the Republic of Korea*).

Finally, Article 20 of the Covenant states that any propaganda for war and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence is prohibited by the law of the State party.

This prohibition includes any form of propaganda that would constitute a threat of an act of aggression or breach of peace contrary to the UN Charter. Therefore, it does not imply the prohibition of the right of peoples to self-determination and independence in conformity with the UN Charter.

Paragraph 2 of Article 20 requires States parties to adopt laws that prohibit any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, both if this propaganda or advocacy pursues the internal goals of the State in question and if its goals are external to the State in question.

States parties must ensure that the measures they adopt to combat terrorism are consistent with Article 19.3. The offences of “incitement to terrorism”<sup>296</sup> and “extremist activity” (Final remarks on the United Kingdom of Great Britain and Northern Ireland (CCPR/C/GBR/CO/6).), as well as the offences of “praising” “exaltation” or “justification” of terrorism, must be clearly defined so that they do not give rise to unnecessary or disproportionate interference with freedom of expression. The media play a crucial role in informing the public about acts of terrorism. For this reason, journalists must not be penalized with regard to their right to seek information.

The prohibition on disrespectful expressions towards a religion or other belief system, including blasphemy laws, are incompatible with the Covenant, except as expressly provided in paragraph 2 of Article 20, i.e. when the disrespectful expressions reach a level that justifies their interpretation as vehicles for discourses of hate, and therefore instruments for the incitement of discrimination and hatred on religious grounds. Restrictive laws that punish any criticism of religious leaders or comments on religious doctrine or dogma would be contrary to the aforementioned Article.

Laws cannot be passed that penalize the expression of opinions about historical facts because they consider them to be misinterpretations or incorrect interpretations of the past (the “laws of historical memory”; see communication N° 550/93, *Faurisson v. France*); unless the denial is so offensive and lacking in rigour, it can be considered an incitement to discrimination and hatred (as is the case of Holocaust denial).

### 3. IMPORTANCE OF INFORMATION AND MEDIA LITERACY (IML) FOR CITIZENS

Information and media literacy (IML) brings together disciplines that were once separate and different. The purpose of IML is to give people an understanding of the importance of the media and other information providers to:

- (a) make informed decisions;
- (b) learn about the world around them;
- (c) develop the sense of community;
- (d) maintain a public debate; and
- (e) engage in lifelong learning.

In addition, IML should encourage citizens to actively provide information, innovate in their use of media products and information and develop critical thinking. IML should encourage them to use new and traditional media to express themselves, develop their creativity and foster greater participation in the democratic life of their country and in the global information network.

296. Regarding the laws that punish incitement to hatred, cf. [Striking a balance between freedom of expression and the prohibition of incitement to hatred](#) and: [Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence](#). Conclusions and recommendations emanating from the four regional expert workshops organized by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012.

Journalism and media sources are important in any society. Without journalists and without the news media, there would be no “window on the world” - we would have few means of knowing what occurs in our communities and in the world beyond our immediate experiences. There are several key elements that journalism must respect and that citizens expect from journalism:

- **Organize knowledge** - organize chaotic information to make this understandable and look beyond official positions to identify special interests.
- **Veracity** - in the media, information sources must be clearly identified so that citizens can judge their relevance, reliability and possible biases; important unanswered questions must be identified and monitored if there is any controversy.
- **Public interest** - in their work, journalists can do much to promote public interest by providing citizens with the information they need to take part in public affairs.
- **Independence** - in public debates journalists should make a clear effort to avoid all personal bias; commentators must take into account “both sides of the coin” (i.e. discuss ideas they approve and disapprove) and journalists must demonstrate independent thinking in their work.
- **The forum for public criticism and problem solving** - the media should offer more channels of interaction with the public (letters, e-mail, telephone contact or public forums); citizens also expect the media to give them access to a space or air time to enable them to converse in their own “language” with their fellow citizens; Furthermore, they expect a broad representation of views and values to be evident in the coverage of current affairs.
- **Accountability** - the media must exercise control over those who wield power, not only governments, but also public bodies and influential private stakeholders; by making the holders of power accountable, the media can foster reflection in communities.
- **Proportional and relevant information** - Citizens need to be informed in a timely manner on important matters and guidelines; reports should not overestimate or underestimate the true nature of the threats and risks when they exist.
- **Find a balance between respect for privacy and the right to know** - Citizens expect media professionals to know how to find a balance between the public’s right to information and the individual right to privacy. (cf. Fackson Banda, UNESCO, 2009)

## 4. FREEDOM OF EXPRESSION, EDITORIAL INDEPENDENCE, PLURALISM AND DIVERSITY

Freedom of information and freedom of expression are two pillars of information and media literacy. In this context, the use of the term “freedom of information” refers to access to public information. “Information is vital to our understanding of the world around us, our ability to find a role that makes sense and our ability to leverage the resources we have. When information is concentrated in the hands of a few, or only in the hands of the elite, the public’s ability to make decisions and to evaluate decisions is very limited. Ethical and pluralistic media can ensure transparency, accountability and the rule of law” (Case UNESCO Freedom of Expression).

Independent media derive their power from the responsible way in which they inform communities to which provide a service.

Monopolistic media ownership, such as State control, may seriously threaten diversity and pluralism and consequently freedom of expression. Competition regulations can limit monopolies, as well as professionalism and independence of journalists. The diversity of viewpoints is also based by the variety of forms of ownership (public, private and non-profit) and the variety of forms of media (print, radio, television, the Internet, etc.)

The widest possible dissemination of information from different and contradictory sources is essential for the well-being of populations. When newspapers and broadcasters with different owners criticize each other's content, the concentration of media in the same hands tends to prevent any mutual criticism and instead leads to self-promotion.

Technological advances in a global market economy have favoured the growth of global media groups, known as transnational media conglomerates. Their power and influence transcends geographical, economic and political barriers. International media groups also include those that operate regionally. Convergence, despite any antitrust regulations that may exist, has also facilitated national and global media mergers and take-overs. Many mass media partner with companies operating in telecommunications, web applications and entertainment (movies and video games). The new companies created by these coalitions have become more powerful because their messages, images and voice can now be communicated globally and even reach the remotest villages through different platforms - printed, televised and digital media.

The emergence of global media presents both challenges and opportunities. Some communication theorists have warned against the threat of cultural homogeneity, but paradoxically, the same media tools offer opportunities for cultural diversity and pluralism (it is now easier to produce, share and exchange local media content). The global media also have the capacity and resources to establish higher standards of professionalism.

Therefore, many local media must become more competitive by improving the quality of their programmes. Moreover, development issues with global impact, such as climate change, pandemics and threats to biodiversity, can be communicated efficiently by the world media. It is also acknowledged that many stories withheld from the local and national public due to political and economic restrictions are disclosed to an international audience by international independent media.

The impact of the media industry at political level is also changing. New media technologies promote information flows in both directions within and outside national borders and the emergence of larger platforms for public debate. All this promotes tolerance and understanding. The key question is: how can the media help promote a wider range of options, choice and freedom?

The dominant commercial media systems deserves special attention since advertising is its main source of income. How can media organizations preserve their independence and retain public trust, while remaining viable (profitable) and sustainable (in terms of operations)? Account must be taken of the consequences of attaching excessive importance to any one of these factors.

#### 4.1. FREEDOM OF EXPRESSION AND OF THE PRESS

Freedom of speech is the freedom to express and exchange views and opinions without fear of threats or punishment. Freedom of expression is a fundamental human right. The right to freedom of expression protects not only freedom of speech but any attempt to find, receive and impart information and ideas, regardless of the medium used. Freedom of the press is a necessary cornerstone of this right because it allows free expression to be public and shared. It is therefore essential for the creation and protection of communities and civil society.

Freedom of expression can promote a true sense of belonging in society by allowing ordinary people to discuss and express thoughts and different opinions. Freedom of expression is an integral part of civic responsibility, and it is essential for critical thinking. Limits on freedom of expression are permissible only when such restrictions are necessary to protect the freedoms of others. Limits, such as laws prohibiting "incitement to hatred", must be strictly defined in order to prevent abuse.

#### 4.2. MEDIA PLURALISM

A pluralistic media sector - which combines media platforms (printed, broadcast, online) and local perspectives (national, provincial or community) and political platforms - enables

companies to better reflect on themselves. When the power of the media is distributed among various owners, unpopular views can find a forum for expression. A successful mix of media at international, national and local level can give people the opportunity to participate in democratic processes. The widest possible dissemination of information from different and antagonistic sources is essential for the well-being of populations. Newspapers and broadcasters belonging to different groups generally criticize each other's content, while media concentration in the hands of one group allows for virtually no critical approach and can lead to the development of media propaganda to serve particular interests.

#### 4.3. EDITORIAL INDEPENDENCE

Editorial independence refers to the professional freedom most often entrusted to editors to make editorial decisions without the interference of media owners or other governmental or non-governmental stakeholders. Editorial independence is proven, for example, when a media publishes articles that may be unpopular with its owners or advertisers.

### 5. MEDIA TREATMENT OF THE ISSUE OF HUMAN RIGHTS, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION IN THE TUNISIAN MEDIA

It is important to note that freedom of expression is not only important in itself but also necessary for the exercise of other human rights: At individual level, freedom of expression is essential for the development, dignity and fulfilment of every individual. At national level, freedom of expression is fundamental for good governance and this can be achieved by ensuring that honest and competent people administer the State, by allowing citizens to express their concerns to the authorities, and by promoting the implementation of other human rights. For all these reasons, freedom of expression and freedom of information are recognized by the international community as fundamental human rights.

In this context of reflection, in the report of the High-Level Group on the agenda for post-2015 development, good governance is understood as the ability of a society to guarantee the rule of law, freedom of speech and open and accountable governance and the importance of freedom of the press in the promotion of good governance is highlighted by the growing number of people who have access to a wide range of media platforms. A society that is guaranteed access to public documents and public decision-making processes can draw attention to conflicts of interest and inform citizens of development process. This is greatly facilitated by a strong right to information that allows citizens - including the news media - to quickly, easily and freely access public information. The laws on freedom of information are increasing in the world, but their implementation needs to be improved if they are to contribute to development. As noted in one study, "Freedom of the press and governance are not mutually exclusive: they are related while promoting the economic and human development of a country".

As regards the Tunisian context, laws regulating the press were introduced after the French occupation, starting with the Decree of 6 August 1936, through to legislation after independence, including the Decree of 9 February 1956, the Decree of 7 November 1957, the Decree of 10 August 1957 and the Decree of 30 August 1961, to the press law of 28 April 1975 (Law No. 32-1975), which was amended several times in subsequent years (1988, 1993, 2001 and 2006). Additionally, despite these many changes, aimed at guaranteeing the freedom and openness of the media landscape in Tunisia, the 1975 Press Code continued to be a repressive text, given the large number of custodial sentences.

In Tunisia, after the revolution of 14 January 2011, the transformations in the media world have been spectacular. A reflection on the total reorganization of the media has been initiated and continues today. Information professionals have called for the abolition of the Press Code, considering its provisions that restrict freedom of expression and its repressive character.

Although new regulations have been implemented, these regulations have gone through several stages, after a struggle lead by the National Union of Tunisian Journalists and INRIC (National Independent Authority for the Reform of the Information and Communication



Sector). This body was established on 2 March 2011 by the interim President of the Republic of Tunisia. From the first days of the revolution, voices were raised demanding the creation of an independent body whose mission would be to reform and regulate the information and communication sector in order to avoid the media discourse degenerating into political squabbles and to prevent it from descending into anarchy and populism. The main function assigned to the INRIC is to propose the necessary legislation for the regulation of the printed media, audio-visual and electronic media sectors.

Three new pieces of legislation have been adopted in collaboration with INRIC and the stakeholders involved in the media sector. These are Decree No. 41-2011 of 26 May 2011 on access to administrative documents of public bodies, of Legislative Decree No. 115-2011 of 2 November 2011 on the freedom of press, of printing and publishing and Decree No. 116-2011 of 2 November 2011 on the freedom of audio-visual communication and the creation of an independent high authority for audio-visual communication (HAICA).

As regards Decree-Law No. 115 on freedom of the press, printing and publishing. This decree clarifies the conditions for engaging in journalism as a profession, protection of sources and the abolition of custodial sentences. It also mentions multiple safeguards provided to enshrine the pluralism of opinion and transparency in the financing and management of press companies.

Decree-Law No. 116 on audio-visual communication is the first law on the Tunisian media to include articles regulating the composition, powers and functioning of the High Independent Authority for Audiovisual Communication (HAICA). In this context, the INRIC report highlights the compliance of these articles with international standards on freedom of expression.

Currently, as mentioned by the High-Level Panel on the Post-2015 Development Agenda: "Freedom of speech favours development and has intrinsic value. It is both a means to an end and an end in itself."



## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 3**

**Subject**

**2.4.4.** Right to peaceful assembly and Freedom of association

**Lecturer:**

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## SUMMARY OF THE TOPIC

The rights to peaceful assembly and association are key to the exercise of many other civil, cultural, economic, political and social rights. They are essential elements for democracy, since through their use, men and women can “express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable”. Such interdependence and interrelatedness with other rights make them a valuable indicator of a State’s respect for the enjoyment of many other human rights

In this topic, they will study what the main international documents are that protect the rights to free peaceful assembly and association, universally and regionally, and mainly in Latin America.

It is essential to recall that the rights to free peaceful assembly and association are the keystone to any democracy, so the States have the duty to facilitate and protect these rights on both the legislative and the practical level. Given the above, some of the topics covered are: the legal framework and the exercise of these rights, the best practices regarding the right to free peaceful assembly, the right to hold peaceful meetings and to participate at them, the best practices regarding the right to free association, the right to form associations and join them, the right to access funding and resources, the right to participate in the management of public affairs and, finally, the right to effective resources and to accountability for violations and abuses of human rights.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBA Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the

pedagogical potential of the *general and specific competencies* described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

More specifically, *on this topic* we will work on the general and specific competencies ticked below.

#### GENERAL:

- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** understand and accept social and cultural diversity as an enriching personal and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** analyse and evaluate the consistency of the approaches, in particular, the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** to be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- Suitably identify, interpret and apply the international, regional and national norms on human rights applicable to the different assumptions posed in their respective disciplines and professional areas.
- Define and accurately distinguish who the possessors of rights are and the holders of obligations in relation to each human right in a particular situation.
- Identify the specific obligations of respect, protection and realisation of each human right and the minimum normative content needed for its realisation and for questioning its fulfilment in a particular situation.
- Identify, analyse, argument and evaluate the critical deviations and gaps in the capability and responsibility of the holders of rights and obligations that hinder the action or transformation of a particular situation in which human rights are being violated.
- Contrast and evaluate situations, practices, legislation, local and national policies in accordance with the legal instruments on human rights ratified in your country, and suggest and plan out some efficient alternatives.
- Identify and apply the international and regional protection mechanisms for human rights.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### Main international standards

- [Universal Declaration of Human Rights: article 20\(1\)](#)
- [International Covenant on Civil and Political Rights: articles 21 and 22](#)

- [General Comment 25 \(Article 25\) of the Human Rights Committee \(participation in public affairs and the right to vote\)](#)
- [International Covenant on Economic, Social and Cultural Rights: article 8](#)
- [International Convention on the Elimination of All Forms of Racial Discrimination: articles 4 and 5\(ix\)](#)
- [Convention on the Elimination of All Forms of Discrimination against Women: article 7\(c\)](#)
- [Convention on the Rights of the Child: article 15](#)
- [International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: article 26](#)
- [International Convention for the Protection of All Persons from Enforced Disappearance: article 24\(7\)](#)
- [Convention on the Rights of Persons with Disabilities: article 29](#)
- [International Labour Organization \(ILO\)'s Convention No. 87 on Freedom of Association and Protection of the Right to Organise](#)
- [ILO's Convention No. 98 on the Right to Organise and Collective Bargaining](#)
- [ILO's Convention No. 135 on Workers' Representatives](#)
- [Declaration on Human Rights Defenders \(Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms\): article 5](#)

### Main regional standards

- [African Charter on Human and Peoples' Rights: articles 10 and 11](#)
- [African Charter on the Rights and Welfare of the Child: article 8](#)
- [American Declaration of the Rights and Duties of Man: articles 21 and 22](#)
- [American Convention on Human Rights: articles 15 and 16](#)
- [European Convention on Human Rights: article 11](#)
- [Charter of Fundamental Rights of the European Union: article 12](#)
- [Organization for Security and Co-operation in Europe \(OSCE\) and Council of Europe's Commission for Democracy through Law \(Venice Commission\): Guidelines on Freedom of Peaceful Assembly \(2nd edition\)](#)
- [OSCE/ Venice Commission: Guidelines on Political Party Regulation](#)

United Nations Human Rights Office of the High Commissioner, [The rights to freedom of peaceful assembly and association](#)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

### [Reports from the United Nations Special Rapporteur:](#)

- A/HRC/20/27, May 21, 2012.
- A/HRC/23/39, April 24, 2013.
- A/68/299, August 7, 2013.
- A/HRC/26/29, April 14, 2014.

Joint report by the Special Rapporteur on the rights to free peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, February 4, 2016.

Statement from the High Commissioner in the Report of the United Nations High Commissioner for Human Rights, Seminar on effective measures and best practices to ensure the promotion and protection of human rights in the context of peaceful protests, A/HRC/25/32 of 29 January 2014

## LEARNING PROCESS RESULTS

Upon completion of this topic, the student should:

- Knowing the main United Nations documents are on this topic as well as in the Inter-American system.
- Noting the area of responsibility of the States in terms of potential violation of the rights to free peaceful assembly and association.
- Identifying the main obstacles that exist today to the protection of the human rights to free peaceful assembly and association in different parts of the world.
- Countering those arguments on the restrictions of the above-mentioned rights.
- Analysing the situation of the rights to free peaceful assembly and to association in relation to particular persons: women, young people. Indigenous peoples, people with disabilities, members of minority or risk groups, victims of discrimination on account of sexual orientation or gender identity, non-nationals and activists.

## METHODOLOGY

We include as suggestions the following:

Methodology:	Teaching tools
Expository method	Reading texts and/or viewing audiovisual material
Problem-solving	Carry out the activity described
Group discussions	Forum and writing the final document

## DESIGNING A SYLLABUS OF LEARNING ACTIVITIES

1. Study the content of the topic.
2. Read the wording of the Rights and their corresponding articles.
3. Choose 4 real-life situations in which, in your opinion, the rights to free peaceful assembly and to association are violated.
4. For each one, justify why the violation of those rights occurs.
5. What international norm is your argumentation based on?
6. Presentation to the group of the different situations chosen by the group members. Debate in regard to how often such violations take place, and the steps that can be taken to prevent and eliminate them.

7. Write a final document that features the main results of the learning activity, insisting on the ways formulated for prevention and elimination of violations of those rights to free peaceful assembly and to association.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Assessment criteria
Reading and study of the subject	1,30 minutes	
Activity 1: Individual work	40 minutes	
Activity 2: Presentation	10 minutes of presentation per student	
Activity 3: Debate	20 minutes	
Activity 4: Writing a final document	Between 10 and 15 minutes	*Proposals for action will be given special consideration.

## SUBJECT 2.4.:

# 2.4.4. RIGHT TO PEACEFUL ASSEMBLY AND FREEDOM OF ASSOCIATION

### INTRODUCTION

The rights to peaceful assembly and association are key to the exercise of many other civil, cultural, economic, political and social rights. They are essential elements for democracy, since through their use, men and women can “express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable” (Council resolution 15/21, preamble). Given the interdependence and interrelatedness with other rights the right to free peaceful assembly and to association constitute a valuable indicator of a State’s respect for the enjoyment of many other human rights

Reactions to the Arab Spring of early 2011 are still being felt around the world, and there is less and less space left where the agents of civil society can collectively promote or defend an area of common interest. Democracy is more than simply exercising the right to vote, and for it to flourish, the people must have all their basic rights and freedoms guaranteed, including the right to expression and to assemble, as a way of influencing the public policies of the State<sup>297</sup>.

#### The Universal Declaration of Human Rights, 1948

**Article 20:** 1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association.

#### International Covenant on Economic, Social and Cultural Rights, 1966

**Article 21:** The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialized agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the present Covenant.

**Article 22:** The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialized agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

297. Report by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 14 April 2014 (UN Doc. A/HRC/26/29, para 7).

# 1. GENERAL PRINCIPLES

## 1.1. LEGAL FRAMEWORK

Resolution 15/21 reaffirms that “everyone has the rights to freedom of peaceful assembly and of association”. This provision must be read conjointly with article 2 of the International Covenant on Civil and Political Rights<sup>298</sup>, as well as article 26, which guarantees to all persons equal and effective protection against discrimination for the reasons stipulated in article 2. This principle applies in particular to minors, indigenous peoples; persons with disabilities; members of minorities and other risk groups, including victims of discrimination for reasons of sexual orientation or gender identity; non-nationals, including stateless, refugees and migrants; and associations, including non-registered groups. The rights to freedom of peaceful assembly and of association are basic human rights that form part of the international rules of human rights and are established in Article 20 of the Universal Declaration of Human Rights.<sup>299</sup>

The right to freedom of peaceful assembly is guaranteed in article 21 of the International Covenant on Civil and Political Rights, and the right to freedom of association, in article 22. These rights are also established in article 8 of the International Covenant on Economic, Social and Cultural Rights. Furthermore, the international human rights instruments that protect the rights of specific groups specifically recognise, directly or indirectly, the rights of these groups to freedom of peaceful assembly and of association:<sup>300</sup>

- The Convention on the Rights of the Child requires the States Parties to recognise the rights of children to freedom of association and freedom of peaceful assembly (art. 15).
- The Convention on the elimination of all forms of discrimination against women requires the States to take all appropriate measures to ensure that women can participate in political and public life of the country on equal terms with men, which includes the right to participate in non-governmental organisations (NGOs) and in associations related with the public and political life of the country (art. 7).
- The obligation of the States to safeguard the human rights of LGBTI persons is clearly established in international law on human rights on the basis of the Universal Declaration of Human Rights, which in article 1 affirms unequivocally: “All human beings are born free and equal in dignity and rights”. Furthermore, it is established in the jurisprudence and in the interpretation of the obligations of the States emanating from international law on human rights made by many bodies created in virtue of human rights treaties from the United Nations<sup>301</sup>. In resolution 17/19, the Human Rights Council expressed concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.
- Article 5 of the Convention on the rights of persons with disabilities gives particular importance to ensuring that such persons are equal under the law and given equal

298. “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

299. See Resolution 17/19 of the Human Rights Council.

300. UN Doc. A/HRC/26/29, para 20.

301. See for example, the Human Rights Committee, *Toonen vs Australia* (ruling) and CCPR/C/KWT/CO/2; the Committee on Economic, Social and Cultural Rights No. 20 (2009); the Committee on the Rights of the Child, General Comments Nos. 3 (2003), 4 (2003) and 13 (2012); and the Committee against Torture, General Comment No. 2 (2007).



treatment. Article 29 explicitly recognises the rights of persons with disabilities to take part in public and political life, including by participating in NGOs that intervene in public and political life and creating organisations that represent their interests at all levels and forming part of them.

- Indigenous peoples have the right, among others, to participate fully in the political, economic, social and cultural life of the State, and to determine their own identity or belonging in accordance with their customs and traditions.<sup>302</sup>
- The rights of minority groups to free assembly is implicit in the protection granted in the International Covenant on Civil and Political Rights to their right, in common with the rest of the members of their group, to having their own cultural life, to professing their own religion and to using their own language (art. 27).
- The International Convention on the protection of the rights of all migrant workers and their families guarantees the right to join associations and to participate in their activities, but it does not extend to protecting the right to create associations (art. 26).
- Internally displaced persons have the same rights and freedoms in accordance with the national and international legislation as everyone else in the country, and in particular, they have the right to associate freely and participate in community affairs on equal terms.<sup>303</sup>
- Refugees who reside legally in a country have the right, as regards the right to freedom of association, to the most favourable treatment given to the nationals of a foreign country in the same circumstances.<sup>304</sup>
- As regards non-nationals, the Committee for the Elimination of Racial Discrimination recognises that the States may require non-citizens to have work permits to be able to access job offers. Nevertheless, everyone is entitled to enjoy labour and employment rights, including freedom of assembly and syndication, from the start to the end of a labour relation.<sup>305</sup>

The Declaration on the right and duty of individuals, groups and institutions to promote and protect universally recognised basic human rights and freedoms explicitly recognises the rights of the defenders of human rights to assemble peacefully, to form non-governmental organisations, associations or groups, and to join them or take part in them, and to communicate with non-government and inter-governmental organisations (art. 5).

According to article 4 of the International Covenant on Civil and Political Rights, the rights to freedom of peaceful assembly and of association are not absolute and may be subject to restrictions, as will be explained further below.

## 1.2 THE ENVIRONMENT IN WHICH THESE RIGHTS ARE EXERCISED

The rights to freedom of peaceful assembly and of association are constitutionally guaranteed in most countries. In many States, specific domestic laws further govern the exercise of these rights. However, in many instances, domestic legislation in place listed grounds additional to those already prescribed by international human rights law or ambiguous. The UN has warned against arbitrary interpretations of such grounds for restriction. It further cautions against an environment in which the enjoyment of these rights is seriously impeded

302. United Nations Declaration on the rights of indigenous peoples, arts. 5 and 33.

303. Guiding Principles on Internal Displacement, principles 1, para. 1, and 22, para. 1 c).

304. Convention on the Status of Refugees, art. 15.

305. General recommendation No. 30 (2004), para. 35.

The legitimate combat against terrorism, and other security considerations, has been used as a justification for the adoption of a state of emergency or other stricter rules to void the rights to freedom of peaceful assembly and of association. In many instances, emergency regulations have been used to clampdown on freedoms of peaceful assembly, of association and of expression. On different occasions, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stressed in a report the repercussion of the measures against this phenomenon on the rights of assembly and association. Instead, limitation measures, as provided for in the International Covenant on Civil and Political Rights are sufficient in an effective fight against terrorism.<sup>306</sup>

Country-specific contexts sometimes extinguish the rights to freedom of peaceful assembly and of association. In situations of armed conflict, individuals who desire to assemble and associate freely, even to address emergency needs or to call for the end of violence, may meet drastic restrictions that may amount to a strict denial of their rights.

The context of elections may also heavily impact on the rights to freedom of peaceful assembly and of association. This is particularly the case when assemblies are systematically prohibited or when individuals active in associations promoting transparent and fair electoral processes and defending democratic principles are subject to harassment and intimidation for their civic activism.

## 2. THE RIGHT TO FREEDOM OF PEACEFUL ASSEMBLY

### 2.1. DEFINITION OF A PEACEFUL ASSEMBLY

An “assembly” is understood as being an intentional and temporary gathering in a private or public space for a specific purpose. It therefore includes demonstrations, inside meetings, strikes, processions, rallies or even sits-in. Assemblies play a vibrant role in mobilizing the population and formulating grievances and aspirations, facilitating the celebration of events and, importantly, influencing States’ public policy.

International human rights law only protects assemblies that are peaceful, i.e. those that are not violent, and where participants have peaceful intentions, which should be presumed. According to the European Court of Human Rights, an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behaviour.

### 2.2 THE RIGHT TO HOLD AND TO PARTICIPATE IN A PEACEFUL ASSEMBLY

Fundamentally, one of the best practices is that of the presumption in favour of holding peaceful assemblies, as stressed by the Panel of Experts on Freedom of Peaceful Assembly from the Organisation for Safety and Cooperation in Europe and the Office of Democratic Institutions and Human Rights (OSCE/ODIHR). Such a presumption should be “clearly and explicitly established in the law”, enshrined either in constitutions or in laws governing peaceful assemblies (e.g. as in Armenia and Romania).

It should be stressed that the enjoyment of the right to hold and participate in peaceful assemblies entails the fulfilment by the State of its positive obligation to facilitate the exercise of this right.<sup>307</sup>

306. UN Doc. A/61/267, para. 53.

307. In this regard is the Law on Assembly in Armenia, which states that the police shall be obliged to facilitate peaceful assemblies (art. 32, para. 2). The statement of the Her Majesty’s Inspectorate of Constabulary of the United Kingdom, an independent assessment institution, noted that “the police as a service has recognized and adopted the correct starting point for policing protest as the presumption in favour of facilitating peaceful protest”

The exercise of fundamental freedoms should not be subject to previous authorization by the authorities (as explicitly expressed in the Spanish Constitution), but at the most to a prior notification procedure, whose rationale is to allow State authorities to facilitate the exercise of the right to freedom of peaceful assembly and to take measures to protect public safety and order and the rights and freedoms of others. Such a notification should be subject to a proportionality assessment, not unduly bureaucratic and be required a maximum of, for example, 48 hours prior to the day the assembly is planned to take place<sup>308</sup>. Prior notification should ideally be required only for large meetings or meetings which may disrupt road traffic.<sup>309</sup>

Should the organizers fail to notify the authorities, the assembly should not be dissolved automatically (e.g. as in Austria) and the organizers should not be subject to criminal sanctions, or administrative sanctions resulting in fines or imprisonment. This is all the more relevant in the case of spontaneous assemblies where the organizers are unable to comply with the requisite notification requirements, or where there is no existing or identifiable organizer. In this context, the UN holds as best practice to adopt legislation allowing the holding of spontaneous assemblies, which should be exempted from prior notification.<sup>310</sup>

In the case of simultaneous assemblies at the same place and time, the UN considers it good practice to allow, protect and facilitate all events, whenever possible. In the case of counter-demonstrations, which aim at expressing discontent with the message of other assemblies, such demonstrations should take place, but should not dissuade participants of the other assemblies from exercising their right to freedom of peaceful assembly. In this respect, the role of law enforcement authorities in protecting and facilitating the events is crucial.

With regard to the responsibilities of organizers, the UN is of the opinion that “organizers should not incur any financial charges for the provision of public services during an assembly (such as policing, medical services and other health and safety measures)”<sup>311</sup>. Most importantly, assembly organizers and participants should not be considered responsible (or held liable) for the unlawful conduct of others, nor should they be held responsible for the maintenance of public order. The UN considers as a good practice, when necessary, the use of stewards appointed by the organizers of an assembly, i.e. persons who provide assistance to them by, for example, informing and orienting the public during the event. Stewards should be clearly identifiable and properly trained.

## 2.3. OBLIGATIONS OF THE STATES

### a) Obligation to protect

The State is not the only perpetrator of violations relating to peaceful assembly and association. The actions of non-State actors play a significant role in denying groups most at risk the space to exercise their rights, often through prevailing patriarchal attitudes,

308. A notification procedure is in force in several countries, including Armenia, Austria, Canada, Cote d'Ivoire, Finland, Indonesia, Morocco, the Occupied Palestinian Territory, Portugal, Senegal, Serbia, and the United Republic of Tanzania.

309. In the Republic of Moldova, any assembly of fewer than 50 participants may take place without prior notification and the change from an authorization to a notification procedure fostered an increase in the number of individuals exercising their right to freedom of peaceful assembly. In this context, the UN regrets that the law on demonstrations recently adopted by referendum in the canton of Geneva, (Switzerland) provides for a fine of up to 100,000 Swiss francs for anyone who, inter alia, does not request an authorization to demonstrate or does not respect the content of the authorisation.

310. This is the case for example, in Armenia, Estonia, Germany, the Republic of Moldova and Slovenia. In this connection, the European Court of Human Rights has emphasized that “in special circumstances when an immediate response, in the form of a demonstration, to a political event might be justified, a decision to disband the ensuing, peaceful assembly solely because of the absence of the requisite prior notice, without any illegal conduct by the participants, amounts to a disproportionate restriction on freedom of peaceful assembly”. (available in Spanish at <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/areas-tematicas/area-internacional/tribunal-europeo-derechos> ).

311. In Austria, for example, protection of assemblies is free of charge.

stereotypes, assumptions and social constructions that keep those groups at the margins of society. The obligations of States extend beyond respecting and fulfilling rights, to protecting rights holders from violations and abuses by others.<sup>312</sup>

States have a positive obligation to actively protect peaceful assemblies. Such obligation includes the protection of participants of peaceful assemblies from individuals or groups of individuals, including agents provocateurs and counter-demonstrators, who aim at disrupting or dispersing such assemblies, including members of the State apparatus or individuals working on its behalf. The organizers and stewards of assemblies should not assume this obligation. Such responsibility should always be explicitly stated in domestic legislation.<sup>313</sup>

The Special Rapporteur has expressed his utmost concern in relation to peaceful assemblies that were either not allowed or violently dispersed in a number of countries, such as in Bahrain, Belarus, China, Egypt, the Islamic Republic of Iran, Malawi, Malaysia, Sri Lanka and the Syrian Arab Republic.

### **b) Obligation to respect**

States have the obligation to prevent undue interference in the exercising of the right to peaceful assembly. The Special Rapporteur holds as best practice “laws governing freedom of assembly [that] both avoid blanket time and location prohibitions, and provide for the possibility of other less intrusive restrictions ... Prohibition should be a measure of last resort and the authorities may prohibit a peaceful assembly only when a less restrictive response would not achieve the legitimate aim(s) pursued by the authorities”.

As mentioned earlier, any restrictions imposed must be necessary and proportionate to the aim pursued. Reference to the proportionality test is found in legislation governing peaceful assemblies in a number of countries, including New Zealand and Switzerland. In addition, such restrictions must be facilitated within “sight and sound” of its object and target audience, and organizers of peaceful assemblies should not be coerced to follow the authorities suggestions if these would undermine the essence of their right to freedom of peaceful assembly”. In this connection, it is reproachable to use the practice whereby authorities allow a demonstration to take place, but only in the outskirts of the city or in a specific square, where its impact will be muted.

The Special Rapporteur further concurs with the assessment of the ODIHR Panel of Experts that the free flow of traffic should not automatically take precedence over freedom of peaceful assembly. In this regard, the Inter-American Commission on Human Rights has indicated that “the competent institutions of the State have a duty to design operating plans and procedures that will facilitate the exercise of the right of assembly ... [including] rerouting pedestrian and vehicular traffic in a certain area”. Furthermore, the Special Rapporteur points to a decision of the Spanish Constitutional Court which stated that “in a democratic society, urban space is not only an area for circulation, but also for participation”.

The regulatory authorities must provide assembly organizers with timely and fulsome reasons for the imposition of any restrictions, and the possibility of an expedited appeal procedure. The organizers should be able to appeal before an independent and impartial court, which should take a decision promptly. In several States, the regulatory authority has the obligation to justify its decision (e.g. Senegal and Spain).<sup>314</sup>

312. UN Doc. A/HRC/26/29, par. 9.

313. This is the case in Slovenia, the Republic of Moldova and Serbia, inter alia. In Armenia, organizers may request police officials to remove provocateurs from the assembly venue (even if in practice the implementation of this provision is reportedly sometimes problematic). Estonia has created a Police Rapid Response Unit (riot police) which aims at protecting peaceful demonstrators against attacks by provocateurs and counter-demonstrators and is trained in how to separate the main provocateurs from peaceful demonstrators.

314. In Bulgaria, the organizer of an assembly may file an appeal within three days of receipt of a decision banning an assembly; the competent administrative court shall then rule on the ban within 24 hours. Similarly, in Estonia, a complaint may be filed with an administrative court, which is required to make a decision within the same or next day; the organizers may also launch a complaint with the Estonian Ombudsman.

## 2.4. MONITORING PEACEFUL ASSEMBLIES

The report to the General Assembly of the United Nations on the situation of human rights defenders stated that “monitoring of assemblies can provide an impartial and objective account of what takes place, including a factual record of the conduct of both participants and law enforcement officials. This is a valuable contribution to the effective enjoyment of the right to peaceful assembly. The very presence of human rights monitors during demonstrations can deter human rights violations. It is therefore important to allow human rights defenders to operate freely in the context of freedom of assembly”<sup>315</sup>. Such defenders include members of civil society organizations, journalists, “citizen journalists”, bloggers and representatives of national human rights institutions.

## 2.5. RESTRICTIONS TO THE RIGHT TO PEACEFUL ASSEMBLY<sup>316</sup>

Freedom of peaceful assembly is a fundamental right, and should be enjoyed without restriction to the greatest extent possible. Only those restrictions which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights and freedoms of others, and are lawful, necessary, and proportionate to the aim pursued, may be applied. Any restrictions are to be the exception rather than the norm, and must not impair the essence of the right.<sup>317</sup>

To satisfy the requirement of lawfulness, any restrictions imposed must have a legitimate and formal basis in law (the legality principle), as must the mandate and powers of the restricting authority<sup>318</sup>. The law itself must be sufficiently precise to enable an individual to assess whether or not his or her conduct would be in breach of the law, and also foresee the likely consequences of any such breach<sup>319</sup>. To conform to the principle of proportionality, any restriction must be appropriate to achieve its protective function. To meet the necessity requirement, it must also be the least intrusive instrument among those which might achieve the desired result<sup>320</sup>. It must be narrowly tailored to the specific aims and concerns of the authorities, and take into account an analysis of the full range of rights involved in the proposed assembly. In determining the least intrusive instrument to achieve the desired result, authorities should consider a range of measures, with prohibition a last resort. To this end, blanket bans, including bans on the exercise of the right entirely or on any exercise of the right in specific places or at particular times, are intrinsically disproportionate, because they preclude consideration of the specific circumstances of each proposed assembly.<sup>321</sup>

When a State invokes national security and protection of public order to restrict an assembly, it must prove the precise nature of the threat and the specific risks posed<sup>322</sup>. It is not sufficient for the State to refer generally to the security situation. National, political or government interest is not synonymous with national security or public order.

315. UN Doc. A/62/225, para. 91.

316. This section is taken from the Joint report by the Special Rapporteur on the rights to free peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, February 4, 2016. (UN Doc. A/HRC/31/66, paras. 29-35).

317. See Human Rights Committee, General Comment No. 27 (1999) on freedom of movement, para. 13.

318. See OSCE/OIDDH, Guidelines, para. 35, and the European Court of Human Rights, *Hyde Park and others v. Moldova*, application no. 33482/06, 31 March 2009.

319. See European Court of Human Rights, *Hashman and Harrup, vs. the United Kingdom*, application no. 25594/94, 25 November 1999, para. 31, and *Gillan and Quinton vs. the United Kingdom*, application no. 4158/05, 12 January 2010, para. 76.

320. See Human Rights Committee, General Comment No. 27, para. 14.

321. See UN Doc. A/HRC/23/39, para. 63.

322. See Human Rights Committee, communication no. 1119/2002, *Lee vs. the Republic of Korea*, decision approved 20 July 2005, para. 7.3.

Assemblies are an equally legitimate use of public space as commercial activity or the movement of vehicles and pedestrian traffic<sup>323</sup>. Any use of public space requires some measure of coordination to protect different interests, but there are many legitimate ways in which individuals may use public spaces. A certain level of disruption to ordinary life caused by assemblies, including disruption of traffic, annoyance and even harm to commercial activities, must be tolerated if the right is not to be deprived of substance.<sup>324</sup>

Participants in assemblies are free to choose and express the content of their message. Restrictions on the content of assemblies may be imposed only in conformity with the legitimate limitations on rights outlined above, for example, where the message advocates national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Where a content-based restriction is justified, authorities should take the least intrusive and restrictive measures to address the issue.

“Time, place and manner” restrictions refer to prior restrictions regarding when, where and how an assembly may be conducted. Such restrictions should never be used to undermine the message or expressive value of an assembly or to dissuade the exercise of the right to freedom of assembly.

The onus of justifying a limitation rests with the authority. If any restriction is imposed there should be an option for organizers to seek judicial review and, where relevant, administrative review, that is prompt, competent, independent and impartial.<sup>325</sup>

### 3. THE RIGHT TO FREEDOM OF ASSOCIATION

#### 3.1 DEFINITION OF AN ASSOCIATION

An “association” refers to any groups of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.<sup>326</sup>

#### 3.2 THE RIGHT TO FORM AND TO JOIN AN ASSOCIATION

The UN emphasizes that the right to form and join an association is an inherent part of the right to freedom of association. It also includes the right to form and join trade unions for the protection of one’s interests, as enshrined in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

International human rights law stipulates that everyone has the rights to freedom of association<sup>327</sup>. As a result, legislation that does not set any specific limitation on individuals, including children (e.g. national human rights institution of Cote d’Ivoire) and foreign nationals (e.g. Burkina Faso and the United States of America) complies with international standards. However, under international human rights law, members of the armed forces and of the police may have their right lawfully restricted. Any restrictions must, nevertheless, comply with States’ international human rights obligations as blanket restrictions shall not be considered lawful. A higher number may be required to establish a union or a political party, but this number should not be set at a level that would discourage people from engaging in associations.

323. See A/HRC/20/27, para. 41, and ODDH/OSCE, Guidelines, para. 20.

324. European Court of Human Rights, Kuznetsov vs. Russia, application no. 10877/04, 23 October 2008, para. 44, and the Inter-American Commission on Human Rights, Report on Citizen Security and Human Rights, para. 197.

325. Resolution 25/38 of the Human Rights Council; see also A/HRC/20/27, 42.

326. See the Report of the Special Representative of the Secretary General on human rights defenders, A/59/401, para. 46.

327. Resolution 25/38 of the Human Rights Council; see also A/HRC/20/27, 42.



An important component of the right to freedom of association is that no one may be compelled to belong to an association (e.g. Chile, Guatemala, Portugal and Republic of Moldova).

### 3.3. OBLIGATIONS OF THE STATES

#### a) Obligation to protect

The right to freedom of association obliges States to take positive measures to establish and maintain an enabling environment. It is crucial that individuals exercising this right are able to operate freely without fear that they may be subjected to any threats; acts of intimidation or violence, including summary or arbitrary executions; enforced or involuntary disappearances; arbitrary arrest or detention; torture or cruel, inhuman or degrading treatment or punishment; a media smear campaign; travel ban or arbitrary dismissal, notably for unionists.

#### b) Obligation to respect

Furthermore, States have a negative obligation not to unduly obstruct the exercise of the right to freedom of association. Members of associations should be free to determine their statutes, structure and activities and make decisions without State interference. Associations pursuing objectives and employing means in accordance with international human rights law should benefit from international legal protection. Associations should enjoy, inter alia, the rights to express opinion, disseminate information, engage with the public and advocate before Governments and international bodies for human rights, for the preservation and development of a minority's culture or for changes in law, including changes in the Constitution. Occasionally, the formation of associations embracing minority or dissenting views or beliefs may sometimes lead to tensions, but it is the duty of the State to ensure that everyone can peacefully express their views without any fear.

Authorities must also respect the right of associations to privacy as stipulated in article 17 of the Covenant on Civil and Political Rights. In this connection, authorities should not be entitled to: condition any decisions and activities of the association; reverse the election of board members; condition the validity of board members' decisions on the presence of a government representative at the board meeting or request that an internal decision be withdrawn; request associations to submit annual reports in advance; and enter an association's premises without advance notice. Recognition must be made of the right of independent bodies to examine the associations' records as a mechanism to ensure transparency and accountability, but such a procedure should not be arbitrary and must respect the principle of non-discrimination and the right to privacy as it would otherwise put the independence of associations and the safety of their members at risk.<sup>328</sup>

### 3.4. THE RIGHT TO ACCESS FUNDING AND RESOURCES

The ability for associations to access funding and resources is an integral and vital part of the right to freedom of association. The Special Rapporteur refers to ILO principles which underline that "provisions which give the authorities the right to restrict the freedom of a trade union to administer and utilize its funds as it wishes ... are incompatible with the principles of freedom of association"<sup>329</sup>. Numerous United Nations human rights bodies have also emphasized the principle that associations should access funding freely.

Any associations, both registered or unregistered, should have the right to seek and secure funding and resources from domestic, foreign, and international entities, including individuals, businesses, civil society organizations, Governments and international organizations. Nonetheless, the Special Rapporteur notes with concerns that, in some countries, only

328. The African Commission on Human and Peoples' Rights ruled the violation of the right to freedom of association by the Government of Nigeria by decreeing that the Nigerian Lawyers Association had to be governed by a new guiding organ and that 97 of the 128 members of this organ would be appointed by the Government. Vid. the report of the Special Rapporteur on the status of human rights defenders, A/64/226, para. 34.

329. Committee on Freedom of Association, Digest of 1985, para. 327.



registered associations are eligible for funding and resources. In this context, it appears essential that rules regulating the creation of associations comply with the aforementioned identified best practices to allow any associations to access funding and resources.

In many countries, domestic funding is very limited or non-existent, leading associations to rely on foreign assistance to conduct their activities. Therefore, funding restrictions, including restrictions on foreign funding, may disproportionately affect associations that promote issues that do not enjoy popularity or the support of the State or the majority of the population, including those that relate to the advancement of the rights of marginalized groups. This is evidenced by the dichotomy that some States impose regarding association funding sources: certain types of activities or organizations are permitted to receive foreign funding while others only receive domestic funding. Legislation that provides broad discretion to authorities to monitor or oversee the activities of associations poses a grave risk to the continued existence of organizations that engage in activities perceived to be threatening to the State<sup>330</sup>.

The Special Rapporteur echoes the recommendations put forward by the then Special Representative of the Secretary-General on the situation of human rights defenders who affirmed that “governments must allow access by NGOs to foreign funding as a part of international cooperation, to which civil society is entitled to the same extent as Governments”<sup>331</sup>. This same principle should apply to any associations regardless of the goals, in line with international law, they pursue. Legislation should not prescribe the approval of the authorities before receiving domestic and foreign funding (e.g. Lebanon, Morocco and the United States). The barriers to foreign funding range from undue delay in approval for funding an association’s project (e.g. Bangladesh) to the requirement of obtaining a prior authorization from the authorities. Some legislation even prohibits human rights associations from receiving more than 10 per cent of their overall resources from foreign sources.<sup>332</sup>

### 3.5. THE RIGHT TO TAKE PART IN THE CONDUCT OF PUBLIC AFFAIRS

Article 71 of the Charter of the United Nations provides that “the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence”. General comment No. 25 (1996) on the right to participate in public affairs, voting rights and the right of equal access to public service further provides that “the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25” (para. 26). This aspect is particularly crucial for unions as the right to bargain collectively is a fundamental right, which is enshrined in ILO Convention No. 98 (1949) on Right to Organise and Collective Bargaining. In this regard, the Special Rapporteur recognizes that best practices are those that allow for genuine social dialogue with meaningful negotiation.

### 3.6. TERMINATION, SUSPENSION AND DISSOLUTION OF ASSOCIATIONS

The right to freedom of association applies for the entire life of the association. The suspension and the involuntarily dissolution of an association are the severest types of restrictions on freedom of association. As a result, it should only be possible when there is a clear and imminent danger resulting in a flagrant violation of national law, in compliance with international human rights law. It should be strictly proportional to the legitimate aim pursued and used only when softer measures would be insufficient.

According to ILO jurisprudence, decisions to dissolve labour organizations “should only occur in extremely serious cases; such dissolutions should only happen following a judicial decision

330. UN Doc. A/HRC/26/29, paras. 57-58.

331. UN Doc. A/59/401, para. 82.

332. Apparently, in Ethiopia where this legislation is in place, out of the 127 associations advocating for human rights active before the 2009 Charities and Societies Proclamation entered into force, very few reportedly still operate.

so that the rights of defence are fully guaranteed". To that effect, such drastic measures shall only be taken by independent and impartial courts.<sup>333</sup>

## 4. THE RIGHT TO AN EFFECTIVE REMEDY AND ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS AND ABUSES

States have an obligation to establish accessible and effective complaints mechanisms that are able to independently, promptly and thoroughly investigate allegations of human rights violations or abuses in order to hold those responsible accountable. This not only entails guarantees that the violation be stopped, but also that it will not be repeated in the future.

The right to a remedy includes the 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.

States must investigate any allegations of violations in the context of assemblies promptly and effectively through bodies that are independent and impartial. The concept of effective investigation includes the following factors: an official investigation initiated by the State; independence from those implicated; capability of determining whether the act was justified in the circumstances; a level of promptness and reasonable expedition; and a level of public scrutiny.<sup>334</sup>

Legislation should establish criminal and disciplinary sanctions against those who interfere with or violently disperse public assemblies through excessive use of force. For example, the legislation in Colombia establishes that undue or arbitrary use of force against peaceful demonstrators constitutes a serious violation of the disciplinary rules of the national police. Similarly, a decree-law in Portugal foresees sanctions against any authorities that hinder the exercise of the right to peaceful assembly, and article 382 of the Portuguese Penal Code establishes sanctions applicable in relation to the abuse of power.<sup>335</sup>

In this context, it is important for police officers to visibly wear their badge numbers on their uniforms. National human rights institutions that comply with the principles of the status of national institutions for the promotion and protection of human rights (Principles of Paris) may also receive and investigate claims on human rights violations and abuses. The authorities shall respect and facilitate the work of these institutions.

Prosecutors should carry out their functions impartially and without discrimination, and should give due attention to prosecuting crimes committed by public officials<sup>336</sup>. When law enforcement officials are prosecuted, the judiciary shall decide matters impartially, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect<sup>337</sup>. Defendants should be brought before an ordinary court or tribunal, and shall be availed of the fair trial protections guaranteed under international law.

In addition to guaranteeing accountability through judicial processes, States should implement additional levels of non-judicial oversight, including an effective internal investigations process and an independent oversight body. These systems should operate in addition to, and not as an alternative to, criminal, public and private legal remedies for police

333. In the United Republic of Tanzania, the case of an association working on gender equality that had been deregistered by the authorities was successfully overturned by the Constitutional Court.

334. European Court of Human Rights, *Isayeva vs. Russia*, application no. 57950/00, 24 February 2005. See also UN Doc. A/HRC/26/36, para. 80.

335. This is the case in Bulgaria, Burkina Faso, Colombia, Cote d'Ivoire, Cuba, Estonia, Japan, Kyrgyzstan, Portugal, Republic of Moldova, Serbia, Spain and other countries.

336. Guidelines 13 a) and 15 of the Guidelines on the Role of Prosecutors.

337. Principle 2 of the Basic Principles on the Independence of the Judiciary.

misconduct<sup>338</sup>. The role of a dedicated civilian oversight body may be complemented by the work of the national human rights institution or ombudsman.<sup>339</sup>

In cases in which undue restrictions are placed on the rights to freedom of peaceful assembly and of association, the victims shall have the right to receive reparation and fair and adequate compensation. Once again, attention must be paid to victims belonging to groups exposed to greater risks in this process.

## SOURCES CONSULTED

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1. Report by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, May 21, 2012.
2. Report by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/23/39, April 24, 2013.
3. Report by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/68/299, August 7, 2013.
4. Report by the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/26/29, April 14, 2014.
5. Joint report by the Special Rapporteur on the rights to free peaceful assembly and of association and the Special Rapporteur on extrajudicial, summary or arbitrary executions on the proper management of assemblies, A/HRC/31/66, February 4, 2016.

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338. Council of Europe, Human Rights Commissioner, “Human Rights Commissioner’s Opinion concerning independent and effective determination of complaints against the police” (12 March 2009), para. 25

339. UN Doc. A/HRC/31/66, para 93-94.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 14****Subject****2.4.5. Right to privacy****Lecturer:**

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## SUMMARY OF THE TOPIC

The right to privacy is regulated in article 17 of the International Covenant on Civil and Political Rights and its wording is almost identical to article 12 of the Universal Declaration of Human Rights. Article 17 of the International Covenant states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

When referring to privacy the article includes two main generic concepts, which are the right to privacy (private life, family life, homes or correspondence) and the right to honour.

Privacy is the right to possess one's own space, free from the interference of third parties, i.e. from both other citizens and from public authorities. This concept rests on the concept of a person's dignity. The right to honour protects everyone, allowing them to have a good image of themselves and a good reputation in front of everyone else.

The definition of the scope of privacy will depend on several factors, among these, the ideas that prevail at any given time. Several international law texts coincide in that privacy includes: family life, the home environment as well as correspondence, and the personal information included in certain data bases, such as those pertaining to people's health.

The right to privacy may also be legitimately limited depending on several criteria and conditions, for example, public interest. On the other hand, technological changes have

added new violations of this right, and in return, new rules protecting privacy have been generated, such as the data protection law.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.
- To identify and apply international and regional human rights protection mechanisms.

- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### International standards

**International human rights law** provides a clear and universal framework for the promotion and protection of the right to privacy. The right to privacy is enshrined by the:

- [Universal Declaration on Human Rights; Article 12](#)
- [International Covenant on Civil and Political Rights: Article 17](#)
- [Convention on the Rights of the Child: Article 16](#)
- [International Convention on the Protection of All Migrant Workers and Members of Their Families: Article 14](#)

At the **regional level**, the right to privacy is protected by:

- [European Convention for the Protection of Human Rights and Fundamental Freedoms: Article 8](#)
- [American Convention on Human Rights: Article 11](#)

**Other human rights instruments** contain similar provisions. The right to privacy is included, for instance, in the following:

- [Cairo Declaration on Human Rights in Islam: Article 18](#)
- [Arab Charter on Human Rights: Articles 16 and 21](#)
- [African Commission on Human and People's Rights Declaration of Principles on Freedom of Expression in Africa](#)
- [African Charter on the Rights and Welfare of the Child: Article 19](#)
- [Human Rights Declaration of the Association of Southeast Asian Nations: Article 21](#)
- [Asia-Pacific Economic Cooperation Privacy Framework](#)
- [Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#)
- [Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows](#)
- [Council of Europe Recommendation No. R\(99\) 5 for the protection of privacy on the Internet](#)
- [European Union Data Protection Directive](#)

### Human Rights Committee:

[General Comment No. 16](#) - Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

- [The Right to Privacy in the Digital Age](#)
- [Special Rapporteur on the right to privacy](#)
- [Documental Citizenfour, 2014](#)

CANNATA, J.A.: *The Individual and Privacy*. Ed Ashgate, 2015.

ROAGNA, I., *Protecting the right to respect for private and family life under the European Convention on Human Rights*, Council of Europe human rights handbooks, Council of Europe, Strasbourg, 2012

## LEARNING PROCESS RESULTS

By the end of the topic, students should be able to

- Understanding that the right to privacy is, first and foremost, a fundamental right based on the inherent dignity of any human being.
- Identifying the minimum or essential content of what privacy is, which includes privacy itself and honour.
- Knowing and applying the criteria based on which the right to privacy may be legitimately limited.
- Identifying and correctly apply the constitutional jurisprudence of their own country and, if applicable, that of the European Court for Human Rights on the scope and limits of the right to privacy.
- Identifying the risks and threats that could potentially accompany the recently developed Internet applications.

Understanding the inter-dependencies between user behaviour and the chance that they may be victims or perpetrators

## METHODOLOGY

We include, as a suggestion, the following:

Methodology	Educational tools
Exposition method	Reading of texts
Case studies	Blog /Forum
Problem-solving	Blog /Forum / Wiki
Group discussions	Blog /Forum

## SCHEDULING OF LEARNING ACTIVITIES

- 1) Reading and personal study of the educational guide for the topic.
- 2) Locate a recent ruling by the country's constitutional court and by the European Court for Human Rights that affects the right to privacy.
- 3) Produce a series of arguments on the legal case object of the chosen ruling. There will be a group discussion on the case, using role play: some will play the victim's defence and others the defence for the violating country, and a third group will play the Court magistrates. The group discussion will take place in the classroom or by Skype.
- 4) Locate a news item where the right to privacy or honour is affected. A presentation will be produced, which will include at least some of the following aspects:
  - Narration of the facts



- Critical assessment of the news item: Is it objective? Is it well documented? Is it clear?
- Compare it to another media source
- Ethical assessment of the news item: Does it respect the right to privacy and honour?

We also propose some of the following activities:

1. Do an online search of the wealth of medical (or other category) information available on the Internet. Can medical websites help you diagnose any health problems you are having? Is it safe to take actions concerning your health based on advice from the web? List and discuss the main ways to determine the authenticity and authority of some of these online medical sites.
2. If you are part of social network, carry out a Google search of your name. How much personal information about you is available in the public domain? Can you still find information about you that you deleted from your social network? Which of the risks mentioned above is this related to?
3. Take an extract from Facebook's Statement of Rights and Responsibilities, Article 2.7 'Sharing Your Content and Information' (or from any other social network or even software that comes with your computer). In small groups, analyse whether the extract you selected may have an effect on someone's privacy and possibly security. How can users control the content posted on them online? Analyse and discuss who holds the copyright for certain types of content (photos, videos, etc.) posted on social networks or on the web.
4. According to the International Telecommunication Union's Technology Watch Report 10, actions to address the concerns of privacy and security are the number one priority to improve life in the digital world and on the Internet. (ITU 2009). The absence of robust security inevitably presents a risk to all systems and processes that rely on electronic communication, including the media (ITU 2006). Weak (or absent) security leads to growing occurrences of cyber-crimes. This threat is so serious that the International Multilateral Partnership Against Cyber-Threats (IMPACT) was created to promote international cooperation to make cyberspace more secure. Dr. Hamadoun Touré, Secretary General of the ITU, says that "access to communication is useless if online peace and security cannot be guaranteed" and he adds that we should see the digital world as "an integrated community, where users have to sacrifice certain freedoms and anonymity in exchange for better security"... (ITU News).

However, many Internet-freedom activists are concerned about the government's interference and control. There is growing concern that the Internet is becoming a closed controlled space rather than an open public-interest space, and is increasingly dominated by governments and corporations. It may be that for some governments and businesses, security is the dominant concern, while this is not the case for many citizens

Discuss the statements above made by Dr Touré. Do you think governments need to take steps to make the virtual world more secure? Why or why not?

5. Do you agree that privacy will have to be sacrificed to some extent? What are some of the implications? Why do you think it is not possible or desirable to regulate the Internet like television and radio? What would happen if the Internet were controlled by any one country or region of the world?
6. Carry out a search on several (5 – 10) types of tools being used for Internet security – blocking, filtering, legal controls and so on. Discuss their benefits and disadvantages. Select any social network website or software that you use. Experiment with the privacy settings. Search in the 'terms of use' for the terms 'privacy and security'. Do you think that the privacy safeguards are sufficient to

help you avoid some of the risks described in this section (see boxes on risks related to Internet content and contact)?

7. What are some of the repercussions when you put the privacy settings to the maximum level?

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1 Read documents pertaining to freedom of expression	5 h	
Activity 2: Identify the ruling	1 h	
Activity 3 Produce arguments. Defend and discuss each position	2 h + 2 h	
Activity 4: Locate the news item and draft a report	4 h	
Total	14h	

## SUBJECT 2.4.:

### 2.4.5. RIGHT TO PRIVACY

#### 1. INTRODUCTION

The purpose of this right is to protect every person against arbitrary or unlawful interference in five areas or spheres of his autonomy and privacy: his private life, family life, home or correspondence, as well as against unlawful attacks on his honour and reputation<sup>340</sup>.

All citizens are entitled to the right to privacy, regardless of their birth, race, sex, religion, opinion or any other personal or social condition or circumstance. As any other fundamental right, it is an essential part of the human dignity concept.

#### 2. NATURE OF THE RIGHT

The right to privacy is a fundamental and very personal right, the essential content of which must be observed by all legislations. The right to privacy or intimacy is the right to have one's own space, free from the interference of third parties, whether it be by the national authorities or by individuals or entities. This right is based on the dignity of the person. Intimacy would be one's own space within which a person can form themselves, coherently with the free development of their personality. This is not an area outside of the law, rather outside the area of interference of third parties. The right to privacy is fundamental in the concept of individual freedom and autonomy. The liberal concept of privacy is based on the dichotomy between what is private and public and on the philosophy that governments should not interfere in matters that are essentially private and of the family.

International texts coincide in that privacy involves several fields, such as private and family life, home and correspondence, honour, reputation or fame. In short, privacy and one's own image, such as honour and fame, are generally considered as legal assets protected by national legislation. The reasons justifying this protection respond both to private and public interest. On the one hand, protection of a person's life and assets is one of the main reasons for a State's being. Protection of a person comprises assets referring both to their physical existence (life and integrity), and to assets that refer to their moral and social existence and are a direct expression of their dignity, such as privacy, own image or honour. On the other hand, there is another important reason to protect this right, linked to a State's public interest in civil co-existence and the common good. Social cooperation absolutely presupposes honour and respect for privacy. In conclusion, a State's legislation must acknowledge every citizen's right to be protected from aggressions, whether due to the important private interests at stake, or by virtue of the public interest of civil co-existence. Thus it follows, on the one hand, that every citizen has the right to concrete and efficient protection of their own privacy and, on the other hand, that the State has the duty to ensure it, also in the form of suitable criminal protection.

The reasons for the legal protection of these assets are so important as to place limits on the freedom of expression and on the right to the duty to inform, as we will see later. However, this importance contrasts with the scarce awareness of this in everyday life, and with the scarce efficiency of the means of protection established by state legislations.

340. See. General Comment nº 16 the Human Rights Committee, par. 1.

### 3. CONTENTS

As has been rightly said, “the right to privacy: a complex and multifaceted human right”<sup>341</sup>. This right, sometimes also called the “right to be left alone” guarantees:

- respect for the individual existence of the human being, i.e. his or her particular characteristics, appearance, honour and reputation;
- protection for individual autonomy, entitling persons to withdraw from public life into their own private spheres in order to shape their lives according to their personal wishes and expectations. Certain institutional guarantees, such as protection of home, family, marriage and the secrecy of correspondence, support this aspect of the right to privacy;
- the right to be different and to manifest one’s difference in public by behaviour that runs counter to accepted morals in a given society and environment. Government authorities and international human rights bodies, therefore, face a delicate and difficult task of striking a balance between the right to privacy and legitimate public interests, such as the protection of public order, health, morals and the rights and freedoms of others<sup>342</sup>.

The following paragraphs touch upon a selection of issues that arise in connection with the right to privacy. In view of the controversial nature of most of the issues involved, it is often impossible to provide generalized answers, as conclusions are usually reached only by carefully weighing countervailing interests on a case-by-case basis, taking into account the special circumstances prevailing in a given society.

International human rights law provides the universal framework against which any interference in individual privacy rights must be assessed. Article 12 of the Universal Declaration of Human Rights provides that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.” The International Covenant on Civil and Political Rights, to date ratified by 167 States, provides in article 17 that “no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation”. It further states that “everyone has the right to the protection of the law against such interference or attacks.”

Other international human rights instruments contain similar provisions (see the regulatory texts listed in the educational guide). Laws at the regional and national levels also reflect the right of all people to respect for their private and family life, home and correspondence or the right to recognition and respect for their dignity, personal integrity or reputation. In other words, there is universal recognition of the fundamental importance, and enduring relevance, of the right to privacy and of the need to ensure that it is safeguarded, in law and in practice.

The Strasbourg Court has never offered a clear and precise definition of what is meant by private life: in its view it is a broad concept, incapable of exhaustive definition.<sup>4</sup> What is clear is that the notion of private life is much wider than that of privacy, encompassing a sphere within which every individual can freely develop and fulfil his personality, both in relation to others and with the outside world. Instead of providing a clear-cut definition of private life, the Court has identified, on a case-by-case basis, the situations falling within this dimension. The result is a rather vague concept, which the Court tends to construe and interpret broadly: over the years the notion of private life has been applied to a variety of situations, including bearing a name the protection of one’s image or reputation, awareness of family origins,

341. Cfr. Nowak, M., *Derechos humanos. Manual para parlamentarios*, Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos y Unión Interparlamentaria, nº 8, 2005, p. 103.

342. Ibid.

physical and moral integrity, sexual and social identity, sexual life and orientation, a healthy environment, selfdetermination and personal autonomy, protection from search and seizure and privacy of telephone conversations.

International and regional human rights treaty bodies, courts, commissions and independent experts have all provided relevant guidance with regard to the scope and content of the right to privacy, including the meaning of “interference” with an individual’s privacy.

Interference with an individual’s right to privacy is only permissible under international human rights law if it is neither arbitrary nor unlawful. In its general comment No. 16, the Human Rights Committee explained the term “unlawful” means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant<sup>343</sup>. In other words, interference that is permissible under national law may nonetheless be “unlawful” if that national law is in conflict with the provisions of the International Covenant on Civil and Political Rights. The expression “arbitrary interference” can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances<sup>344</sup>. The Committee interprets the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case<sup>345</sup>.

The essential content, or minimum content of this right, is ultimately determined by the constitutional courts, which are the maximum guarantors of the Constitution. Thus, States have the margin of appreciation doctrine embodies the proportionality principle. Such levels of intensity range from “rationality review”<sup>346</sup>, where it is sufficient that the national regulator demonstrates a rational basis for passing the contested legislation, to more strict levels of scrutiny, where “compelling state interest”, or “weighty reasons” should be demonstrated in order to justify a national measure<sup>347</sup>. The breadth of the national regulatory playground depends -within Europe- on both the European Court and national jurisdictions. On the part of the Court the understanding of the margin of appreciation lies at the heart of the subsidiary scheme of the Convention, which considers that Contracting Parties are normally in the best position to assess the necessity and proportionality of certain measures in the relevant cultural and socioeconomic context, particularly when it comes to policies on debated moral issues or local economic development<sup>348</sup>. Where there is no consensus within the member states of the Council of Europe, on either the relative importance of the interest at stake or the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider; whereas if the presence of a regulatory goal or policy is perceived as “common” or “European” it will have the effect of narrowing the margin of appreciation. In most cases, when exercising their margin of appreciation, states are called upon to strike a balance between competing private/public interests and Convention rights. Where there is no consensus within the member states of the Council of Europe, on either the relative importance of the interest at stake or the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider; whereas if the presence of a regulatory goal or policy is perceived as “common” or “European” it will have the effect of narrowing the margin of appreciation. In most cases, when exercising their margin of appreciation, states are called upon to strike a balance between competing

343. *Official Records of the General Assembly para. 3.*

344. *Ibid.*, para. 4.

345. Communication No. 488/1992, *Toonan v Australia*, para. 8.3; see also communications Nos. 903/1999, para 7.3, and 1482/2006, paras. 10.1 and 10.2.

346. *Rasmussen v. Denmark*

347. *Abdulaziz, Cabales and Balkandali v. the United Kingdom*.

348. *Handyside; Rees v. the United Kingdom*.

private/public interests and Convention rights. The boundaries of the margin of appreciation depend very much on the interests at stake: the more they involve fundamental values and essential aspects of private life, the less the Court is likely to recognise wide discretion<sup>349</sup>.

## 4. OBLIGATIONS DERIVED FROM THE RIGHT TO PRIVACY

The Member States have the specific obligation to respect, protect and implement the right to privacy and to take the steps necessary for its application. All rights, to varying degrees, entail an immediate obligation, such as the obligation to not discriminate in the enforcement of the right in question. Article 17 of the Covenant and article 8 of the European Convention aim to protect the individual from the arbitrary interference of public authorities. But they do not settle for demanding the State to abstain from these interferences: to this mainly negative obligation they add positive obligations that the State must meet to ensure effective respect for private or family life, which are increasingly more frequent. In this sense the Human Rights Committee highlights that « The obligations imposed by article 17 require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right »<sup>350</sup>. Positive obligations under Article 8 were discussed for the first time in 1997, in *Marckx*. Then the Court observed as the word “respect” contained in the first paragraph of Article 8 suggested, the existence of positive obligations on states. Because of the nature of the provision, however, the identification of such obligations suffers from the wide margin of appreciation states are entitled to under the derogation clause. The sphere of protection of Article 8, nonetheless, has grown much more complex as case-law has developed, extending to the obligation of Contracting Parties to secure protection from risks arising within individual relationships (as opposed to relationships developing between individuals and the state).

The Member States have the specific obligation to respect, protect and implement the right to privacy and to take the steps necessary for its application. All rights, to varying degrees, entail an immediate obligation, such as the obligation to not discriminate in the enforcement of the right in question.

- i. The **obligation to respect** the right to privacy of all people under its jurisdiction, which means that the State is under the obligation to abstain from any conduct or activity that may interfere or undermine the enjoyment of this right. This obligation requires States to ensure that human rights are fully observed in politics, laws and actions of state, including those actions of public civil servants. The Human Rights Committee has been guided by the principle, as expressed even in its earliest jurisprudence that a State may not avoid its international human rights obligations by taking action outside its territory that it would be prohibited from taking “at home”<sup>351</sup>. This position is consonant with the views of the International Court of Justice, which has affirmed that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State “in the exercise of its jurisdiction outside its own territory”<sup>352</sup>, as well as articles 31 and 32 of the Vienna Convention on the Law of Treaties.

349. Ivana Roagna, *Protecting the right to respect for private and family life under the European Convention on Human Rights*, Council of Europe human rights handbooks, Council of Europe, Strasbourg, 2012, pp. 51-53.

350. General Comment n° 16: art. 17, par. 1.

351. See *Official Records of the General Assembly, Thirty-sixth Session* (see footnote 27), annex XIX, paras. 12.2-12.3, and annex XX, para. 10.3.

352. Advisory opinion of the International Court of Justice on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, of 9 July 2004 (A/ES-10/273 and Corr.1), paras. 107-111. See also International Court of Justice, case concerning *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), judgment, 2005, p. 168.



Companies must also meet their obligation to observe human rights, taking into account the safeguards on matters of due diligence and risk management, as well as their role regarding effective resources. “When a company supplies data or user information to a State in response to a request that contravenes the right to privacy under international law, a company provides mass surveillance technology or equipment to States without adequate safeguards in place or where the information is otherwise used in violation of human rights, that company risks being complicit in or otherwise involved with human rights abuses. The Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2011, provide a global standard for preventing and addressing adverse effects on human rights linked to business activity. The responsibility to respect human rights applies throughout a company’s global operations regardless of where its users are located, and exists independently of whether the State meets its own human rights obligations”<sup>353</sup>.

- ii. The **obligation to protect**, without discrimination, the right to privacy of every person from violations by the state or by non-state agents, including people, groups, institutions and companies. This obligation requires States to guarantee that all people under its jurisdiction enjoy the right to privacy. This protection is basically achieved by passing laws and establishing appeal procedures, as well as through national mechanisms to monitor violations of this right.

Meeting this obligation requires, firstly, classifying as a crime those acts by individuals that infringe on fundamental values and essential aspects of private life. However, this obligation cannot be interpreted as an exclusion of the offer of unlimited civil resources when there are criminal sanctions, even in those cases where the rights of children and other vulnerable people are at stake.

- iii. The **obligation to comply with (or guarantee)** the right to privacy by creating a favourable environment through all appropriate means, particularly by assigning resources. The obligation to guarantee includes promoting respect for the right to privacy by, for example, educating and training in human rights, as well as other measures necessary to prevent human rights violations.

## 5. DIMENSIONS OF THE RIGHT TO PRIVACY<sup>354</sup>

### 5.1. TO PRESERVE INDIVIDUAL IDENTITY AND PRIVACY

Privacy starts with respect for an individual’s specific identity, which includes one’s name, appearance, clothing, hairstyle, gender, feelings, thoughts and religious and other convictions. Mandatory clothing or hairstyle rules, a forced change of one’s name, or non-recognition of a name change, religion or gender (for instance, a State’s refusal to alter the birth registration of a transgender person) or any form of indoctrination (“brainwashing”) or forced personality change interfere with the right to privacy. The intimacy of a person must be protected by respecting generally acknowledged obligations of confidentiality (for instance, those of physicians and priests) and guarantees of secrecy (for instance, in voting), and by enacting appropriate data protection laws with enforceable rights to information, correction and deletion of personal data.

The Human Rights Committee points out that “The gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person’s private life does not reach the hands of persons who are not authorized by law to receive, process and use it, and is never used for

353. A/HRC/23/40, para. 33.

354. This section was transcribed literally from Nowak, M *Derechos humanos. Manual para parlamentarios*, cit., pp. 104-107 y de Ivana Roagna, *La protection du droit au respect de la vie privée et familiale par la Convention européenne des droits de l’homme*, Série des précés sur les droits de l’homme du Conseil de l’Europe, Conseil de l’Europe, Strasbourg, 2012.



purposes incompatible with the Covenant. In order to have the most effective protection of his private life, every individual should have the right to ascertain in an intelligible form, whether, and if so, what personal data is stored in automatic data files, and for what purposes. Every individual should also be able to ascertain which public authorities or private individuals or bodies control or may control their files. If such files contain incorrect personal data or have been collected or processed contrary to the provisions of the law, every individual should have the right to request rectification or elimination”<sup>355</sup>. It also states that in the cases where “personal and body search is concerned, effective measures should ensure that such searches are carried out in a manner consistent with the dignity of the person who is being searched. Persons being subjected to body search by State officials, or medical personnel acting at the request of the State, should only be examined by persons of the same sex”<sup>356</sup>.

## 5.2. PROTECTION OF INDIVIDUAL AUTONOMY

The extent to which the sphere of autonomy is protected by the right to privacy is a highly controversial issue. Individual autonomy — i.e., the area of private life in which human beings strive to achieve self-realization through action that does not interfere with the rights of others — is central to the liberal concept of privacy. In principle, autonomy gives rise to a right to one one’s own body, which also comprises a right to act in a manner injurious to one’s health, including committing suicide. Nevertheless, societies have consistently deemed such behaviour to be harmful to the common good and morals, and have often prohibited and penalized its manifestations (for instance, suicide, passive euthanasia and drug, alcohol and nicotine consumption). Whether the right of a woman over her own body gives rise to a right to abortion is a disputed question to which different answers have been provided by various supreme courts and constitutional courts. The right to privacy also implies an individual’s right to communication with others, including the right to develop emotional relationships. The right to sexual autonomy and sexual relations is especially important, and Governments must be particularly careful when interfering with sexual matters.

The duty to protect one’s sexual sphere and interpersonal relationships is one of the positive obligations arising from Article 8. The fulfilment of such obligation requires, in the first place, for the criminalisation of actions by private individuals that interfere with fundamental values and essential aspects of one’s private life<sup>357</sup>. The obligation, however, cannot be interpreted to exclude the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation, even in cases when the rights of children and other vulnerable individuals are at stake<sup>358</sup>.

Physical and psychological integrity are covered by the notion of private life and also enjoy positive protection.

## 5.3. PROTECTION OF THE FAMILY

Protection of the family is essential to the right to privacy. According to the general observation number 16 of the Human Rights Committee and to purposes of article 17, the term family “be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned”. (par. 5). The notion used by the Court has developed over time in line with the changing attitudes of European society and might very well continue to do so in the light of evolving customs. The Court has time and again said in its case-law that the notion of “family life” in Article 8 is not confined solely to families based on marriage, and may encompass other de facto relationships. When deciding whether a relationship may be said to amount to “family life”, a number of factors may be relevant, including whether the

355. General Comment nº 16: art. 17, par. 10.

356. Ibid., pár. 8.

357. X and Y v. the Netherlands, which concerned the impossibility for the victim to have criminal proceedings instituted against the perpetrator of a sexual assault on a minor girl aged more than sixteen (which is the age of consent) who was unable, on account of a mental handicap, to determine her wishes.

358. Stubbings v. the United Kingdom.

couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means<sup>359</sup>. De facto family life, therefore, receives recognition under the Convention on an equal basis with formally established ties<sup>360</sup>. In any case, should a situation fall foul of the notion of “family life”, it might very well enjoy the protection of Article 8 under the angle of “private life”.

The following relationships have been found to amount to family life for the purpose of Article 8:

- between children and their grandparents<sup>361</sup>;
- between siblings, regardless of their age<sup>362</sup>;
- between an uncle or aunt and his/her nephew or niece<sup>363</sup>;
- between parents and children born into second relationships, or those children born as a result of an extra-marital or adulterous affair, particularly where the paternity of the children has been recognised and the parties enjoy close personal ties<sup>364</sup>;
- between adoptive/foster parents and children<sup>365</sup>.

The right to privacy entails the protection of family life against arbitrary or unlawful interference, above all by State authorities. One typical interference is the mandatory separation of children from their parents on grounds of gross disregard of parental duties and the placement of the children under the guardianship of the State. Family life is not limited to social, moral or cultural relations, but also encompasses interests of a material kind, such as the obligations<sup>366</sup> in respect of maintenance, inheritance rights and limitations and matters of disposition between near relatives<sup>367</sup>. Article 8, however, cannot be interpreted as imposing an obligation on the states to recognise religious marriages or to establish a special regime for particular categories of unmarried couples for inheritance purposes<sup>368</sup>.

When it comes to family life, the case-law indicates that two main types of obligation stem from Article 8: the first is to give legal recognition to family ties; the second is to act to preserve family life: « As envisaged by Article 8, respect for family life implies in particular, in the Court’s view, the existence in domestic law of legal safeguards that render possible, as from the moment of birth, the child’s integration in its family »<sup>369</sup>. The positive obligation to respect family life implies not only that recognition of family ties should be possible, but also its converse: that none of the subjects involved should be compelled to such recognition. This means that putative fathers wishing to contest the paternity of a child, challenging legal presumptions or their previous recognition (for instance because of fresh biological evidence not available or accessible at the time of recognition) must have the possibility to do so<sup>370</sup>.

359. X, Y, and Z v. the United Kingdom.

360. Schalk and Kopf v. Austria.

361. Marckx v. Belgium.

362. Olsson v. Sweden; and as adults Boughanemi v. France.

363. Boyle v. the United Kingdom.

364. X v. Switzerland.

365. Jolie and Lebrun v. Belgium,

366. Velcea and Mazare v. Romania. In Pla and Puncernau v. Andorra the Court clarified that inheritance rights between grandchildren and grandparents fell within the category of “family life”, even if the testator had died before her grandson’s adoption.

367. Merger and Cross v. France.

368. Serife Yigit v. Turkey.

369. Marckx v. Belgium.

370. Phinikaridou v. Cyprus; Shofman v. Russia

Once established, family life can be interrupted only in exceptional circumstances. The relevant case-law has set forth the various obligations, including positive ones that states bear in this respect. These are primarily procedural and relate to the process by which family members are being separated and how decisions on custody and visiting rights are enforced as well as measures facilitating the reunion of family members after a separation has taken place<sup>371</sup>. The procedural obligations also encompass the right to seek for judicial review of the merits of the attribution of parental authority, to be enjoyed without discrimination<sup>372</sup>.

Non-execution of judicial decisions granting custody or regulating access rights might also trigger the international responsibility of the state. The position of the Court is, in this respect, rather moderate: whilst acknowledging the presence of a positive obligation incumbent upon states, it considers that this duty is not absolute and, in particular, that it has to be balanced against the “superior interest of the child” and the latter’s rights under Article 8. In every case

The position of the Court is, in this respect, rather moderate: whilst acknowledging the presence of a positive obligation incumbent upon states, it considers that this duty is not absolute and, in particular, that it has to be balanced against the “superior interest of the child” and the latter’s rights under Article 8. Positive obligations are also often present in Article 8 cases related to the international abduction of children and in situations concerning immigrants.

After hearing several cases, the European Court for Human Rights established certain minimum guarantees for those parents and children affected, such as participation in the respective administrative procedures, legal review and regular contact between parents and children during the period of assignment to foster families in order to allow for family reunification. In the same order of ideas, after the divorce both spouses retain the right to visitation with their children.

#### 5.4. PROTECTION OF THE HOME

The general observation number 16 of the Human Rights Committee states that the term home “is to be understood to indicate the place where a person resides or carries out his usual occupation” (párr. 5). In general, home has been identified as the place where the person lives on a permanent basis or with which the person has sufficient and continuous links. The Court, considering that the two versions of the Convention differ in this very point (“home” is the term used in the English. Boughanemi version, whereas the French refers to the broader concept of “domicile”) has opted for a more flexible interpretation<sup>373</sup>. The concept has been found to cover the following:

- holiday homes, second homes and hotels providing long term accommodation<sup>374</sup>;
- a house belonging to another person being occupied, for a significant period or on an annual basis, by someone else<sup>375</sup>;
- social housing occupied by the applicant as a tenant, even though the right of occupation under domestic law may have come to an end<sup>376</sup>;
- business premises, when there is no clear distinction between a person’s office and private residence or between private and business activities<sup>377</sup>;

371. Olsson.

372. Zaunegger v. Germany.

373. *Niemietz v. Germany*.

374. *Demades v. Turkey* (dec.).

375. *Mentez and others v. Turkey* (dec.).

376. *McCann v. the United Kingdom*.

377. *Niemietz*.

- a company`s registered office, branches or other business premises<sup>378</sup>;
- non-traditional residences such caravans and other nonfixed abodes<sup>379</sup>;
- one`s living conditions (falling cumulatively under the notion of private, family life and home)<sup>380</sup>.

The protection of the home is another important aspect of privacy, since the home conveys a feeling of familiarity, shelter and security, and therefore symbolizes a place of refuge from public life where one can best shape one`s life according to one`s own wishes without fear of disturbance. In practice, “home” does not apply only to actual dwellings, but also to various houses or apartments, regardless of legal title (ownership, rental, occupancy, and even illegal use) or nature of use (as main domicile, weekend house or even business premises). Every invasion of that sphere — described under the term “home” — that occurs without the consent of the individuals concerned represents an interference. The classic form of interference is a police search for locating and arresting someone or finding evidence to be used in criminal proceedings.

As established by the Human Rights Committee, “Searches of a person`s home should be restricted to a search for necessary evidence and should not be allowed to amount to harassment”<sup>381</sup>.

But it is not the only type of interference. The violent destruction of homes by security forces, forced evictions, the use of hidden television cameras or listening devices, electronic surveillance practices or extreme forms of environmental pollution (such as noise or noxious fumes) may constitute interference with the right to protection of the home. Such interference is permissible only if it complies with domestic law and is not arbitrary, i.e., if it occurs for a specific purpose and in accordance with the principle of proportionality. Police searches, seizure and surveillance are usually permissible only on the basis of a written warrant issued by a court, and must not be misused or create disturbance beyond the pursuit of a specific purpose, such as securing evidence.

Regarding the positive obligations stemming from Article 8 of the Convention in relation to the “home”, it is possible to affirm that states are not obliged to implement a given policy on housing. The Court, however, whilst dealing with cases related to the interferences in the enjoyment of one`s home by third parties, was able to identify the following as situations that can give rise to a breach of the positive obligations enshrined in Article 8. These are:

- A negligent application of the law.
- A prolonged and unjustified delay in the execution of a court decision concerning the right of ownership or occupancy.
- Absence of state supervision over housing stocks described in the national legislation.
- The passivity of authorities regarding the persistent nocturnal noise caused by neighbouring discos that considerably affected peace in the home. In this regard, the court concluded on the presence of a violation of article 8 and issued a statement affirming the right to respect for the home, as it has been protected by Article 8 should be understood “not just the right to the actual physical area, but also to the quiet enjoyment of that area”, which can be hampered not only by concrete or physical breaches, but also by noise, emissions, smells or other forms of interference.

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378. Stes Colas Est and others v. France.

379. Buckley v. the United Kingdom; Chapman.

380. Moldovan and others v. Romania (no. 2).

381. General Comment No. 16, the Human Rights Committee par. 8.

## 5.5. PROTECTION OF PRIVATE CORRESPONDENCE

Although the term “correspondence” was initially applied to written letters, it now covers all forms of communication at a distance: by telephone, cable, telex, facsimile, electronic mail or other mechanical or electronic means. The technological advancements registered in the field of communication have been regularly taken into account by the Court, which has adopted an evolutive interpretation of the word correspondence. In addition to traditional letters on paper, the following have been considered “correspondence” for the purposes of Article 8:

- older forms of electronic communication such as telexes;<sup>382</sup>;
- telephone conversations<sup>383</sup>, including information relating to them, such as their date and duration and the numbers dialed<sup>384</sup>;
- pager messages<sup>385</sup>;
- electronic messages (e-mails), and information derived from the monitoring of personal Internet use<sup>386</sup>;
- private radio communication<sup>387</sup>, but not when it is on a public wavelength and is thus accessible to others<sup>388</sup>;
- correspondence intercepted in the course of business activities or from business premises<sup>389</sup>;
- electronic data seized during a search of a law office<sup>390</sup>;
- packages seized by customs officials<sup>391</sup>.

Protection of correspondence means respect for the secrecy of such communication. Any withholding, censorship, inspection, interception or publication of private correspondence constitutes interference. “Compliance with article 17 required that the integrity and confidentiality of correspondence should be guaranteed *de jure* and *de facto*.” Correspondence should be delivered to the addressee without interception and without being opened or otherwise read. Surveillance, whether electronic or otherwise, interceptions of telephonic, telegraphic and other forms of communication, wiretapping and recording of conversations should be prohibited”<sup>392</sup>.

The most common forms of such interference are surveillance measures secretly taken by State agencies (opening letters, monitoring telephone conversations and intercepting faxes and e-mails, etc.) for the purpose of administering justice, preventing crime (e.g., through censorship of detainees’ correspondence) or combating terrorism. As is the case for house

382. *Christie v. the United Kingdom*.

383. *Klass; Malone; Margareta and Roger Andersson*

384. *P.G. and J.H.*

385. *Taylor-Sabori v. the United Kingdom*.

386. *Copland v. the United Kingdom*.

387. *Camenzind v. Switzerland*.

388. *B.C. v. Switzerland* (dec.). Similarly, in *Muscio v. Italy* (dec.), the Court clarified that, although receiving “spam” messages in one’s electronic inbox amounted to an interference with the right to respect for private life, e-mail users connecting to the Internet knowingly expose themselves to the risk of receiving such communications.

389. *Kopp v. Switzerland*; *Halford v. the United Kingdom*.

390. *Wieser and Bicos Beteiligungen GmbH v. Austria*.

391. *X v. the United Kingdom* (dec.), 12 October 1978

392. General Comment No. 16, the Human Rights Committee pár. 8.

searches, interference with correspondence must comply with domestic law (i.e., as a rule, it requires a court order) and with the principle of proportionality.

Intrinsic to the detainees' right to respect for correspondence, as guaranteed by Article 8 of the Convention, is the right to be supplied with the necessary writing materials. This does not mean, however, that detainees have an unlimited right to have access to a choice of writing material or that all prisoners' correspondence costs must be borne by the state. However, the restrictions must not be such as to hinder in practice the right to correspondence. The positive obligations also extend to preventing the disclosure of such private exchanges<sup>393</sup>.

## 5.6. PROTECTION OF HONOUR AND REPUTATION

Honour has a double internal and external dimension, corresponding to the subjective and objective aspect of the right to honour. The internal and subjective side entails the right of every person to have a feeling of esteem for oneself (self-esteem), insofar as a necessary asset for balance and normal psychological and ethical development of the human personality. The external and objective side refers to the right to have a good reputation before others. Fame in its basic sense corresponds to a person insofar as expression of the dignity that all people have and never lose; in its positive sense, fame corresponds to a person as an asset constructed throughout time with their own moral, professional effort, etc.

Legal protection of honour varies from country to country. Whereas in Anglo-Saxon systems civil protection prevails, in others criminal protection prevails. Italian and Portuguese law include two offences against honour: slander or contumely and defamation, the Spanish criminal code includes slander and false accusation; whereas others, such as the German, Swiss and Austrian systems include three different offences: slander, defamation and false accusation.

Slander is offence against the honour or decorum of a person through words, gestures, telephone communication, drawings, writings or other signals aimed at the offended person. The offence against honour is to attribute to a present person a moral guilt, an offence or a defect that entails or presupposes moral guilt, with the consciousness and will to offend. The dishonour is even more serious if it is made public. Slander entails the duty to repair the damaged honour.

Defamation is the revelation, without a morally or legally valid reason, of the defects or faults of an absent subject to people who are not aware of them. That is, defamation leads to public knowledge of true defects that were hidden, whereas false accusation attributes guilt or defects contrary to the truth, harming their reputation and giving rise to erroneous judgements.

Defamation refers, in short, to the dissemination of facts which, given their nature or other circumstances, are reserved and must remain as such.

As the Committee on Human Rights states, "Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible. States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law and how this protection is achieved according to their legal system"<sup>394</sup>.

In 2007 the Court, with a judgment representing a progressive step in the development on the right to respect for private life, expressly recognised that Article 8 applies to the protection of one's reputation. It stated that a reputation forms part of the individual identity and psychological integrity, imposing a duty of protection on national courts, even if the criticism is expressed in the context of a public debate<sup>395</sup>.

393. Craxi v. Italy (no. 2).

394. General Comment No. 16: art. 17, par. 11.

395. The position was recalled in Petrina v. Romania.



## 6. LIMITS

Unlike certain other provisions of the Covenant, article 17 does not include an explicit limitations clause. Guidance on the meaning of the qualifying words “arbitrary or unlawful” nonetheless can be drawn from the Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights<sup>396</sup>; the practice of the Human Rights Committee as reflected in its general comments, including Nos. 16, 27, 29, 34, and 31, findings on individual communications<sup>397</sup> and concluding observations<sup>398</sup>; regional and national case law<sup>399</sup>; and the views of independent experts<sup>400</sup>. In its general comment No. 31 on the nature of the general legal obligation on States parties to the Covenant, for example, the Human Rights Committee provides that States parties must refrain from violation of the rights recognized by the Covenant, and that “any restrictions on any of [those] rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights<sup>401</sup>.” The Committee further underscored that “in no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.”

These authoritative sources point to the overarching principles of legality, necessity and proportionality, the importance of which also was highlighted in many of the contributions received. To begin with, any limitation to privacy rights reflected in article 17 must be provided for by law, and the law must be sufficiently accessible, clear and precise so that an individual may look to the law and ascertain who is authorized to conduct data surveillance and under what circumstances. The limitation must be necessary for reaching a legitimate aim, as well as in proportion to the aim and the least intrusive option available<sup>402</sup>. Moreover, the limitation placed on the right (an interference with privacy, for example, for the purposes of protecting national security or the right to life of others) must be shown to have some chance of achieving that goal. The onus is on the authorities seeking to limit the right to show that the limitation is connected to a legitimate aim. Furthermore, any limitation to the right to privacy must not render the essence of the right meaningless and must be consistent with other human rights, including the prohibition of discrimination. Where the limitation does not meet these criteria, the limitation would be unlawful and/or the interference with the right to privacy would be arbitrary<sup>403</sup>.

In assessing the necessity of a measure, the Human Rights Committee, in its general comment No. 27, on article 12 of the International Covenant on Civil and Political Rights, stressed that that “the restrictions must not impair the essence of the right [...] the relation between right and restriction, between norm and exception, must not be reversed”<sup>404</sup>. The Committee further explained that “it is not sufficient that the restrictions serve the permissible purposes; they

396. See E/CN.4/1985/4, annex.

397. For example, communication No. 903/1999, 2004, Van Hulst v. The Netherlands.

398. CCPR/C/USA/CO/4.

399. For example, European Court of Human Rights, Uzun v. Germany, 2 September 2010, and Weber and Soravia v. Germany, para. 4; and Inter-American Court of Human Rights, Escher v. Brazil, Judgment, 20 Nov. 2009.

400. See A/HRC/13/37 and A/HRC/23/40. See also International [Principles on the Application of Human Rights to Communications Surveillance](#).

401. CCPR/C/21/Rev.1/Add. 13, para. 6.

402. CCPR/C/21/Rev.1/Add.9, paras. 11 – 16. See also A/HRC/14/46, annex, practice 20.

403. Alto Comisionado de las Naciones Unidas para los derechos humanos, *El derecho a la intimidad en la era digital*, Informe presentado en la vigésimo séptima sesión del Consejo de Derechos Humanos, 30 de junio de 2014, [Doc. A/HRC/27/37, paras. 21-23].

404. CCPR/C/21/Rev.1/Add.9, paras. 11 – 16. See also European Court of Human Rights, Handyside v. the United Kingdom, para. 48; and Klass v. Germany, para. 42.



must also be necessary to protect them". Moreover, such measures must be proportionate: "the least intrusive instrument amongst those which might achieve the desired result"<sup>405</sup>.

Paragraph 2 of article 17 of the International Covenant on Civil and Political Rights explicitly states that everyone has the right to the protection of the law against unlawful or arbitrary interference with their privacy. This implies that any communications surveillance programme must be conducted on the basis of a publicly accessible law, which in turn must comply with the State's own constitutional regime and international human rights law<sup>406</sup>. "Accessibility" requires not only that the law is published, but that it is sufficiently precise to enable the affected person to regulate his or her conduct, with foresight of the consequences that a given action may entail. The State must ensure that any interference with the right to privacy, family, home or correspondence is authorized by laws that (a) are publicly accessible; (b) contain provisions that ensure that collection of, access to and use of communications data are tailored to specific legitimate aims; (c) are sufficiently precise, specifying in detail the precise circumstances in which any such interference may be permitted, the procedures for authorizing, the categories of persons who may be placed under surveillance, the limits on the duration of surveillance, and procedures for the use and storage of the data collected; and (d) provide for effective safeguards against abuse<sup>407</sup>. Neither do laws or rules that give the executive authorities, such as security and intelligence services, excessive discretion; the scope and manner of exercise of authoritative discretion granted must be indicated (in the law itself, or in binding, published guidelines) with reasonable clarity. A law that is accessible, but that does not have foreseeable effects<sup>408</sup>.

Unlike article 17 of the Covenant, article 8 of the European Convention is more explicit in regulating the limits of the right to privacy and provides clear guidelines for the Court to decide if interference is justified<sup>409</sup>. The wording of article 8 § 2 allows a point-by-point analysis of the report, focused on progressiveness. An affirmative response to the question: Was there interference in the right protected by article 8? will inevitably lead to the following questions: Is the interference provided for by law? Does it pursue a legitimate purpose? Is it necessary in a democratic society? The Court performs this evaluation whenever a contentious case regarding article 8 is presented. However, depending on the facts of the case, every criterion is not always the object of a detailed analysis.

Since the derogatory clause enables restrictions to the rights guaranteed by the Convention, its field of application must be strictly marked off. The Court, therefore, adopts a narrow approach: the exceptions form a closed list, whose interpretation must be rigorous<sup>410</sup>. In line with the general principle unanimously affirmed in the Strasbourg case-law, any limitation to the protection provided for by the Convention must be expressly authorised or justified by the Convention itself. According to Article 18 restrictions can only be applied for the purpose for which they are prescribed.

The second stage of the Court's structured approach on the justification of the interference entails the detection of a legal basis legitimising the restriction. The Strasbourg Court has established a threefold test to determine whether an interference is in accordance with the law. The scheme leads the Court to evaluate: a) the presence of a national law; b) the clearness and precision of its wording; c) the aim it pursues.

.....  
405. CCPR/C/21/Rev.1/Add.9, paras. 11 – 16.

406. See *ibid.*, annex.

407. CCPR /C/USA/CO/4, para. 22. See also European Court of Human Rights, *Malone v the United Kingdom*, No. 8691/79, 2 August 1984, paras. 67 and 68; and *Weber and Saravia v Germany*, application no. 54934/00, 29 June 2006, in which the Court lists minimum safeguards that should be set out in statute law.

408. A/HRC/27/37, paras. 28-29.

409. Paragraph 2 of article 8 states: There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

410. *Sidiropoulos v. Greece*.

Reference to the principle of legality evokes the need that the interference is based on a national legal provision. The Court has given a wide interpretation of this criterion. The justification of an interference can be entrenched in a national statutory regime, but also in different sources, such as professional rules of conduct, common law unwritten principles, European Union regulations or international – either bilateral or multilateral – treaties. On the contrary, administrative regulations, orders, instructions and any other legal source characterized by a high degree of flexibility or discretion or not displaying binding effects, lacking accessibility, usually do not constitute sufficient legal basis for the purposes of Article 8 §2<sup>411</sup>.

Secondly, the Court has to consider the text of the law, the field it covers and the number and status of those to whom it is addressed, in order to assess its clearness and precision. This requirement can be defined as that of “accessibility” of the law. On the one hand, it means that the norm has to rule the specific situation interested by the case; on the other hand, from a subjective perspective, «the citizen must be able to have an indication that is adequate, in the circumstances, of the legal rules applicable to a given case»<sup>412</sup>.

The third aspect, directly linked to the previous one, involves the foreseeability of the consequences of one’s conduct: any individual should be able to regulate his behaviour according to the provisions of the law.

Once the Court is satisfied with the legality of the interference, it will examine the legitimacy of the aim pursued. The aims listed in paragraph 2 form part of a closed list. It has happened, however, that the Court has taken into consideration objectives different from those explicitly elicited. The wording of the Convention appears to be comprehensive of the main interests potentially at stake, each of which is couched in broad terms. They are encompassed by all qualified rights, with the sole exceptions of the economic well-being of the country. In procedural terms, it is for the respondent state to spell out the objective pursued with the interference: generally, the Court will be satisfied with it. This means, however, that the true battle is fought over the necessity and proportionality of the measures adopted to pursue such aims. The legitimate aims, as listed in Article 8 and as interpreted by the Court, are: National security, Public safety, Economic well-being of the country, Prevention of disorder or crime, Protection of health or morals, Protection of the rights or freedoms of others.

The legality and legitimacy of the interference do not guarantee its compliance with Article’s 8 conditions of derogation. The measure will also have to pass the necessity test, which entails a multi-faceted analysis. In assessing the necessity requirement, which inevitably implies a proportionality test, the Court might also extend its scrutiny beyond the boundaries of the right in question, extending its assessment to the democratic essence of the respondent state against a number of indicators such as pluralism, tolerance, broadmindedness, equality, liberty, right to fair trial, freedom of expression, assembly and religion<sup>413</sup>. As for what is meant by necessity, as usual the Court has not come out with a clear-cut definition: instead, it uses a composite and balanced notion, whereby necessity is not synonymous with « indispensable », nor has it the same flexible meaning of expressions such as reasonable, « useful » or « desirable »<sup>414</sup>. Although in the subsidiary system established by the Convention Contracting States enjoy a variable margin of appreciation on the means to reach their objectives, ultimately it is for the Court to assess that the interference corresponds to a pressing social need and that it is proportionate to the legitimate aim pursued and to the social need addressed.

411. Shimovolos v. Russia.

412. Malone.

413. Refah Partisi (the Welfare Party) v. Turkey.

414. Handyside v. the United Kingdom.

## 7. PROCEDURAL SAFEGUARDS, EFFECTIVE OVERSIGHT AND RIGHT TO AN EFFECTIVE REMEDY

Article 17, paragraph 2 of the International Covenant on Civil and Political Rights states that everyone has the right to the protection of the law against unlawful or arbitrary interference or attacks. The “protection of the law” must be given life through effective procedural safeguards, including effective, adequately resourced institutional arrangements. Judicial involvement that meets international standards relating to independence, impartiality and transparency can help to make it more likely that the overall statutory regime will meet the minimum standards that international human rights law requires. At the same time, judicial involvement in oversight should not be viewed as a panacea; in several countries, judicial warranting or review of the digital surveillance activities of intelligence and/or law enforcement agencies have amounted effectively to an exercise in rubber-stamping. Attention is therefore turning increasingly towards mixed models of administrative, judicial and parliamentary. Jurisprudence at the regional level has emphasized the utility of an entirely independent oversight body, particularly to monitor the execution of approved surveillance measures<sup>415</sup>. In 2009, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism suggested, therefore, that “there must be no secret surveillance system that is not under review of an independent oversight body and all interferences must be authorized through an independent body”<sup>416</sup>.

The International Covenant on Civil and Political Rights requires States parties to ensure that victims of violations of the Covenant have an effective remedy. Article 2, paragraph 3 (b) further specifies that States parties to the Covenant undertake “to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy”. States must also ensure that the competent authorities enforce such remedies when granted. As the Human Rights Committee emphasized in its general comment No. 31, failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant<sup>417</sup>. Moreover, cessation of an ongoing violation is an essential element of the right to an effective remedy<sup>418</sup>.

Effective remedies for violations of privacy through digital surveillance can thus come in a variety of judicial, legislative or administrative forms. Effective remedies typically share certain characteristics. First, those remedies must be known and accessible to anyone with an arguable claim that their rights have been violated. Notice (that either a general surveillance regime or specific surveillance measures are in place) and standing (to challenge such measures) thus become critical issues in determining access to effective remedy. States take different approaches to notification. There are also variable approaches at national level to the issue of an individual’s standing to bring a judicial challenge. Second, effective remedies will involve prompt, thorough and impartial investigation of alleged violations. This may be provided through the provision of an “independent oversight body [...] governed by sufficient due process guarantees and judicial oversight, within the limitations permissible in a democratic society”<sup>419</sup>. Third, for remedies to be effective, they must be capable of ending ongoing violations, for example, through ordering deletion of data or other reparation<sup>420</sup>. Fourth, where human rights violations rise to the level of gross violations, non-judicial remedies will not be adequate, as criminal prosecution will be required<sup>421</sup>.

415. See for example European Court of Human Rights, *Ekimdzhev v Bulgaria*, application No. 62540/00, 28 June 2007.

416. A/HRC/13/37, para. 62.

417. CCPR/C/21/Rev.1/Add. 13, para. 15.

418. A/HRC/27/37, para. 39.

419. “Joint declaration on surveillance programs and their impact on freedom of expression”, issued by the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the [Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights](#), June 2013, para. 9.

420. See for example European Court of Human Rights, *Segersted-Wibber and others v. Sweden*, application No. 62332/00, 6 June 2006. See also CCPR/C/21/Rev.1/Add. 13, paras. 15-17.

421. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law

# APPENDIX :

## CHALLENGES AND RISKS RELATED TO ONLINE CONTENT<sup>422</sup>. ADAPTED FROM YOUTH PROTECTION ROUNDTABLE TOOL KIT – STIFTUNG DIGITALE CHANCEN 2009

**Infringement of human rights / defamation:** In the anonymity of the web, propaganda against certain population groups or individuals can easily be widespread. In addition, one can presume that people act differently online when they do not have to face their counterparts or victims directly and therefore are not immediately confronted with the consequences of their conduct. Thus the risk of infringement of human rights and being a victim of defamation is much more likely online than in reality. Also, defamatory content is harmful to children and young people whose opinion might be influenced by misleading information.

**Inappropriate advertisement and marketing to children:** Inappropriate advertisement means the risks of receiving or being exposed to advertising for products and/or services that are inappropriate to children like cosmetic surgery. The more users give away private information (i.e. name, age or gender), the more likely they are to receive advertisements or be asked to participate in lotteries. Since children are in many cases unaware of the consequences of typing their names into forms and boxes on the web, they are profoundly at risk. Considering the high penetration rate of mobile phones among children and young people, attention should also be paid to this additional channel for the dissemination of advertisement.

**Privacy:** Once published on the web, content can spread rapidly around the world and remain in existence indefinitely. Users, and in particular children and young people, are often unaware of the short-and long-term consequences of publishing texts and pictures they may not want to make available publicly later. Data stored on a server or a platform can be easily accessed by others and people may not be aware of how unprotected their personal data can be. It is important when using the Internet that people fully understand the environment they are working in.

## RISKS RELATED TO ONLINE CONTACT ADAPTED FROM YOUTH PROTECTION ROUNDTABLE

### TOOL KIT – STIFTUNG DIGITALE CHANCEN 2009

**Identity theft:** Getting hold of, and making use of, other people's electronic identity (e.g. user name and password) with the intent to commit commercial or other fraud and to benefit from it is called identity theft. Identity theft is a growing risk as the number of virtual identities is increasing with the number of people online and particularly those using personalized services.

422. Extracted from Alton Grizzle and Carolyn Wilson (Eds.), *Media and Information Literacy Curriculum for Teachers*, UNESCO, Paris, 2011, pp. 132-133.

**Grooming:** Grooming refers to pedophiles using the Internet as a means to contact children and young people while concealing their adult identity. They often build their strategy on children's longing for friendship and familiarity. All areas of the Internet that provide platforms for personal contact and exchange are likely to provide a basis for grooming attacks. As mentioned before, the mobile phone (as an additional device to contact others and to access social networks) should be taken into strong consideration here, especially as children look at their mobile phone as a particular part of their private life and are mostly on their own when using it. Thus, with the increase of mobile communication technologies and social networks, the risk of falling prey to a grooming attack and then accepting a dangerous invitation has become much greater.

**Bullying:** Various types of bullying seem always to be part of people's lives. Bullying one another is certainly simplified by the Internet due to the anonymity provided by the medium. Children and young people in particular risk being both victims of bullying and offenders. Hence bullying is related to one's own conduct as well as to the conduct of others. Even though publishing content like defamatory pictures can be part of bullying, the phenomenon is chiefly related to online contact. As mentioned before, multifunctional mobile phones are often used for taking pictures with the intention of bullying and then uploading the pictures to the Internet or sending them via multimedia messaging (MMS) to others. Since many children and young people have a mobile phone equipped with a digital camera, bullying is becoming easier.

**Disclosing private information:** When setting up a profile on a social community platform, users are invited to disclose private information to present themselves to the community. Also in chat rooms and forums users may disclose private data to others, such as their address or telephone number. Young people in particular, are unable to foresee the consequences of publishing their private data. They are often unaware that a chat room is not a private but a public area.

**Profiling:** With the increasing number of profiles a person can publish on different platforms, there is a greater risk that personal data published on one platform will be merged with data published on other platforms or given away elsewhere (e.g. in polling or raffles). Thus, profiles are created that make it possible to directly address the person with potentially unwanted content, services and advertisements. Profiling can be carried out from the website when personal data are displayed publicly, but a more dangerous practice is when profiles of users (or their partial profiles) are harvested from the database behind the website and sold by the platform provider to third parties.

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60**

**Subject**

**2.4.6.** Administration of justice. Right to effective remedy

**Lecturer:**

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## SUMMARY OF THE TOPIC

One of the facets of the rule of law within any state is that the administration system that is charged with upholding that law will be fair and respect the rights of all of those within the system, particularly victims. The United Nations has been at the forefront in enshrining positive and soft law to ensure states meet these standards. The purpose of this course is to introduce participants to those UN instruments that foster the administration of justice and the promote and protect the participants' rights, and to show how these instruments and associated mechanisms can be used in practice.

In particular, this module will:

1. Consider the fundamental rights of prisoners, and others who have been administratively detained, at the UN level;
2. Look at the standards that law enforcement officials have to meet, such as judges, prosecutors and the police;
3. Examine the rights of specific groups, including children

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

#### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.
- To identify and apply international and regional human rights protection mechanisms.
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.



# BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

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## Treaties

- Universal Declaration of Human Rights 1948
- [International Covenant on Civil and Political Rights, 1966](#)
- [Optional Protocol to the International Covenant on Civil and Political Rights, 1966](#)
- [Convention on the Elimination of All Forms of Discrimination against Women, 1979](#)
- [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(CAT\), 1984](#)
- [Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment \(OPCAT\)](#)
- [Convention on the Rights of the Child, 1989](#)
- [International Convention for the Protection of All Persons from Enforced Disappearance, 2006](#)
- [Convention on the Rights of Persons with Disabilities, 2006](#)

## Human Rights Committee Jurisprudence

- Abdelhamid Taright et al. v. Algeria, Human Rights Committee, 2006
- Danyal Shafiq v. Australia, Communication, Human Rights Committee, 2006
- William Eduardo Delgado Páez v. Colombia, Human Rights Committee, 1985

## Human Rights Committee, General Comments

- General Comment No. 32, Human Rights Committee, 2007
- General Comment No. 35, Human Rights Committee, 2014

## Declarations, Standards, Principles, etc.

- [Basic Principles and Guidelines on the Right to a Remedy and Reparation, 2005](#)
- [Basic Principles for the Treatment of Prisoners, 1990](#)
- [Basic Principles on the Independence of the Judiciary, 1985](#)
- [Basic Principles on the Role of Lawyers](#)
- [Basic Principles on the Use of Force and Firearms by Law Enforcement Officials](#)
- [Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment](#)
- [Code of Conduct for Law Enforcement Officials, 1979](#)
- [Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power](#)
- [Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)
- [Declaration on the Protection of All Persons from Enforced Disappearance](#)
- [Guidelines for Action on Children in the Criminal Justice System, 1997](#)
- [Guidelines on the Role of Prosecutors, 1990](#)

- [Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)
- [Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#)
- [Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions](#)
- [Safeguards guaranteeing protection of the rights of those facing the death penalty](#)
- [United Nations Guidelines for the Prevention of Juvenile Delinquency \(The Riyadh Guidelines\)](#)
- [United Nations Rules for the Protection of Juveniles Deprived of their Liberty](#)
- [United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders \(the Bangkok Rules\), 2010](#)
- [United Nations Standard Minimum Rules for Non-custodial Measures \(The Tokyo Rules\)](#)
- [United Nations Standard Minimum Rules for the Administration of Juvenile Justice \(The Beijing Rules\), 1985](#)
- [United Nations Standard Minimum Rules for the Treatment of Prisoners \(the Nelson Mandela Rules\), 1955](#)
- [Updated Set of principles for the protection and promotion of human rights through action to combat impunity](#)

### United Nations Mechanisms

- [UN Working Group on Arbitrary Detention](#)
- [Individual Complaints and Urgent Appeals](#)
- [Working Group on Enforced or Involuntary Disappearances](#)
- [Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment](#)

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Reidy, Aisling, [The prohibition of torture. A guide to the implementation of Article 3 of the European Convention on Human Rights](#), Human rights handbooks No.6, Strasbourg Cedex, 2003.

Yang, Kenny. "Public accountability of public prosecutions." 20.1 (2013).

## LEARNING PROCESS RESULTS

On successful completion of this module, participants should:

- Having a working knowledge of the main UN positive and soft law responsible for strengthening systems for the administration of justice, and protecting and promoting the rights of the various stakeholders in the system;
- Being able to apply that knowledge, individually and collectively, in a range of different contexts in order to identify the most effective strategies;
- Identifying the most effective forms of communication for upholding and promoting the administration of justice in any given situation
- Showing awareness of the different factors that apply in the administration of justice, especially political, ethical and cultural, and be able to balance these interests

## METHODOLOGY

- 1) Research: read and make thorough notes on, at least, the mandatory reading mentioned above
- 2) Teamwork: in the context of a hypothetical individual complaint to the Human Rights Committee, and in groups, be able to play the role of, and make submissions on behalf of, a complainant or state party
- 3) Case note: write a case note on an important individual complaint already heard by the Human Rights Committee
- 4) Team project: review the media to identify a current case study for the purposes of developing an effective administration of justice strategy
- 5) Individual project: write a hypothetical individual complaint to the UN Working Group on Arbitrary Detention

## SCHEDULING OF LEARNING ACTIVITIES

### 1) RESEARCH/LECTURE TASK:

In order to gain a working understanding of the UN standards with respect to the administration of justice, especially on fundamental rights, such as the right to liberty and a fair trial, the duties of judges, prosecutors and police, and the safeguarding of specific groups like children, it is naturally important to read the relevant international instruments. There are many such instruments and they form an intricate and interconnected corpus of law offering protection in many different situations. The main instruments are set out above, and relevant extracts below. Please read these extracts and answer the following questions:

- A. Based on your reading, how would you define the following concepts: 'administration of justice', 'rule of law', 'arbitrary arrest'; and 'fair trial'? In 500 words, explain how these terms are interconnected.
- B. Which people are the most vulnerable in the justice system and why? Do you think that the UN standards provide them with adequate protection? With reference to actual examples, name five reasons why protection may fail?
- C. Make a list of the different UN mechanisms that may be used to enforce administration of justice standards. How easy is it to access those mechanisms? In what different circumstances may they be used?

## 2) TEAMWORK TASK:

This task concerns an individual communication brought at the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights by Mr X against state Y. Please select the role of agent of either Mr X or State Y: you will have to draft submissions as to the merits of the following communication for the party you choose to represent. [Please use the International Covenant on Civil and Political Rights 1966, its Optional Protocol, the General Comments of the Committee, and its conclusions and jurisprudence on previous communications in order to do so.](#) Once you have drafted your submissions, you may decide to have a role play before an independent judge, delivering your submissions.

*Mr X is a thirty five year old man. He was born in state Y and has lived there his entire life. He is a citizen of state Y. He has been campaigning against a policy decision by state Y to cancel all state housing benefit for anyone over the age of thirty. Mr X is disabled and unable to work. He can only stand for 30 minutes at a time, and cannot sit on any hard surface at all. He needs cushions every 30 minutes for about one hour. He can then stand for 30 minutes again. As he cannot work, he has been relying on state benefit in order to accommodate himself. One day he stands outside the local state office and holds a banner saying 'The Government of State Y is Corrupt' Members of the local state office call the police to complain about Mr X. A police officer asks Mr X to remove his banner, even though the constitution of State Y guarantees Mr X the right to peaceful protest. Mr X tries to explain to the police officer that he is just exercising his constitutional right to peaceful demonstration, which he is legally allowed to do, however, the police officer says 'I don't care. I don't like your banner.' The police officer then forcibly places handcuffs on Mr X and takes him to the police station. He does not say anything else to Mr X, such as what crime he has committed. At the police station, Mr X is placed in a cell with no seating. Also, the floor is extremely hard. He is forced to stand for long periods of time, despite his disability, and when he sits on the floor his back starts to hurt. This continues for twelve hours. No one comes to see him, despite his cries of back pain. After twelve hours, a police officer comes to see him. He has an order from the court which says that Mr X has been convicted of public disorder and must now stay in that same cell for 6 months. He will only be allowed out for two hours a day. When Mr X protests the police man laughs and walks away. Mr X manages to contact his friend, who immediately contacts a charity. They see Mr X, who by this time, is in extremely bad pain. A doctor has prescribed basic pain killers but he is still in the same cell with no bedding or seating. The charity attempts to challenge the conviction in court, but no court accepts the appeal. As state Y has signed the optional protocol to the International Covenant on Civil and Political Rights 1966, the charity makes an individual complaint to the Human Rights Committee. The Committee accepts that the communication is admissible and moves on to consider its merits.*

Please draft submissions as above.

## 3) CASE NOTE TASK:

Case-noting is an important skill. Please read the following communication in full: [William Eduardo Delgado Páez v. Colombia, Human Rights Committee, 1985](#)

Please summarise the above communication in the following format:

- Name of the case
- Name of the parties
- Summary of the facts

- Finding on admissibility
- Finding on merits
- Important principles
- Outcome of communication

#### 4) TEAM PROJECT TASK:

For this task, please work in groups. Identify a current news story that raises potential administration of justice issues. Prepare a draft strategy, based on the relevant human rights standards and mechanisms, for finding a successful outcome for the issues raised by this case. Please focus on the I-R-A-C method (information and issues – research and rules – analysis and argument – conclusions)

- Information and Issues: please summarise what has happened/is happening in the case. What administration of justice issues arise? What would be the best resolution or outcomes?
- Research and Rules: what UN standards and mechanisms apply? Why are they relevant? How can they be accessed?
- Analysis and Argument: How do those standards apply? What interpretation should be relied and why? What are the advantages and disadvantages in using those standards? How much will it cost and how much time is there, or will be spent? Why are those mechanisms the most appropriate for achieving the necessary outcomes? How should they be used? What ethical and communication issues arise?
- Conclusion: who will enforce the mechanism? How will they do this? What monitoring system will be used? What communication strategy should be involved? What will count as success/failure? What will be the resource implications of this? How will the outcome be carried enforced and forward?

#### 5) INDIVIDUAL PROJECT TASK:

Written skills are a fundamental part of enforcing human rights. Whether it be writing a human rights report, making submissions to a governmental department or tribunal or writing to someone who has been affected by a human rights issue, the ability to identify and analyse the issues and communicate them using appropriate is crucial. The UN Working Group on Arbitrary Detention can receive individual complaints and for the purposes of this task you will be required to draft an actual communication, [based on the facts at Task 2 above, for the Working Group, referring to its rules.](#)

### TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1 Research/Lecture Task	8 hours	Self-test
Activity 2 Teamwork Task	8 hours	Forum
Activity 3 Case Note Task	8 hours	Portfolio
Activity 4 Team Project Task	12 hours	Portfolio
Activity 5 Individual Project	24 hours	Portfolio

## EVALUATION SELF-TEST

- 1: Under Article 9 of the Universal Declaration of Human Rights 1948, anyone detained on a criminal charge shall be entitled to a trial within:
  - a). An adequate time
  - b). An appropriate time
  - c). A reasonable time
  - d). A suitable time
- 2: Under General Comment No. 32, Human Rights Committee, 2007, the right to access to courts is:
  - a). Only open available to citizens of a country
  - b). Only available to those who have lived in a country for 5 years
  - c). Only available in cases of a serious political crime
  - d). Available to all subject to the jurisdiction of the State party.
- 3: Section 7 of the United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 requires what should be kept?
  - a). The prisoners personal possessions
  - b). A bound registration book
  - c). A certain amount of money
  - d). A telephone and computer
- 4: Article 3 of the Convention on the Rights of the Child 1989 says that the 'primary consideration' must be:
  - a). The best interests of the child
  - b). The child's age
  - c). The child's education
  - d) The child's health
- 5: Which article of the Convention on the Rights of Persons with Disabilities, 2007 is on access to justice:
  - a). Article 13
  - b). Article 2
  - c). Article 35
  - d). Article 40

## EVALUATION SELF-TEST

Question	Question Key
Question 1	c
Question 2	d
Question 3	b
Question 4	a
Question 5	a

## SUBJECT 2.4.:

# 2.4.6 ADMINISTRATION OF JUSTICE. RIGHT TO EFFECTIVE REMEDY

## 1. THE RIGHT TO LIBERTY

### INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1948

#### Article 9:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

#### Article 10:

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
- (b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

### ABDELHAMID TARIGHT ET AL. V. ALGERIA, HUMAN RIGHTS COMMITTEE, 2006

8.3 The Committee reaffirms its prior jurisprudence that pretrial detention should be the exception and that bail should be granted, except in situations where the likelihood exists that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party. The drafting history of article 9, paragraph 1, confirms that “arbitrariness” is not to be equated with “against the law”, but must be interpreted more



broadly to include elements of inappropriateness, injustice, lack of predictability and illegality. Further, continued pretrial detention following legal arrest must not only be lawful, but also reasonable in all respects. The Committee is of the view, however, that the State party has not sufficiently justified its arguments, either concerning the reasons for placing the authors in pretrial detention or concerning the complexity of the case such that it might justify keeping them in custody.

#### DANYAL SHAFIQ V. AUSTRALIA, COMMUNICATION, HUMAN RIGHTS COMMITTEE, 2006

7.2 In respect of the author's claim under article 9, paragraph 1, that he was held in arbitrary and indefinite detention, the Committee recalls its jurisprudence that the notion of "arbitrariness" must not be equated with "against the law" but be interpreted more broadly to include such elements as inappropriateness and injustice. In this regard, the Committee recalls that the important guarantee contained in Article 9 is applicable to all deprivations of liberty, whether in criminal cases or other cases such as, for example, mental illness, drug addiction, educational purposes, immigration control, etc [20]. Thus remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case and proportionate to the ends sought, for example, to prevent absconding or interference with evidence [21]. It recalls that every decision to keep a person in detention should be open to periodical review, in order to reassess the necessity of detention and detention should not continue beyond the period for which a State party can provide appropriate justification [22].

#### WILLIAM EDUARDO DELGADO PÁEZ V. COLOMBIA, HUMAN RIGHTS COMMITTEE, 1985

5.5 The first sentence of article 9 does not stand as a separate paragraph. Its location as a part of paragraph one could lead to the view that the right to security arises only in the context of arrest and detention. The travaux préparatoires indicate that the discussions of the first sentence did indeed focus on matters dealt with in the other provisions of article 9. The Universal Declaration of Human Rights, in article 3, refers to the right to life, the right to liberty and the right to security of the person. These elements have been dealt with in separate clauses in the Covenant. Although in the Covenant the only reference to the right of security of person is to be found in article 9, there is no evidence that it was intended to narrow the concept of the right to security only to situations of formal deprivation of liberty. At the same time, States parties have undertaken to guarantee the rights enshrined in the Covenant. It cannot be the case that, as a matter of law, States can ignore known threats to the life of persons under their jurisdiction, just because that he or she is not arrested or otherwise detained. States parties are under an obligation to take reasonable and appropriate measures to protect them. An interpretation of article 9 which would allow a State party to ignore threats to the personal security of non-detained persons within its jurisdiction would render totally ineffective the guarantees of the Covenant.

#### GENERAL COMMENT 35, HUMAN RIGHTS COMMITTEE, 2014

3. Liberty of person concerns freedom from confinement of the body, not a general freedom of action. Security of person concerns freedom from injury to the body and the mind, or bodily and mental integrity, as further discussed in paragraph 9 below. Article 9 guarantees those rights to everyone. "Everyone" includes, among others, girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, migrant workers, persons convicted of crime, and persons who have engaged in terrorist activity.

## 2. THE RIGHT TO A FAIR TRIAL

#### UNIVERSAL DECLARATION OF HUMAN RIGHTS, 1948

**Article 6:** Everyone has the right to recognition everywhere as a person before the law.

**Article 10:** Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

## INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS, 1966

### Article 14,

- 1: All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - (c) To be tried without undue delay;
  - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
  - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
  - (g) Not to be compelled to testify against himself or to confess guilt.
4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

#### GENERAL COMMENT NO. 32, HUMAN RIGHTS COMMITTEE, 2007

**Article 14** encompasses the right of access to the courts in cases of determination of criminal charges and rights and obligations in a suit at law. Access to administration of justice must effectively be guaranteed in all such cases to ensure that no individual is deprived, in procedural terms, of his/her right to claim justice. The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party.

### 3. JUDGES DUTIES

#### BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY, 1985

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

### 4. PROSECUTORS RESPONSIBILITIES

#### GUIDELINES ON THE ROLE OF PROSECUTORS, 1990

12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.

### 5. PRISONERS RIGHTS

#### 5.1. PROHIBITION AGAINST SLAVERY

#### INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS 1966

##### Article 8:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour;
- (b) Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court;
- (c) For the purpose of this paragraph the term "forced or compulsory labour" shall not include:

- (i) Any work or service, not referred to in subparagraph (b), normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention;
- (ii) Any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors;
- (iii) Any service exacted in cases of emergency or calamity threatening the life or well-being of the community;
- (iv) Any work or service which forms part of normal civil obligations.

## 5.2. PROHIBITION AGAINST TORTURE

### INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS 1966

**Article 7:** No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

### CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, 1984

#### Article 1:

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

#### Article 2:

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.
3. An order from a superior officer or a public authority may not be invoked as a justification of torture.

**Article 10:** Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.

## UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS, 1955

- (1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:
  - (a) Information concerning his identity;
  - (b) The reasons for his commitment and the authority therefor;
  - (c) The day and hour of his admission and release.
- (2) No person shall be received in an institution without a valid commitment order of which the details shall have been previously entered in the register.

## BASIC PRINCIPLES FOR THE TREATMENT OF PRISONERS, 1990

1. All prisoners shall be treated with the respect due to their inherent dignity and value as human beings.
2. There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. It is, however, desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require.

## 6. LAW ENFORCEMENT OFFICIALS

### CODE OF CONDUCT FOR LAW ENFORCEMENT OFFICIALS, 1979

**Article 1:** Law enforcement officials shall at all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.

## 7. REMEDIES

### BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW, 2005

- VI. Treatment of victims: 10. Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.
- VII. Victims' right to remedies: 11. Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:
  - (a) Equal and effective access to justice;
  - (b) Adequate, effective and prompt reparation for harm suffered;

(c) Access to relevant information concerning violations and reparation mechanisms.

VIII. Access to justice : 12. 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 as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should:

## 8. DISAPPEARANCE

### INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE, 2006

#### Article 1:

1. No one shall be subjected to enforced disappearance.
2. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance.

**Article 2:** For the purposes of this Convention, “enforced disappearance” is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

**Article 3:** Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

## 9. CHILDREN

### UNITED NATIONS STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE (“THE BEIJING RULES”), 1985

1.1 Member States shall seek, in conformity with their respective general interests, to further the well-being of the juvenile and her or his family. 1.2 Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible. 1.3 Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

### GUIDELINES FOR ACTION ON CHILDREN IN THE CRIMINAL JUSTICE SYSTEM, 1997

Particular attention should be given to the following points:

- (a) There should be a comprehensive child-centred juvenile justice process;

- (b) Independent expert or other types of panels should review existing and proposed juvenile justice laws and their impact on children;

#### CONVENTION ON THE RIGHTS OF THE CHILD 1989

**Article 3:** 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

**Article 37:** States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

## 10. WOMEN

#### CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN NEW YORK, 18 DECEMBER 1979

**Article 1:** For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

**Article 2:** States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

#### UNITED NATIONS RULES FOR THE TREATMENT OF WOMEN PRISONERS AND NON-CUSTODIAL MEASURES FOR WOMEN OFFENDERS (THE BANGKOK RULES), 2010

**Rule 10:**

1. Gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners.



2. If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.

## 11. DISABILITY RIGHTS

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### CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, 2007

#### **Article 13** - Access to justice:

1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 70min****Subject****2.4.7.** Rights to a name, identity and nationality**Lecturer:**Pilar Diago,  
Senior Lecturer in International Private Law at the University of Zaragoza  
Email: [mpdiago@unizar.es](mailto:mpdiago@unizar.es)

## SUMMARY OF THE TOPIC

This unit explores the fundamental right to nationality according to the primary United Nations sources.

1. It provides a basic approach to the right to nationality, including its acquisition and, where necessary, change.
2. It makes specific reference to the consequences involved in respecting this right and ensuring that arbitrary deprivation of nationality is prevented.
3. It provides a comprehensive view of the legal framework, covering the declarations, conventions and other agreements which include this right.
4. It includes a specific section on statelessness, focusing on it as a violation of the right to a nationality, and therefore a situation which States must prevent. Evidence of this can be seen in legislation such as that being outlined in Spain for avoiding statelessness, whereby Spanish nationality is granted to those at risk of being stateless.
5. It also provides a brief outline of the right to a name and official identity, from the perspective of the recognition of this right in the Convention on the Rights of the Child.
6. It also addresses the difficulties entailed for a person who lacks an official identity and underlines the importance of the recognition of this right for all persons.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

### GENERAL:

- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

- [Convention on the Reduction of Statelessness](#)
- [Convention relating to the Status of Stateless Persons](#)
- [Convention relating to the Status of Refugees](#)
- [Protocol relating to the Status of Refugees](#)
- [Declaration on the Human Rights of Individuals who are not nationals of the country in which they live](#)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

The Human Rights Council has addressed the enjoyment of the right to a nationality and the avoidance of statelessness in several resolutions on 'Human rights and arbitrary deprivation of nationality':

- [Resolution 7/10 \(2008\)](#)
- [Resolution 10/13 \(2009\)](#)
- [Resolution 13/2 \(2010\)](#)
- [Resolution 20/4 on the Right to a Nationality: Women and Children \(2012\)](#)
- [Resolution 20/5 \(2012\)](#)
- [Resolution 26/14 \(2014\)](#)
- [Resolution 32/5 \(2016\)](#)

### Report of the Secretary-General on human rights and arbitrary deprivation of nationality:

- [A/HRC/10/34](#)
- [A/HRC/13/34](#)
- [A/HRC/19/43](#)
- [A/HRC/23/23](#)
- [A/HRC/25/28](#)
- [A/HRC/31/29](#)

### Documents

[Regional Expert Meeting on the Human Rights of Stateless Persons in the Middle East and North Africa](#) (PDF)

Inter-Parliamentary Union - the United Nations High Commissioner for Refugees, Nationality and Statelessness. Handbook for Parliamentarians, N° 22, Geneva, 2014.

Office of the United Nations High Commissioner for Human Rights, [The Rights of Non-citizens](#), New York and Geneva, 2006 (HR/PUB/06/11).

UN High Commissioner for Refugees (UNHCR), [Background Note on Gender Equality, Nationality Laws and Statelessness 2016](#), 8 March 2016.

UN High Commissioner for Refugees (UNHCR), [I Am Here, I Belong: The Urgent Need to End Childhood Statelessness](#), 3 November 2015.

UN High Commissioner for Refugees (UNHCR), [Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A\(2\) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees](#), October 2014, PPLA/2014/01.

UN High Commissioner for Refugees (UNHCR), [Good Practices Paper - Action 3: Removing Gender Discrimination from Nationality Laws](#).

## LEARNING OUTCOMES

On completion of the topic, the student should be able to:

- Understanding and identify the content of the rights discussed, as well as understand the consequences of the deprivation of these rights;
- Identifying these rights in the texts of the Universal Declaration of Human Rights and the Convention on the Rights of the Child;
- Refuting restrictive arguments on the way these rights are formulated.

## METHODOLOGY

Methodology	Educational tools
Expository method	Reading of the corresponding text.
Problem solving	Completing the activity: creation of a chart which clearly illustrates the concept of the right to citizenship and its consequences.
Group discussions	The chart will be subject to group discussion and review. Following the exchange of views, a single chart will be created to include all the suggestions presented, as agreed by the group as a whole.

## SCHEDULING OF LEARNING ACTIVITIES

1. Study the topic content.
2. Read the texts relating to the rights and their corresponding articles.
3. Create a chart with the description of the right and its consequences, addressing issues such as: What would happen if a person had no nationality or name? Why are rights fundamental? What does it mean to be stateless? What are the consequences?
4. Each student will discuss their chart with the group.
5. Once all the charts have been submitted, a single chart will be created to include all the suggestions presented, as agreed by the group as a whole.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1: student's individual work - reading and creating the chart	40 minutes	
Activity 2: presentation in the virtual classroom and discussion	For each student: a 10-minute presentation followed by an open discussion of approximately 20 minutes' duration.	In addition to the individual presentation, other students' participation in terms of suggestions, objections and proposals will also be assessed.

## SUBJECT 2.4.:

# 2.4.7. RIGHTS TO A NAME, IDENTITY AND NATIONALITY

## 1. THE RIGHT TO A NAME AND AN OFFICIAL IDENTITY

Article 7 of the Convention on the Rights of the Child stipulates that every child *'shall have the right from birth to a name'* and *'the right to acquire a nationality'*. All children have the right to an official identity recorded on a birth certificate, as well as the right to acquire a nationality and the right to know and be cared for by his or her parents.

Birth registration is a fundamental right recognised in Article 24, Paragraph 2, of the International Covenant on Civil and Political Rights: *'Every child shall be registered immediately after birth and shall have a name'*.

Birth registration, as set out in the corresponding Report of the Office of the United Nations High Commissioner for Human Rights, is 'the continuous, permanent and universal recording within the civil registry of the occurrence and characteristics of birth, in accordance with the national legal requirements'. It establishes the existence of a person under law, and lays the foundation for safeguarding civil, political, economic, social and cultural rights.

In the context of registration, there can be no discrimination based on sex, race, colour, language, religion or other grounds. All children are entitled to registration under equal conditions. Without formal registration at birth or identification documents, children may find themselves excluded from access to vital services, such as education, health care and social security. Birth registration is fundamental to the prevention of statelessness, as it constitutes an important form of proof of the link between an individual and the State, and this can mitigate extreme cases of statelessness on the basis of State legislation (see Spain's Civil Code). Without birth registration, children are invisible in official statistics and this invisibility denies them their corresponding rights.

This is a human right which must be enforced. It is important to remember that the Convention on the Rights of the Child applies to practically the entire community of nations, including the Maghreb countries. The implementation of its provisions must be governed by the best interests of the child.

Providing information and raising awareness of the value of birth registration is vital as an ongoing process to aid understanding of this right; often parents are unaware of their right to register their child and of its importance.

Examples of good practices in this context are described in the Report of the Office of the United Nations High Commissioner for Human Rights on Birth registration and the right of everyone to recognition everywhere as a person before the law. Notable good practices include:

- In Mali, a citizen's guide to birth registration has been issued in five languages (French, Bamanankan, Fulfulde, Sonrai and Tamasheq). In order to ensure that those who were illiterate could benefit from the guide, more than 1,000 audio copies and 600 video copies have also been distributed.
- The Minimbah Project, established by a group of university students at the University of New England (Australia), involves a volunteer team that holds birth registration days in local primary schools in order to raise community awareness of the importance of birth registration. Children whose births have not been registered are therefore given the opportunity to register for a birth certificate.

- In the Sekameng area of Mafeteng District in Lesotho, World Vision met with officers from the Departments of Home Affairs and Social Welfare, leaders and community members to discuss child protection issues. As a result, a plan of action was drawn up under which local church leaders agreed to give awareness-raising sermons on birth registration at least once a month for three months, to facilitate the registration of names of children in need of birth certificates on dedicated days, and to submit the list of names for forwarding to the Department of Home Affairs.

## 2. THE RIGHT TO A NATIONALITY

Nationality is a highly sensitive issue as it is a manifestation of a country's sovereignty and identity. Not surprisingly, disputes about citizenship can, and often do, result in tension and conflict, both within and between States. During the 20th century, there was both an increase in the incidence of statelessness around the world and growing awareness of and concern for human rights. International law on nationality thus evolved along two tracks: to protect and assist those individuals who were already stateless, and to try to eliminate, or at least reduce, the incidence of statelessness.

Everyone has the right to acquire, change and retain a nationality. International human rights law provides that the right of States to decide who their nationals are is not absolute and, in particular, States must comply with their human rights obligations concerning the granting and loss of nationality. They must also ensure that there is no discrimination based on sex in the conditions for granting nationality, nor in cases resulting in its deprivation or loss.

### 2.1 THE INTERNATIONAL LEGAL FRAMEWORK

The Hague Convention of 1930, held under the auspices of the Assembly of the League of Nations, was the first international attempt to ensure that all persons have a nationality. Article 1 of the Convention states that: *'It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality'*.

In other words, how a State exercises its right to determine its citizens should conform to the relevant provisions in international law. Throughout the 20th century, those provisions gradually developed to favour human rights over claims of State sovereignty.

Article 15 of the Universal Declaration of Human Rights (UDHR) of 1948 states: *'Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality'*.

This right is founded on the existence of a genuine and effective link between an individual and a State. The first time this link was acknowledged as the basis of citizenship was in a case decided by the International Court of Justice in 1955, the *Nottebohm Case*. In that case, the Court stated that: *'According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'*.

The genuine and effective link, made manifest by birth, residency, and/or descent, is now reflected in the provisions of most States' nationality legislation as well as in recent international instruments relating to nationality, such as the 1997 European Convention on Nationality.

Nationality is also defined by the Inter-American Court of Human Rights as: *'the political and legal bond that links a person to a given State and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that State'* (Castillo-Petruzzi et al v. Peru, Judgment of May 1999, IACHR [ser.C] No. 52 1999).



The right to a nationality has been recognised as a fundamental human right in numerous international<sup>423</sup> and regional<sup>424</sup> legal instruments. The international community has recognised that the protection of the right to a nationality is a matter of direct importance in international law, whose violation compromises the international responsibility of the State.

To ensure that no one is deprived of minimum rights linked to nationality, the international community adopted two key treaties: the 1951 Convention relating to the Status of Refugees (the '1951 Convention' or 'Refugee Convention') and the 1954 Convention relating to the Status of Stateless Persons (the '1954 Convention').

## 2.2 THE ARBITRARY DEPRIVATION OF NATIONALITY

The right to retain a nationality corresponds to the prohibition of arbitrary deprivation of nationality, included in numerous international instruments<sup>425</sup>. In particular, it is worth noting that Article 15 of the Universal Declaration of Human Rights explicitly provides that no one should be arbitrarily deprived of his or her nationality. Paragraph 4 of Article 12 of the International Covenant on Civil and Political Rights states that 'no one shall be arbitrarily deprived of the right to enter his own country'.

The General Assembly, in its resolution 50/152, also recognised the fundamental nature of the prohibition of arbitrary deprivation of nationality. For its part, the Human Rights Council in its Resolution 10/13 recognises that arbitrary deprivation of nationality, especially on discriminatory grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, is a violation of human rights and fundamental freedoms. Unfortunately, this occurs in many cases in real-world situations.

Arbitrary deprivation of nationality, therefore, effectively places the affected persons in a more disadvantaged situation concerning the enjoyment of their human rights because some of these rights may be subjected to lawful limitations that otherwise would not apply, but also because these persons are placed in a situation of increased vulnerability to human rights violations.

.....

423. The international legal instruments that recognise the right to a nationality include: the Universal Declaration of Human Rights (Article 15); the International Convention on the Elimination of All Forms of Racial Discrimination (which states, in the initial paragraph and paragraph d(iii) of Article 5, that States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of rights including in particular the right to nationality); the International Covenant on Civil and Political Rights (Article 24.3); the Convention on the Rights of the Child (Articles 7 and 8); the Convention on the Elimination of All Forms of Discrimination against Women (Article 9) and the Convention on the Nationality of Married Women (which establishes similar guarantees about the nationality of married women); the Convention on the Rights of Persons with Disabilities (Article 18); the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Article 29) and the Convention on the Reduction of Statelessness (Article 1.1).

424. See the OAS Declaration of the Rights and Duties of Man (Article XIX); the American Convention on Human Rights (Article 20); the African Charter on the Rights and Welfare of the Child (Article 6); the Arab Charter on Human Rights (Article 29); the Covenant on the Rights of the Child in Islam (Article 7); the European Convention on Nationality (Article 4); and the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (Article 24).

425. The importance of the right to a nationality in the American Convention on Human Rights is underlined by its inclusion as one of the non-derogable rights which may not be suspended in time of war, public danger, or other emergency that threatens the independence or security of a State Party, in accordance with the provisions of Article 27.2 of the ACHR. The Inter-American Court of Human Rights recognises that these rights form part of the non-derogable nucleus of rights, because they cannot be suspended. In this regard, see *Case of the Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006 (Merits, Reparations and Costs), Series C No. 140, para. 119, and *Case of González et al. ("Cotton Field") v. Mexico*, para. 244. See also *Habeas corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8.

## 2.3 DISCRIMINATION BASED ON SEX IN THE CONTEXT OF THE RIGHT TO A NATIONALITY

The right to a nationality is related to other human rights. Discriminatory nationality laws are one of the main causes of statelessness which, it is estimated, affects about 12 million women, men and children around the world. Discrimination based on sex is one of the most significant areas of discrimination affecting the right to a nationality. Legislation on nationality which discriminates against women creates serious problems in terms of their empowerment and participation in society.

In 2013, OHCHR submitted a report to the Human Rights Council on the issue, entitled, 'discrimination against women on nationality-related matters'. The report examines how women in certain countries do not enjoy equal rights with men to acquire, change and retain their nationality and are also not allowed to transfer nationality to their children or spouses on the same basis, which very often results in statelessness. It analyses the negative impact of discriminatory nationality laws on the enjoyment of women's rights and the rights of their children and spouses, and also includes best practices and other measures to eliminate discrimination against women in nationality laws. The report provides a comprehensive framework for pledges and action towards the full implementation of States' human rights obligations in the area of equal nationality rights.

Extreme situations can occur when legislation is based on the application of the principle of 'dependent nationality'. This principle is based on the idea that a family should have the same nationality owing to concerns of divided loyalty and on the patriarchal notion that the nationality of the entire family should follow that of the husband. This principle is still reflected in discriminatory nationality laws in force in different regions of the world<sup>426</sup>. The Report of the Office of the United Nations High Commissioner for Human Rights states: 'Where both the countries of the husband and the wife follow the principle of dependent nationality, the woman automatically acquires the nationality of her husband but loses her own<sup>427</sup>. Where only the country of the wife follows the principle of dependent nationality, she will lose her nationality when marrying a foreigner, even if she does not automatically acquire the nationality of her husband. Women in those cases will become stateless, even if they remain in their country of origin. Where the husband's country follows the principle of dependent nationality, the husband's nationality will be imposed on the wife, regardless of whether she would like to acquire such a nationality<sup>428</sup>. In the event of termination of the marriage by death or divorce, the married woman may lose her entitlement to her husband's nationality, and, as a result, may become stateless.

Discrimination also occurs when *jus sanguini* transmission of nationality is allowed for men but not for women. Thus, a child born to a father of a particular nationality will acquire that nationality, but a child born to a mother of the same nationality will not acquire that nationality, except through their father.

### EXAMPLES OF DISCRIMINATION:

E.g. 1. A child born to a father with nationality corresponding to country X will be a national of that country. However, a child born to a mother with nationality corresponding to country X will not be a national of that country.

E.g. 2. If a child is born to a father who is a national of country X and a mother who is a national of country Y, the child will acquire nationality X from the father and not nationality Y from the mother.

426. See Report on discrimination against women on nationality-related matters, including the impact on children (UN Doc. A/HRC/23/23, para. 5).

427. See International Law Association Committee on Feminism and International Law, Final Report on Women's Equality and Nationality in International Law, London, 2000, p. 17; Marsha A. Freeman, Christine Chinkin and Beate Rudolf, *The UN Convention on the Elimination of All Forms of Discrimination against Women: a Commentary*, Oxford Commentaries on International Law, 2012, p. 234.

428. Ibid., para. 20.

A further risk of discrimination may exist in nationality-related legislation. When women are unable to document their nationality, they can be at risk of statelessness. For instance, 'women may lack access to the documentation necessary to prove or claim their nationality, such as passports, identity cards or birth or marriage certificates. Their birth may not have been registered owing to laws and practices discriminating against and excluding girls, in particular girls from poor families, minority and foreigner communities or with disabilities'<sup>429</sup>. Their marriage may not have been registered either owing to the lack of the husband's consent, lack of awareness or any other reason. In certain circumstances, such as in cases of trafficking or situations of violence and abuse, women's documentation may have been deliberately appropriated or destroyed as a means of control. In some countries, discriminatory practices, such as requirements of third-party male authorisation to obtain nationality documents, further affect women's enjoyment of their right to nationality'<sup>430</sup>. Restrictions on retention of dual nationality also have the potential to discriminate against women in practice.

Women are also discriminated against in nationality-related matters, when different rules apply to children born in or outside of wedlock. In some countries, the nationality of children born out of wedlock or to a foreign mother living abroad is determined by that of the mother, to the exclusion of the father. Women in those circumstances may face many challenges in claiming support for their children. Since the children do not have the nationality of the father, the father's State of origin might be reluctant to accept the mother's claim for support'<sup>431</sup>.

Under international human rights law, States are required to take all measures necessary to remove laws and procedures and to abolish practices that directly or indirectly discriminate against women'<sup>432</sup>. States must also take proactive measures to achieve substantive equality between men and women in nationality-related matters. Ensuring access to legal assistance and literacy, language courses, subsidies for fees related to residence permits, and facilitating dual nationality are important measures for addressing de facto discrimination against women in this area. The Committee on the Elimination of Discrimination against Women has repeatedly reminded States that they are required to amend discriminatory nationality provisions that violate article 9.1 of the Convention'<sup>433</sup>. The Committee further clarified in its general recommendation No. 21 (para. 6) that 'nationality should be capable of change by an adult woman and should not be arbitrarily removed because of marriage or dissolution of marriage or because her husband or father changes his nationality'.

Despite the progress witnessed in many countries since the adoption of the Convention on the Elimination of All Forms of Discrimination against Women, laws in around 30 countries still do not grant women equal rights with men with regard to the nationality of their children'<sup>434</sup>. These countries attribute nationality to children solely on the basis of the father's nationality; this constitutes discrimination against women. Often women discover that they cannot transmit their nationality to their children only when they have their first child or when their husband leaves the family or dies, sometimes leaving them stateless'<sup>435</sup>. As a direct result of such discriminatory laws, women become disempowered, as their rights and opportunities are restricted. In such situations, for example, women are more reluctant to return to their country of origin for a job opportunity or a position in public services because their children

429. See [Under the Radar and Under Protected: The Urgent Need to Address Stateless Children's Rights](#), UNHCR and Plan, 2012, p. 12. See also the contributions of the International Disability Alliance and Movimiento Sociocultural para los Trabajadores Haitianos.

430. See UN Doc. A/HRC/23/23, para. 23.

431. Ibid., para. 38. See UNHCR, [Guidelines on Statelessness](#) No. 4 (HCR/GS/12/04, para. 15).

432. See for example the Convention on the Elimination of All Forms of Discrimination against Women, Article 2.

433. See UN Doc. A/HRC/23/23, paras 26-27.

434. UNHCR, Background Note on Gender Equality, Nationality Laws and Statelessness, 2012, available from [www.unhcr.org/4f5886306.html](http://www.unhcr.org/4f5886306.html).

435. See Laura van Waas, [The Situation of Stateless Persons in the Middle East and North Africa](#), UNHCR, 2010, p. 39.

will have no opportunity to attend school or have access to health services, given that they lack the nationality of their mothers<sup>436</sup>.

National legislative reform is often required to avoid the situations described. In this regard, the Report of the Office of the United Nations High Commissioner for Human Rights<sup>437</sup>, offers an overview of best practices, including the following:

- Countries such as Algeria, Morocco, Cyprus, Egypt, Fiji, Ireland, Jamaica, Liechtenstein, Malaysia (partially), the Republic of Korea, Thailand and Turkey have lifted their reservations to Article 9 of the Convention on the Elimination of All Forms of Discrimination against Women, an important step towards ensuring women's equality with men in nationality-related matters. The lifting of reservations should be followed by appropriate legal and policy reform to ensure the realisation of rights in practice.
- Lebanon reported that it had set up a ministerial commission to study claims made by civil society organisations to amend the law on nationality. The National Commission for Lebanese Women submitted a project to amend the law on nationality to the commission in June 2012. Senegal also reported that it was considering reforming its nationality code to allow women to transfer their nationality to their husbands and children.
- One of the most relevant cases is Attorney General of the Republic of Botswana v. Unity Dow (1992), where the Botswana High Court ruled that the 1984 Citizenship Act violated the Constitution of Botswana in that it discriminated against women on the basis of sex. According to the Act, while the children of Botswana men married to foreigners or children born out of wedlock were entitled to Botswana nationality by birth, children of Botswana women married to foreigners were not. The Court referred in its decision to the Convention on the Elimination of All Forms of Discrimination against Women. The Citizenship Act was amended in 1995 to conform to the ruling.

## 2.4. IMPACT ON CHILDREN OF THE DEPRIVATION OF THE RIGHT TO A NATIONALITY

Children living under laws that do not allow women to pass on nationality to their children risk becoming stateless, for instance when the father is stateless, unknown or not married to the mother at the time of birth; the father has been unable to take the administrative steps necessary to confer his nationality or acquire proof of nationality for his children owing to death, forcible separation from his family or inability to fulfil onerous documentation or other requirements; the father is unwilling to fulfil administrative steps to confer his nationality or acquire proof of nationality for his children (for example, if he has abandoned the family); or the laws of the father's country do not permit him to confer nationality in certain circumstances, such as when the child is born abroad<sup>438</sup>. In addition, some contemporary families formed by single women or lesbian couples may find that their children are rendered stateless, because women are prevented from conferring their nationality<sup>439</sup>.

Article 2 of the Convention on the Rights of the Child stipulates that: 'States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind...' <sup>440</sup>. Again, this stresses the importance of children having a nationality and not having to be subject to the status of 'non-citizens'. If this

436. See UN Doc. A/HRC/23/23, paras 34-35.

437. Ibid., paras 57-61.

438. See Official Records of the General Assembly, Fifty-Sixth Session, Supplement No. 38 (A/56/38), para. 300; CEDAW/C/EGY/CO/7 and CEDAW/C/JOR/CO/5.

439. Ibid., para. 37.

440. See UN High Commissioner for Refugees (UNHCR), [I am here, I belong: The urgent need to end childhood statelessness](#), 3 November 2015.

occurs, they must be guaranteed those measures of protection required by their status as minors, regardless of their status as non-citizens.

One of the most important aspects is ensuring that minors who may be in an irregular situation due to immigration are not deprived of the right of access to education. Special mention should be made of Article 12 of the Convention, which establishes the right of the child to express their views in all matters affecting the child and to be provided the opportunity to be heard in any judicial or administrative procedure that affects them. This is a highly significant issue in immigration processes and those involving the possible return of minors to their countries of origin.

### 3. STATELESSNESS

Stateless persons are those who have no nationality. This may result from a variety of causes. Some persons are stateless from birth, while others become stateless through loss or deprivation of their nationality.

International recognition of the right to a nationality for all persons imposes on States the obligation to prevent and eradicate statelessness, a legal status which includes all those who are not recognised as citizens of any State<sup>441</sup>. The causes of statelessness are diverse and are often linked to migration. In this respect, the following causes have been identified: (a) succession of States; (b) lack of birth and marriage records; (c) refugee status or undocumented immigrant status; (d) people trafficking; and (e) arbitrary deprivation of nationality<sup>442</sup>. Arbitrary deprivation of nationality may occur either through refusal of access to nationality, whether at birth or through naturalisation, or through denationalisation, when a State rescinds an individual's nationality.

In accordance with the obligations arising from international human rights law, as well as the conventions on statelessness, States must refrain from implementing laws or practices which result in persons being denied access to a nationality<sup>443</sup>.

The Protocol on stateless persons that had been drafted as an addendum to the 1951 Refugee Convention was made into a Convention in its own right in 1954. The 1954 Convention is the primary international instrument that aims to regulate and improve the status of stateless persons and to ensure that stateless persons are accorded their fundamental rights and freedoms without discrimination. The provisions of the Convention are, in many respects, very similar to those of the 1951 Refugee Convention. Acceding to the Convention is not a substitute for granting nationality to those born and habitually resident in a State's territory. No matter how extensive the rights granted to a stateless person may be, they are not the equivalent of acquiring citizenship.

Most of the rights granted to stateless persons under the 1954 Convention are the same as those granted to refugees under the 1951 Convention. However, due to the specific situation of refugees, the 1951 Convention contains specific reference to non-penalisation for unlawful entry or presence and to non-refoulement. These principles are not contained in the 1954 Convention. If one and the same person qualifies as a refugee and as a stateless person the State must apply to him or her the more favourable provisions of the Refugee Convention.

Article 1(1) of the 1954 Convention provides an internationally accepted definition of a stateless person: *'a person who is not considered as a national by any State under the operation of its law'*.

441. Guidelines on Statelessness No. 1: The definition of "Stateless Person" in Article 1(1) of the 1954 Convention relating to the Status of Stateless Persons. UNHCR February 2012.

442. Ibid., p. 99.

443. Inter-American Court of Human Rights. *Case of the Girls Yean and Bosico v. Dominican Republic*. Judgment of September 8, 2005 (Preliminary Objections, Merits, Reparations and Costs). Series C No. 130, para. 142.

Persons who fall within the scope of Article 1(1) of the 1954 Convention are sometimes referred to as *de jure* stateless persons. By contrast, reference is made in the Final Act of the 1961 Convention to *de facto* stateless persons. The term *de facto* statelessness is not defined in any international instrument and there is no treaty regime specific to this category of persons. For practical purposes, the UNHCR defines *de facto* stateless persons as persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country.

Whilst the 1954 Convention establishes the international legal definition of “stateless person” and the standards of treatment to which such individuals are entitled, it does not prescribe any mechanism to identify stateless persons as such. Yet, it is implicit in the 1954 Convention that States must identify stateless persons within their jurisdictions so as to provide them appropriate treatment in order to comply with their Convention commitments. UNHCR has published a [Handbook on Protection of Stateless Persons](#) for States and UNHCR staff. In addition, UNHCR provides assistance and services to States through its offices, delegations and headquarters, and also offers advice, upon request, on how to establish and implement the appropriate procedures.

The exact number of stateless people is not known, but UNHCR estimates that there are at least 10 million people globally. In addition to violations of their right to a nationality, stateless persons are subject to several other human rights violations. States must introduce safeguards to prevent statelessness by granting their nationality to persons who would otherwise be stateless and are either born in their territory or are born abroad to one of their nationals. States must also prevent statelessness upon loss or deprivation of nationality.

A further problem with regard to statelessness is the determination of personal status, since many legal systems determine this by nationality. In these cases, the personal status of a stateless person is usually governed by the law of the country of their domicile or, if they have no domicile, by the law of the country of their residence. This is in accordance with the provisions of Article 12 of the 1954 Convention relating to the Status of Stateless Persons. An example of this can be seen in Article 9.10 of the Spanish Civil Code, which uses habitual residence as a basis.

States are empowered to regulate the scope and enforcement of rights, including the right to a nationality. Nevertheless, restrictions or requirements established for acquiring nationality must be subject to strict principles, such as that of necessity and proportionality, i.e., restrictions must be in the public interest and must be proportionate to the interest that justifies it. These restrictions must also be prescribed by law, must pursue a legitimate aim and must not be discriminatory nor involve arbitrary deprivation of nationality<sup>444</sup>.

444. See Inter-American Court of Human Rights. *Case of the Girls Yean and Bosico v. Dominican Republic*. Application of 11 July 2003, para. 51.



# ADDENDUM:

## RECOMMENDATIONS OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS ON COMBATING DISCRIMINATION AGAINST WOMEN WITH REGARD TO NATIONALITY, INCLUDING THE IMPACT ON CHILDREN

The following recommendations were issued to States by the High Commissioner in recognition of the fact that discrimination against women in nationality-related matters is still prevalent in law and practice<sup>445</sup>.

OHCHR therefore recommends that States and other stakeholders:

- (a) Withdraw all reservations to the Convention on the Elimination of All Forms of Discrimination against Women that impede women's enjoyment of their nationality rights on the same basis as men, in particular their reservations to article 9, and ratify relevant international human rights instruments, including the optional protocols providing for individual complaints.
- (b) Remove all provisions in Constitutions and nationality laws that discriminate against women, thereby ensuring full equality between men and women regarding the acquisition, change and retention of their nationality. In particular, States should ensure that marriage to a foreigner or a change to the husband's nationality during marriage will not automatically change the nationality of the wife, force her to take the nationality of the husband, or put her at risk of statelessness. States should introduce safeguards to nationality laws to ensure that any loss of nationality is conditional upon the possession or acquisition of another nationality. States should also ensure that women may transfer nationality to their foreign spouses on the same basis as men, and that those who have acquired nationality on the basis of marriage to a national do not lose that nationality in the event of dissolution of the marriage, or death.
- (c) Amend nationality laws to allow women to confer their nationality to their children on the same basis as men. In addition, with regard to the acquisition of nationality laws should not distinguish between children born in and out of wedlock. States should also ensure consistency among all laws, policies and regulations dealing with nationality.

445. UN Doc. A/HRC/23/23.



- (d) Amend nationality laws and allow women whose marriage has been dissolved to automatically reacquire their former nationality through a simple declaration in cases where women automatically lose or have to renounce their nationality when they marry. States should also raise awareness among women on how to reclaim their nationality.
- (e) Recognize dual nationality for children born to parents from different nationalities and for spouses married to foreigners and residing in the State of the spouse who express their wish to acquire the nationality of their spouse without losing their nationality of origin.
- (f) Take the measures necessary to address practices that discriminate against women in nationality matters as well as indirect discrimination in nationality laws, so that substantive equality between women and men in nationality matters may be achieved. States should also address the specific challenges faced by women who suffer from multiple forms of discrimination, especially in their enjoyment of the right to nationality.
- (g) Guarantee the full enjoyment of human rights for non-national family members, in particular the rights to education, health, work, residence and freedom from violence. Access to administrative and judicial remedies should be also available to them.
- (h) Improve data collection, research and dissemination of information relating to women's equal right to nationality. This includes information on legal provisions and the consequences of discrimination against women in nationality-related matters on the enjoyment of their human rights.
- (i) Take all the measures necessary to ensure that all girls and boys are registered immediately after birth, without discrimination based on sex, race, disability, social or other status. Marriages should also be registered in a timely manner.
- (j) Ensure equal access to documents used to prove nationality, in particular passports, identity documents and birth and marriage certificates. Laws and practices requiring women to secure the consent and assistance of their husband, husband's family or father in order to obtain nationality documents should be amended, including those that require the husband's consent to add children names to the mother's passport. Alternative systems of proof of identity in contexts where documentary evidence is not available or cannot reasonably be obtained should be provided.
- (k) Facilitate the acquisition of nationality for those who do not benefit from recent reforms in nationality laws because the law is not retroactive or has other stringent requirements.
- (l) Ensure that effective remedies are available and accessible to those affected by sex discriminatory provisions in nationality laws. States should also widely disseminate all relevant judicial decisions and recommendations of human rights mechanisms on nationality, and ensure their implementation.
- (m) Implement training programmes for Government officials, the judiciary and other relevant stakeholders at all levels on reformed nationality laws. States should also raise awareness of the public, in particular women, on their equal right to nationality and on recently amended laws and procedures.
- (n) Protect women human rights defenders involved in nationality-related campaigns and ensure effective representation of women in all reforms to nationality law, whether at national, regional or international level.
- (o) Strengthen collaboration between stakeholders working to end discrimination against women in nationality laws and those working to prevent statelessness. This includes States, international organizations, civil society groups and affected individuals themselves.

- (p) The Human Rights Council, including the universal periodic review, the special procedures and the treaty bodies should continue to review the laws and practices of States with respect to discrimination against women in nationality-related matters, including where this results in statelessness of women or their children. Such mechanisms should continue to engage with civil society, in particular with women's organizations.

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60**

**Subject**

**2.4.8.** Right to participate in public life and to vote

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## SUMMARY OF THE TOPIC

The right to participation in public affairs is a right to freedom: the right to the State not impeding participation in public affairs, which in turn gives rise to the obligation for the State to create a legal framework to facilitate such participation. This right has its origins in an old conviction, namely that every right must be decided by all. Participation varies from State to State according to political traditions, but it is clear that no restriction based on individual or social circumstances is legitimate. Discrimination is not an option. Political participation exists at local, regional or national level, whereby citizens are able to freely elect representatives who will assume the functions of government - representative democracy - or to participate directly in decision-making through any kind of referendum, plebiscite or simply public consultation at municipal level (direct democracy). Both modalities constitute the right to vote.

The other dimension of this right, i.e. the passive dimension, is embodied in the right to stand as a candidate and possibly be elected: [the right to] a) access public service; b) remain in the aforementioned service; and c) not be limited or obstructed in the performance of the corresponding functions. State laws may establish restrictions on the exercise of the right but they must be objective, reasonable and non-discriminatory and provided for in law.

This right also includes access to public service based on merit and ability. But this is a different right, which must not be confused with the principle of representation.

The freedoms of expression, assembly and association are the essential conditions that the State must recognize and promote for the effective exercise of political participation. Without it, political participation is meaningless.

In social States, this political participation is accompanied by the right to participate in economic, cultural and social life, either individually or through groups to which the individual belongs.

In this topic, students will find material to deepen their knowledge of the implementation of this right through the identification of the main challenges facing the Maghreb.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

### GENERAL:

- **Teamwork:** Integrate and collaborate actively to achieve common goals with other persons, departments and organizations.
- **Adaptation to the environment:** Tackle critical situations in the psychosocial sphere, maintaining the necessary levels of mental and physical equilibrium and well-being to enable individuals to continue to act effectively.
- **Interpersonal communication:** Maintain positive relationships with other people through empathetic listening and clear and affirmative expression of personal opinions and/or feelings, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** Understand and accept social and cultural diversity as an enriching personal and collective component to promote coexistence between people without falling into discrimination for reasons of gender, age, religion, social status, or for political and/or ethnic reasons.
- **Critical reasoning:** Analyse and assess the consistency of approaches, including most notably affirmations or ideas that society accepts as true, in the immediate context where human life unfolds.
- **Ethical sense and commitment:** Embrace moral goodness for oneself or for others (i.e. toward all that is or means good, the experience of meaning, individual self-fulfilment, the sense of justice) and pursue this moral good.

### SPECIFIC:

#### Module 1:

- In the specific setting of university education, make effective use of the concepts and terminology that must accompany skills-based learning, and include one's own vision, supported by this framework.
- Explain and differentiate, using a specific example, the key aspects of skills-based learning for its development and subsequent evaluation in the university context.
- In the particular context of individual educational activities, justify the skills-based planning process as a critical strategy for stimulating the meaningful learning of human rights among students.
- Explain the functions and basic characteristics of educational planning, as part of an integrated training project and a skill-based training approach.

- Based on a specific situation in the university context, plan educational activities in a skills-based approach focused on human rights learning.
- Effectively use terminology focusing on the concept of evaluation, identifying differences with other similar terms and closely related to the assessment activity (measurement and qualification).
- Recognize different types of assessment for learning in the university setting, based on significant classification criteria in a skills-based training approach: depending on their purpose, the evaluator and the time of application.
- Select and develop valid measuring instruments to verify the achievement of the envisaged learning outcomes in relation to human rights, recognizing their advantages and disadvantages for effective use throughout the evaluation process.
- Rigorously and accurately programme the assessment of human rights learning through a skills-based approach, taking into account validity and viability criteria in the process.

### Module 2:

- Identify, interpret and properly implement international, regional and national regulations on the right to participation applicable in different existing scenarios.
- Define and distinguish clearly and precisely the holders of rights and the holders of obligations relating to the right to participation in a given situation.
- Identify specific obligations for the respect, protection and implementation of the right to participation and the minimum regulatory content necessary for its implementation, and also question its implementation in a given situation.
- Identify, analyse, argue and assess critical gaps and shortcomings in terms of capacities and the responsibility of holders of rights and obligations that prevent action or transformation in a given situation or the right to participation.
- Compare and evaluate local and national situations, practices, laws and policies in the light of the legal instruments on human rights ratified by their country, and propose and plan effective alternatives.
- Identify and implement international and regional human rights protection mechanisms.
- Find, sort and analyse information from different sources (legal, social, economic, etc.). Plan and properly document this task.

### Module 3:

- Understand the process of intervention in the reality of social life related to the area of knowledge of the programme, through the development of a service learning project.
- Design and guide a service learning project for the defence or promotion of human rights related to the area of knowledge.
- Qualify, evaluate and reflect on the process and outcomes of the action taken in line with the reality, as well as learning acquired by students through service learning projects.
- Assess needs and options through participatory methods to guide an intervention and management strategy aimed at ensuring that the guided activities are aligned with the desired results (participatory management results-based models).
- Identify, interpret and act to resolve situations of risk.

## BIBLIOGRAPHY AND OTHER COMPULSORY TEACHING RESOURCES

- [Universal Declaration of Human Rights: Article 21](#)
- [Cairo Declaration on human rights in Islam \(1990\): arts. 22-23](#)
- [International Covenant on Civil and Political Rights: Article 25](#)
- [International Convention on the Elimination of All Forms of Racial Discrimination: Article 5](#)
- [Convention on the Elimination of All Forms of Discrimination Against Women: Article 7](#)
- [International Convention on the Rights of All Migrant Workers and Members of their Families: Articles 41 and 42](#)
- [Convention on the Rights of Disabled Persons: Article 29](#)
- [First Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms: Article 3.](#)

General Comment. 25: Article 25 (Participation in public affairs and right to vote) HRI/GEN/1 Rev.9 (Vol.1) page 255, Fifty-seventh session (1996).

- Constitution of the country
- Legislation on the development of the right to participation of the country

Inter-Parliamentary Union / UN Office of the High Commissioner for Human Rights, [Human Rights: Handbook for Parliamentarians](#) No. 26, 2016 (English, French, Arabic and Spanish versions are available).

[Political rights](#): Thematic dossier on [www.humanrights.ch](http://www.humanrights.ch)

United Nations High Commissioner for Human Rights, [Civil and Political Rights: The Human Rights Committee](#): Fact Sheet No. 15

United Nations High Commissioner for Human Rights, [Frequently Asked Questions on Economic, Social and Cultural Rights](#), Fact Sheet No. 33.

United Nations High Commissioner for Human Rights, Report on the promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them (A/HRC/30/26).

## LEARNING OUTCOMES

- Understanding the nature and scope of the right
- Identifying rights holders and especially risk groups and any violations of the right
- Identifying challenges that must be overcome regarding the right to participation in the Maghreb in general and in your particular context.
- Integrating in educational programmes the right to participation in service learning projects associated with a specific situation in which a violation of this right has been identified.
- Knowing the mechanisms for safeguarding the right to participation

## METHODOLOGY

Methodology	Teaching tools
Lecture format	Reading of texts and/or viewing of audiovisual material
Practical case studies	Blog/Forum
Problem solving	Blog/Forum/Wiki
Preparation of projects	Blog/Forum/Wiki
Cooperative learning	Forum/Wiki
Group discussions	Blog/Forum

## PROGRAMMING OF LEARNING ACTIVITIES

### 1) Reading of the Teacher's Guide to the subject

Reading this guide will give the participant a general idea of the topic and content of the activity to be developed in parallel.

### 2) Reading of the presentation of the topic and the corresponding fact sheet

Reading of the presentation of the topic will allow the student to acquire a general, summarized idea of the main elements of the right to participation. This reading will be completed by the Fact Sheet.

After this first reading, the participant will be able to identify his or her teaching area of interest to deepen the study of the right to participation and for the practical application of the course.

### 3) Search for documents relating to the Challenges concerning the right to participation in the Maghreb and in his/her specific context.

To complement the previous activity, students must look for official documents on the situation of the right to participation in the Maghreb. They must study the constitutional protection of this right in national legislation on this subject and the public policies that safeguard this right. They must also find the recommendations made to the country by the different United Nations bodies entrusted with monitoring this right: the international treaty bodies on human rights, special procedures and the Universal Periodic Review (UPR). At this point, the student must have consulted at least 5 documents. Then, the student must prepare a document to record work carried out clearly indicating the degree to which the country applies the international legal obligations deriving from this right.

### 4) Analysis of the context of the right to participation in the chosen situation or group, indicating the main challenges for the Maghreb.

Previous information searches will be followed by an analysis of the context in relation to the right to education. For this purpose, the three-level analysis model (causal analysis, analysis of roles and analytical of skills gaps) will be applied, together with the bibliography presented in Module 2 of the course. The student will prepare a document describing the methodology used to carry out the analysis.

### 5) Drafting of the report on the challenges to the right to participation in the Maghreb and in the context of the intervention

Preparation of a status report (minimum 5000 words) presenting a reasoned diagnosis based on the information consulted.



## 6) Design of educational syllabuses

The practical part of the course involves the development of an educational syllabus for a discipline or topic.

These activities are designed for focus groups or the performance of individual or group work.

ACTIVITY 1: PORTFOLIO. **Identify a problem** that represents a violation of the right to political and social participation and a group that has difficulties in exercising this right.

Through the application of the rights-based approach methodology, perform a three-level analysis: causal analysis, gap analysis and capacity analysis.

For the causal analysis, **develop a cause tree** to explain the problem. For this purpose, use all the documented information possible:

- a) International information: international instruments ratified by your country relating to this right, the responses provided by international mechanisms to your State regarding the exercise of this right (committees, universal periodic review, special rapporteurs or experts, etc.).
- b) National information:
  - Identify and analyse the mechanisms established in your legislation to guarantee the right to participation.
  - Identify standards that reflect the requirements for access to public service in order to confirm their relevance.
  - Refer to the data provided by the Parliament in your country and prepare a table summarising the results obtained in the last three general elections.
  - Analyse the relationships between the right to participation and the freedoms of expression, assembly and association.
  - Other information

PRODUCT. Presentation of a 10-page document prepared by the participant presenting the conclusions drawn from the data. The presentation, quality of arguments and capacity for critical analysis of the standards will be assessed.

### ACTIVITY 2: Case study on best practices

- Study a government institution that facilitates economic, cultural or social participation and describe its functions.
- Study a government institution that facilitates economic, cultural or social participation and describe its functions.

ACTIVITY 3: (General group discussion) After reading electoral legislation or other standards - the Penal Code, for example - discuss the **restrictions imposed on voting rights in your country**. The group discussion would focus on the following issues:

- Do you think it is justified for the right to vote in parliamentary elections to be conditional upon having the nationality of the country?
- Do you consider the relationship between political parties and political participation to be appropriate?

Incorporate the most relevant conclusions from the report on Activity 1, if you consider these to be useful for a causal analysis.

ACTIVITY 4: Analyse **gaps in capabilities and roles** and define the appropriate strategy to achieve the desired results.

Design syllabuses incorporating the service learning methodology to address the topic from your specialty field (Communications, Law, Education, Social Work).

## TIMETABLE OF ACTIVITIES IN THE SUBJECT

Identification of the activity	Estimated work time	Assessment criteria
Reading of the Teacher's Guide to the subject	1 hour	
Reading of the presentation of the topic	3 h	Self-assessment
Activity 1. Analysis of the context of the right to participation in the situation or selected group	10 h	Portfolio: methodology used
Activity 1. Writing of the context report	8 h	Portfolio: Progress report
Activity 2	4 h	Portfolio:
Activity 3	4 h	Portfolio:
Activity 4	10	Portfolio:
Design of the syllabus incorporating the service learning methodology to address the topic from your specialty field (Communications, Law, Education, Social Work).	20 h	Final practical work
	60 hours	

## SELF-EVALUATION TEST

- The right to participation may be limited.
  - Yes.
  - No.
  - Yes, but there is no type of discrimination.
  - Under no circumstances are foreigners allowed to vote.
- What conditions must the restrictions meet?
  - The State may freely impose restrictions because the right to participation is different in each country.
  - Restrictions can only be imposed on foreigners.
  - The restrictions must be objective and reasonable.
  - They must be prescribed by law and be objective, reasonable and non-discriminatory.

3. Everyone who can vote can be elected.
  - a) Yes.
  - b) No.
  - c) The law may establish conditions for candidates that are different to those established for voters.
  - d) Members of a minority may vote but cannot be elected.
  
4. What associations are an ordinary means for channelling political participation in elections?
  - a) Any legitimately constituted organisation.
  - b) Trade unions.
  - c) Participation is without the mediation of any association.
  - d) Political parties.
  
5. Legal remedies must be established against government actions that violate the right to participation.
  - a) Never.
  - b) It depends on what is freely established in the law.
  - c) The law must always establish legal remedies to protect the right.
  - d) Judicial remedies are inconsistent with administrative claims.

## SELF-EVALUATION TEST

Question	Answer key
Question 1	c
Question 2	d
Question 3	c
Question 4	d
Question 5	c

## SUBJECT 2.4.:

# 2.4.8. RIGHT TO PARTICIPATE IN PUBLIC LIFE AND TO VOTE

## INTRODUCTION

“A large number of international instruments address the different dimensions of the right to participate. As defined by General Comment No. 25 of the UN Committee on Cultural, Economic and Social Rights (the body entrusted with monitoring the implementation of the International Covenant on Economic, Social and Cultural Rights in the States Parties) “Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public service. Whatever form of constitution or government is adopted by a State, Article 25 requires States to adopt such legislative or other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects. Article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant” (*General Comment* No. 25, paragraph 1)

Participation refers to the procedures, methods or initiatives made to allow individuals to play a role in the making of decisions that affect the community or the organization to which they belong, and political participation refers to all the political activities that individuals may engage in within a society. Ideally, it consists in the exercise of a dynamic and thoughtful citizenship, but only a very small part of society actively engages in politics. This low level of participation is due to the inherent costs in terms of mobilization and time, but also costs in terms of information, because participation requires an understanding of the challenges involved. This participation, which may be conventional or unconventional, i.e. legal or on the fringes of legality, is explained by a number of biological, sociological, economic and cultural or even legal variables, representing simultaneously the most basic and comprehensive instrument of participatory democracy: participation. This concept applies to many different fields:

- At the most general level, those relating to governance, participative democracy, citizenship or ecocitizenship.
- At a more restricted level, those relating to the management of organizations, companies, associations or grassroots groups.

The political participation of citizens does not merely consist in the action of depositing a voting slip in a ballot. There are many ways citizens can participate in politics, and etymologically in the life of their town or city. The emergence of new channels of information, the development of new forms of participating in public debate put the action of voting in society into perspective. That said, the majority of citizens continue to participate regularly in elections.

We will try to answer some of these questions through the notional and regulatory analysis of the different concepts of the right to political participation in the sphere of political and legal sciences.

## 1. DEFINITION

Participation is a general term encompassing the different means by which citizens can contribute to political decisions. In other words, it is, according to Philippe Braud, “a set of

individual or collective activities that may allow the governed to influence the functioning of the political system”.

The right to participation in public affairs is a right to freedom: the right to the State not impeding participation in matters relating to governance, which in turn gives rise to the obligation for the State to create a legal framework to facilitate such participation. This right has its origins in an old conviction, namely that every right must be decided by all. Participation varies from State to State according to political traditions, but it is clear that no restriction based on individual or social circumstances is legitimate. Discrimination is not an option.

## 2. TYPES OF POLITICAL PARTICIPATION

Citizens can participate in the political sphere in different ways: voting, partisan activism, trade union involvement, involvement in community activities, participation in collective mobilization (demonstrations, strikes, petitions), the acquisition of a local mandate, etc.

The actions of the governed may be individual (i.e. voting), but they are mostly collective, in the form of social movements (demonstrations that bring together individuals who form a cohesive unit because they share a common interest, and characterised as being collective, intentional, collaborative and goal oriented).

In terms of the forms of political activity, a distinction can be made between conventional and non-conventional forms of political activity, and social movements.

In democracy, political participation is a core value associated with the concept of citizenship, notably through voting. But political participation also includes other types of actions. Today, political participation can be defined as a voluntary act to influence elections or political decisions. It exists in two forms: conventional and unconventional. A distinction must therefore be made between two categories of political activity:

### 2.1. CONVENTIONAL POLITICAL PARTICIPATION

This refers to all political activities that take place within a legal framework without questioning the legitimacy of the system (voting, party membership, participation in an election campaign, but also, more prosaically, participation in a political discussion or the monitoring of political developments in the media).

Conventional forms of political participation receive this name because they reflect an acceptance of political rules. Ultimately, these practices refer to a range of activities and behaviours organised around voting. These forms can be classified according to the degree of engagement:

- Registration on electoral lists (since the Law of 10 November 1997, registration is automatic whenever there is a majority);
- Searching for political information through the press and participation in political discussions;
- Active engagement (militancy in political parties, interest groups, associations, trade unions, etc.);
- The act of voting;
- The public expression of a public opinion, the payment of financial contributions during an election campaign, attendance at meetings, etc. These forms vary across countries and political cultures, according to the cost of engagement, if only in terms of time. Activities mobilising more than half of citizens are registration for voting (once), voting and the reading of political information. Other activities only concern a minority.

The involvement of citizens in institutionalist political life is commonly referred to as “conventional participation”. Conventional participation takes place around the time of elections and when voting, but it may encompass anything that contributes to the development

of the electoral process (interest in politics by listening to political broadcasts, reading the press, political discussions and debates, participation in meetings, support to political parties, membership and activism).

## 2.2. UNCONVENTIONAL PARTICIPATION

This refers to all forms of protest-based participation on the fringes [of legality], which radically challenge the established order, or breach the law, and which question the legitimate practices of the system (demonstrations, strikes and even violent actions of thugs, the illegal occupation of premises, the taking hostage of a factory owner).

The main non-conventional instrument of participation is the demonstration, which has become a modern form of political participation to influence governments or to express disagreement regarding a political action. Demonstrations have become commonplace, legal and peaceful, promoting some authors to even suggest the emergence of a “demonstration culture”. In the nineteenth century, demonstrations were carried out by the working class. Today, they have become a legitimate means of expression of collective expectations and now involve different social classes.

Unconventional participation is characterised by different forms of civic disapproval, although through elections as the full expression of civic-mindedness; it is up to individuals to participate, but is also used as a means of dissemination. If unconventional participation is sometimes manifested through individual action (hunger strikes), it is generally expressed in the form of collective action (mobilization of groups of individuals), which is often direct (without the mediation of representatives) and autonomous (when outside the scope of legal frameworks and dispute resolution procedures). Some of examples of unconventional participation are legal (signing of a petition, protesting, going on strike) while others are violent (damage to buildings, kidnapping, destruction of documents, physical confrontations).

### Political protests:

- a) **Strikes:** A strike is a collective cessation of work, after consultation, by the workers of a company for protest purposes. Theoretically, employees do not receive their wages during this period. The right to strike is protected by the Constitution. Strikes break out across the world every day. This is the most widespread form of protest.
- b) **Occupation of premises:** Carried out by striking workers who occupy company premises; the occupation of work premises can be illegal if non-striking employees are prevented from working. The employer may request an order to evict strikers illegally occupying company premises.
- c) **Other movements:** Today, a movement organized around strong opposition against GMOs (genetically modified organisms). These are the so-called “GMO crop busters”. Society seems to be divided on the question of GMOs. Indeed, there seems to be a certain fear about these new organisms, the risks of which have not yet been identified.

### Expressions

- a) **Cultural expressions:** Example: The film “Days of Glory” [“Indigènes” in French] directed by Rachid Bouchareb and released in film theatres on 27 September 2006, deals with a forgotten period of the Second World War. The film is set in 1943 when soldiers from North Africa, called “indigènes”, arrived to help the French.

It addresses a taboo subject that has never really been addressed publicly. In fact, the film follows the journey of four men: Saïd (Jamel Debbouze), Messaoud (Roschdy Zem), Yassir (Samy Naceri) and Abdelkader (Sami Bouajila). In this film, they are victims of inequality because of their origins despite the French motto “liberty, equality, fraternity”, which should give them the same rights and privileges as French soldiers. This film brought out of the shadows a memory that had been buried for many generations.

The French government finally recognized the courage of these fighters by paying them full, unbridled tribute and honours almost sixty years later. The main contribution of this film was that it challenged stereotypes and racism and honoured the memory of the “native” soldiers who died for France.

- b) *Artistic demonstrations*: Artistic demonstrations are carried out by different artists involved in politics. For example, “Guernica” by Picasso denouncing human barbarity and the slaughter of so many innocent people (1,600 dead) on 1 May 1937. “I have always believed and believe that artists who live and work with spiritual values cannot and should not remain indifferent to the conflict in which the highest values of humanity and civilization are at stake.” Pablo Picasso.

Pierre Favre distinguished three types of demonstration:

- **Initiating demonstrations**, imposing a problem on the political scene with maximum visibility, ending the concealment of a problem by the institutions (1960s: women and environmental events).
- **Routine expressions**, constituting a means of maintaining the visibility of an organization, allowing organizations to periodically express their capacity to mobilize/their representativeness.
- **Demonstrations associated with global political crises**, such as 6 February 1934 and 30 May 1968. The aim of these demonstrations is to maintain or overthrow governments. They constitute no more than the decision of certain social groups to demonstrate for or against the government in power.

Not all demonstrations are protests; some are movements to express solidarity or a specific desire. They are strategies that seek to make public statements, promote a renewal of forms of interaction between rulers and the ruled. The success of a demonstration increases the legitimacy of the leadership of the organizations that organize them. Demonstrations have an impact on the functioning of politics, and can influence decision-making processes. They reflect the greater strength of minorities (development of democracy on the fringes of universal suffrage).

In public opinion, a type of hierarchical structure develops around this type of protest-motivated participation. Two-thirds say they are ready to strike but only 28% support the occupation of government buildings and 1% approve the causing of damage. The growing importance of these demonstrations reveals the emergence of new forms of political participation.

This distinction must however be criticized:

- On the one hand, borders change according to the time and places. For example, demonstrations are rarely tolerated in dictatorships, so people look for alternative means of protest (a funeral can be a pretext to demonstrate, as we saw during the Arab Spring of 2011);
- On the other hand, borders are not watertight. Sometimes, militants or political leaders may have to commit illegal actions (wild pasting of bills, use of secret financing, etc.).

## 2.3. SOCIAL MOVEMENTS

A social movement is a form of collective action by several individuals that is at the same time concerted and intentional. These actions rely on three elements: identification with a group, opposition to an adversary and a common challenge involving the opponents. Social movements seek to express and collectively defend demands and claims, expressed against a given authority, as a potential method for vindicating such claims. A social movement can lead to the resignation of a minister, the reaction of a public authority, etc. Such movements translate the claims in more or less conflicting ways outside election periods, and are used more and more by citizens.



Studies of social movements make a distinction between traditional social movements on the distribution of wealth and new movements that emerged in the 1980s, characterized by a greater focus on thematic identity or the defence of post-materialist values. These social movements employ methods that reflect great mistrust towards representative organizations. They defend different aspects, such as anti-nuclear positions, the environment, human rights, feminism, protection of minorities, etc.

These movements developed in the last twenty years of the 20th century in Germany, England and France. The emergence of new movements is related to the transformations of capitalism and changing values (post-materialist values: living conditions, morals/ethics, etc.). These groups mobilise around a clear identity outside of the workplace, a community-based lifestyle or value. They are led by new middle classes emerging from the democratization of education and the tertiarisation of the labour market. These categories remain available for universalist or very specific claims. This leads to mistrust of the usual representative organizations as they consider their organization to be too inflexible/bureaucratic. These social movements are more decentralized and attribute great importance to deliberative assemblies. The longer these new movements last, the more organised and - unfortunately - institutionalised they become.

The 20th century began to put democratic countries to the test; in most cases, their democracies were barely 100 years' old. The rise of German and Italian totalitarianism and instability in other European countries such as Spain and Portugal threatened the worldwide sustainability of this system of governance. The 20th century also saw democracy prevail in a growing number of countries and has been adopted in the majority [of countries] today.

### 3. THE DIFFERENT CONCEPTS OF DEMOCRACY

Thus, democracy became a political system (and no longer merely a regime) in which sovereignty was attributed to the people who exercise it:

- **Direct democracy**, i.e. a regime in which the people make important laws and decisions and choose the agents responsible for implementing democracy and who can generally be removed [from office]. This is called a direct democracy;
- **Indirect democracy**, i.e. a regime in which representatives are chosen by sortition or elected by citizens for a limited non-binding mandate, during which they are generally not removed [from office] by citizens. This is called representative democracy.

#### 3.1. PARTICIPATORY DEMOCRACY (DIRECT)

General Comment No. 25 refers to direct participation in the following terms. "Citizens participate directly in the conduct of public affairs when they exercise power as members of legislative bodies or by holding executive office. This right of direct participation is supported by paragraph (b). Citizens also participate directly in the conduct of public affairs when they choose or change their constitution or decide public issues through a referendum or other electoral process conducted in accordance with paragraph (b). Citizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government. Where a mode of direct participation by citizens is established, no distinction should be made between citizens as regards their participation on the grounds mentioned in Article 2, paragraph 1, and no unreasonable restrictions should be imposed (General Comment No. 25, paragraph 6).

Participatory democracy establishes all the mechanisms and procedures necessary to strengthen the participation of citizens in political life and increase their role in decision making. It is rooted in the shortcomings of participatory democracy:

- Parliament not representative of the diversity of society;
- Distant from local elected representatives and daily reality;
- Feeling on the part of citizens that they are not understood by politicians;
- Mistrust of politicians;
- Weak counter-powers;
- Greater abstention.

In a direct democracy, power is exercised directly by citizens without the intermediation of representative bodies. According to thinkers, the notion of direct democracy refers to different conceptions of the direct exercise of sovereignty by the people. Similarly, depending on the place and time, direct democracy has designated different forms of government or political association in which the population makes decisions on the law. If the term “democracy” is today normally used to refer to the idea of representative government, for a long time it was associated with the notion of direct democracy, particularly in reference to Athenian democracy: citizens gathered in assembly decided laws, magistrates [made decisions on] administrative and executive officers were chosen by sortation, and magistrates, whenever the function required certain expertise, were elected and removed by citizens.

Participatory democracy has the following characteristics:

- The extension of the right to vote and its frequency, together with legislative initiative (e.g. through petitions);
- Dynamic dialogue, in the form of free debates regarding decisions at both local and national level (e.g. Advisory Committees, District Councils, etc.);
- The establishment of an organized system ensuring that all constructive ideas and matters presented by citizens are addressed effectively.

Nevertheless, participatory democracy is realized in the following forms:

#### a) The referendum

The local referendum is a mechanism established by the deliberative assembly of a local authority. It thus confers decision-making and not merely consultative power. It is clearly regulated by law and requires strict and precise conditions for its realization. A deliberative assembly may hold a local referendum in order to take a decision on a given matter within its jurisdiction. It defines the terms, the draft decision and the date. Only community voters are invited to vote and not all residents. The proposal is adopted with the majority of votes in favour and a quorum of at least half of registered voters. There are three types of referendum:

- **The legislative referendum:** under Article 11 of the Constitution, the President of the Republic, on the proposal of Government or joint proposal of the two assemblies, is allowed to present a draft bill to the people covering different aspects (the organization of government, national economic, social or environmental policy and public services contributing thereto, or authorization to ratify an international treaty).

General de Gaulle used, albeit in disputed circumstances, Article 11 to revise the Constitution (in 1962, for the election of the president by universal suffrage, approved; in 1969, to reform the Senate and regions, rejected).

With the constitutional amendment of 23 July 2008, and the Organic Law and Law of 6 December 2013, on the application of Article 11 of the Constitution, a joint referendum initiative can be organized at the initiative of one fifth of members of parliament with the support of one tenth of registered voters. This referendum may be held in relation to economic, social and environmental reforms, or for the ratification of a treaty “which, without being incompatible with the Constitution, would affect the functioning of institutions.” This provision entered into force on 1 January 2015.

- The text submitted to referendum is presented in the form of a proposed law and cannot repeal a legislative provision promulgated less than one year previously. The text must be approved by the Constitutional Council. If the result of the referendum is negative, a period of two years must elapse as from the date of the referendum before a new proposal on the same matter can be submitted. However, in both cases (bill or proposed law), if the result is positive, the law is adopted.
- **Constitutional referendum:** under Article 89 of the Constitution, the President of the Republic or the assemblies have the right to propose amendments to the Constitution. The referendum is held after both assemblies have voted, in the same terms, on the proposed amendment of the Constitution. If the result of the referendum is positive, the amendment is adopted.
- **Referendum proposed by popular initiative:** this exists in Italy, Switzerland and Austria. It is characterized by the fact that it is initiated by the people and can cover different aspects (legislative or constituent). The procedures vary, but general phases can be identified: the initiators of a proposal must obtain a pre-established number of signatures in support of the proposed text (petition); if this number is reached, the authorities are obliged to hold a referendum; if the result of the referendum is in favour of the proposed text, Parliament must necessarily discuss an amendment to the law in accordance with the result of the referendum.
- A referendum of this kind is foreseen in the Lisbon Treaty, which entered into force on 1 December 2009: one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission to submit any appropriate proposal on any European legislation whenever they deem this appropriate (Article 11 of the Treaty on European Union).

In addition to these three types of referendum, mention must be made of the “local referendums for decision-making” in France. Indeed, the constitutional reform of 28 March 2003 recognised the right of all local authorities to submit to their voters any draft (bill or deliberation) within their respective jurisdictions (Article 72-1). The Organic Law of 1 August 2003 specified the different organizational arrangements for these referendums.

### b) Voting

From the Latin *scrutinium*, i.e. the action of searching. Voting consists in depositing votes using “boules” (balls), ballots or forms placed in a ballot box or virtual box (electronic voting). More generally, a ballot refers to the set of operations constituting a vote or election. (A distinction can be made between the single-member ballot [one member or seat] and the multi-member ballot system [list of names]. According to the representation technique adopted, ballots may follow the majority or proportional voting systems):

- **Majority voting systems:** These are the oldest mode of appointing elected representatives. They consist of assigning one seat (single-member ballot) or several seats (multi-member system) to one or more candidates with most votes.

In the first-past-the-post system (e.g. in Great Britain), the candidate obtaining most votes wins the seat. This has the advantage of simplicity. At global level, it is common for the party finishing second to be under represented in relation to its total votes. As for the other parties, they get almost no elected representatives. Moreover, the geographical representation of parties has a great influence on the final outcome insofar as a small, well-established party can be represented, but the party with the most votes at national level may also be deprived of its victory because its votes are too scattered.

**In a single-member two-round system** (e.g. in France), success in the first round is conditioned by obtaining an absolute majority of votes, sometimes with the obligation to obtain a minimum number of registered voters. If no party obtains this minimum number, a second round is held. Access to his second round is regulated: the two best-placed candidates in the first round (French presidential election); the minimum number of votes or percentage of registered voters (French legislative elections). Compared to the one-round voting system, the possibility of establishing alliances for the second round can help reduce or compensate for any distortion: smaller parties can enter into agreements with other [parties] to obtain elected representatives in places where they are strong, in exchange for a transferral of votes elsewhere. In contrast, parties that do not conclude alliances are often deprived of any representation.

**In one or two-round ballots based on lists of candidates**, all seats are assigned to the list finishing first (designation of electoral votes in the US presidential elections). The margin of victory can be amplified very significantly, and may even seem unjust (a majority of seats but a minority of votes). If vote-splitting is permitted, those obtaining most votes are elected (e.g. in France in municipal elections in municipalities with less than 1,000 inhabitants).

- **Proportional voting systems:** The proportional voting system are simple in principle - seats are allocated according to the number of votes - but complicated to implement. It has developed with the role of political parties: it is less about voting for an individual and more to do with voting for a party or programme.

Various methods exist for distributing votes. The quotient method sets the number of votes required to obtain a seat (electoral quotient). The number of seats allocated to each list is then defined by dividing the total number of votes obtained by each list by the electoral quotient. After the first distribution of votes, the rest are distributed either according to the quota method, which favours small parties (after deducting the votes that allowed the first allocation, the lists with the largest quotas win) or the highest average (ratio of remaining votes and the number of remaining seats to be filled). The latter method is used for the French Senate elections in the departments electing at least four senators.

There are other methods for distributing remaining votes, such as the compensation systems used in Germany. Seats are distributed among the list according to the order of presentation in most cases, but sometimes also according to the preferences expressed by voters.

In proportional representation systems, the established threshold for obtaining the right to distribute seats and the size of the constituency are key variables. The higher the threshold, the larger the number of major divisions, and the access of small parties to seats is difficult. Some countries (e.g. Israel for legislative elections) choose to have only one constituency at national level. The threshold depends on the characteristics of each country: set at 5%, as in Germany or France, it excludes few national parties, whereas in young democracies with many parties it could leave a significant proportion of population unrepresented.

- **Mixed ballots:** finally, mixed ballots borrow elements from the majority and proportional systems. They therefore combine both mechanisms, albeit with in different ways. The objective is to combine the advantages of both methods and limit the disadvantages.

For example, the aim of the voting system used in France for municipal elections in municipalities with more than 1,000 inhabitants is to ensure a majority for the winner, allow parties to establish alliances between both rounds and give representation to minorities. Thus, after the second round, the list coming first obtains half the seats, while the other half is divided proportionally among all the lists obtaining at least 5% of the votes.

## Advantages and disadvantages of each of these systems

Debates on voting systems often arise due to the difficulty in reconciling different objectives and due to political contingencies. Proportional voting systems must provide a true picture of the political situation and the electorate, while majority systems aim to designate a majority of elected officials capable of governing. Beyond the distribution of seats, the choice of voting system corresponds to a conception of political life, which it necessarily influences.

Proportional systems often give rise to dysfunctional political systems; they promote a multiparty system and assign an important function to small pivotal parties, which are often indispensable partners of majority parties (as in the Fourth Republic in France or in Italy). The majority or first-past-the-post system favours alternations but only between two parties (the United Kingdom, for example). The two-round majority system, e.g. in the Fifth Republic, is flexible as it enables alternation and encourages more parties to form alliances for the second round.

Proportional systems hinder the emergence of a stable and coherent majority, thus favouring greater cooperation between parties (the parties share power and seats). Conversely, majority systems often result in stable majorities based on a confrontation with the opposition (the coalition that wins governs alone) and at the cost of unjust representation.

However, criticism of participatory democracy is mainly related to:

- The concept of participatory democracy, which is often merely rhetorical and lacking any specific reality, and is sometimes associated with populism;
- The representativeness of citizens participating in debates;
- The role of boards and committees that are often limited to a merely “consultative” role, without taking into account the importance of “interaction between stakeholders”;
- The difficulty of knowing whether expressed opinions are based on objective considerations or on the defence of personal interests;
- The difficulty of verifying the accuracy of information used as a basis for argumentation.

### 3.2. REPRESENTATIVE DEMOCRACY (INDIRECT)

General Comment No. 25 refers to the **representative democracy** in these terms: “Where citizens **participate** in the conduct of public affairs **through freely chosen representatives**, it is implicit in Article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for their exercise of that power. It is also implicit that the representatives exercise only those powers which are allocated to them in accordance with constitutional provisions. Participation through freely chosen representatives is exercised through voting processes which must be established by laws that are in accordance with paragraph (b). (*General Comment* No. 25, paragraph 7)

Representative democracy or representative government is a political system in which citizens elect representatives to make laws on their behalf (legislative power) and implement them (executive power). An Assembly is empowered to represent a people, a nation or a community. The will of citizens is expressed through representatives who embody the general will. They vote on laws and, in a parliamentary regime, control the government.

In contemporary democratic regimes, representatives are elected. In such a system, the latter, who are elected by voters, hold power and represent the people or the nation as a whole. There are two types of indirect democracy:

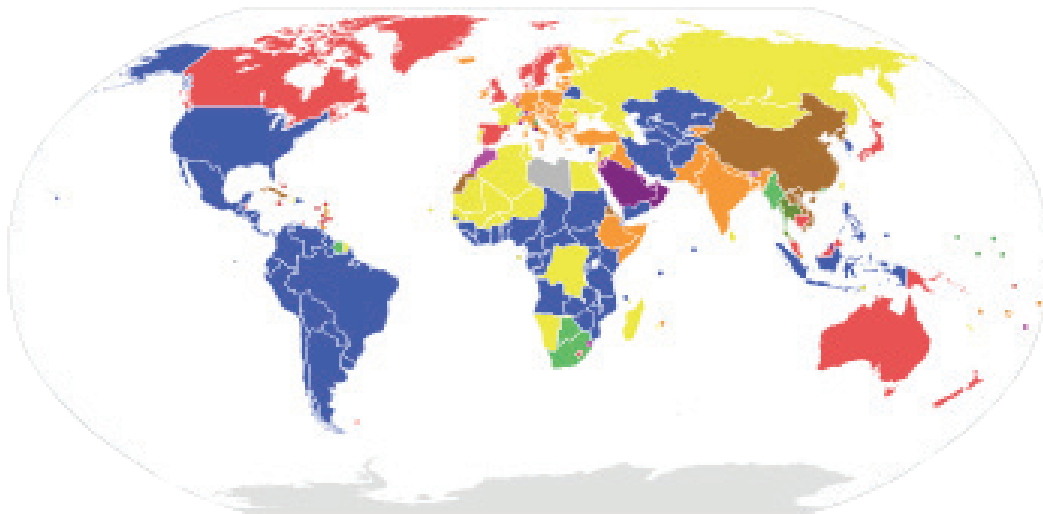
- representative, based on the representative mandate;
- federal, based on a binding mandate (the options on the basis of which an elected official is elected are binding).

A representative democracy is also different to a direct democracy in which the people take decisions themselves. For example, in ancient Greece, there was only one democracy, a direct democracy; the so-called representative democracy was called an oligarchy and was seen as the traditional enemy of democracy.

For some authors, it would be more suited to modern times, for example, than the Athenian democracy. Thus, according to Benjamin Constant, the representative system (it was not yet referred to as a “representative democracy”) allows more people to be released from the daily management of public affairs: *“Poor men look after their own business: rich men are stewards. This is the history of ancient nations and modern nations. The representative system is a proxy given to a certain number of men by the mass of the people who wish their interests to be defended and who nevertheless do not have time to defend them themselves”*.

It is far more common than direct democracy: about half of the world’s inhabitants live under representative democracies, including citizens in the richest and most powerful states.

This map shows the political regimes in the world (2016)



### Republics

- Republics with a presidential system
- Republics with a presidential system together with a parliamentary regime
- Republics with a semi-presidential system

### Monarchies

- Constitutional monarchies with a parliamentary regime in which the monarch does not exercise power
- Constitutional monarchies in which the monarch exercises power, often with a Parliament with weak powers
- Absolute monarchies

### Military government

- Military dictatorships
- Not known

With time the term “representative democracy” has become, in everyday language and due to malapropism, synonymous with the term “democracy” itself. This is partly due to the fact that this is the most widespread form of democracy in the world today.

There are different types of indirect democracy, as detailed in the following sections:

- **Parliamentary system:** Democracies with parliamentary systems have a government, which is appointed by and politically accountable to a Parliament, which can therefore remove the government by means of a motion of censure, the modalities of which vary from country to country. In contrast, the government, which has executive power, may dissolve the Assembly or House, which has legislative power. Thus, in a parliamentary system there is clear separation of powers. It is described as a “soft” system because of the mutual control between the executive and legislative. A distinction can be made between monist and dualist parliamentary systems. Monist systems are ones in which the government is only accountable to parliament and not the Head of State, who plays a minor political role. Conversely, in dualist systems government is accountable to parliament and the Head of State.
- **Presidential system:** Unlike the parliamentary system, the presidential system is characterized by strict separation of powers. This is a representative government in which the executive branch has is not politically accountable to the legislative branch, which means that it cannot remove the latter. Conversely, the Head of State (who is also the Head of Government), elected by direct universal suffrage or indirect [universal suffrage], has less power over Parliament in a parliamentary system, since he or she is unable to dissolve [Parliament]. In the US, the main country with a true presidential system, the President has a veto over legislation.
- **Semi-presidential or mixed system:** The semi-presidential system is a representative system that combines features of the parliamentary and presidential systems; hence, it is sometimes described as a “mixed” system.

One example is the 5th French Republic, in which the head of state is elected by direct universal suffrage, appoints the government and removes members of the government. The Head of State can dissolve the Assembly but the latter, like the Senate, can only challenge the government, mainly through a censure motion. If the President does not have a parliamentary majority, he/she is a priori forced into “cohabitation”, thus effectively diminishing his/her power in favour of the Government and the Head of Government. This type of system is similar to the parliamentary system.

This table shows **the different characteristics of indirect and direct democracy** for comparison purposes.



Characteristics	Democracy	
	Direct	Indirect
Object represented	<b>the people</b>	the nation
Type of sovereignty	<b>Popular:</b> each citizen holds part of sovereignty. Rousseau's idea, "The Social Contract".	<b>National</b> The nation is indivisible, it is formed by people living in a territory but also the experiences and projects, the dead and those yet to be born.
Figures	The people act and expresses themselves. Existence of representatives to simplify political life.	The nation is an abstraction, it can neither act nor speak. Representatives are needed who shall be entrusted with acting on behalf of the nation.
Concept of electorate	<b>The electorate's right:</b> any citizen, as the holder of a fraction of sovereign authority, has the right to speak. This theory necessarily requires universal suffrage.	<b>The electorate's function:</b> citizens have no natural right to speak because sovereignty is external to them. Their function is to designate the person who will speak for them.
Status of representatives	<b>Binding mandate:</b> the people appoint representatives; the elected representative is not free, he/she executes the instructions received by the people. He/she is subordinate to the people. He/she is deprived of any autonomous initiative.	<b>Representative's mandate:</b> the representative acts without control. His/her freedom is absolute for the term of his/her mandate. His/her penalty: non re-election. He/she therefore has a general power but there is the risk of a transfer of sovereignty.
Type of mandate	<b>Short term:</b> this avoids the abuse of power and rifts between representatives and the represented. It facilitates control by the people.	<b>Long mandate:</b> avoids the tiresome process of elections, promotes more freedom of thought, symbolizes the continuity of the State by the Head of State, and allows elected representatives to learn.

## 4. THE MEANS OF EXERCISING DEMOCRACY

*Elections* are one of the different forms of political participation, and the main means whereby people can exercise [political participation] and sovereignty. Voting is collectively the most influential political participation activity, insofar as it enables citizens to legitimately choose which one of several candidates will hold power. Voting puts all citizens in an equal position without distinction.

However, this system can be criticised: voting is not the most powerful political action performed by citizens, and it also offers an insight into the temperament of all citizens. A person can vote at a specific moment casting his or her vote at random or vote for his or her party after several days of reflection.

#### 4.1. FREEDOM OF EXPRESSION, ASSEMBLY AND ASSOCIATION:

The free expression of ideas, the right of assembly and demonstration and the freedom of association are **rights to freedom** which consist of the **recognition by the State of a free sphere of action** for citizens that must not be restricted.

These freedoms are **key** to the right to participate in public affairs and the right to vote. In reality, political participation cannot exist if the State does not guarantee these rights. These are the real conditions for the exercise of these freedoms.

Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice (*General Comment* No. 25, paragraph 12).

“In order to ensure the full enjoyment of rights protected by Article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other free media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in Articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas (*General Comment* No. 25, paragraph 25).

“The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by Article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and in the election process. States should ensure that, in their internal management, political parties respect the applicable provisions of Article 25 in order to enable citizens to exercise their rights thereunder (*General Comment* No. 25, paragraph 26).

#### 4.2. EQUAL ACCESS TO PUBLIC SERVICE

The article also envisages the right to **access public service** based on merit and ability, but this is a different right (no relation to the principle of representation). In this case, the **possession of skills** (merit and ability) is important and must be demonstrated by means of non-discriminatory processes guided by legally-established objective criteria.

“[...] To ensure access on general terms of equality, the criteria and processes for appointment, promotion, suspension and dismissal must be objective and reasonable. Affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures. It is of particular importance to ensure that persons do not suffer discrimination in the exercise of their rights under article 25, subparagraph (c), on any of the grounds set out in article 2, paragraph 1” (*General Comment* No. 25, paragraph 23).

“State reports should describe the conditions for access to public service positions, any restrictions which apply and the processes for appointment, promotion, suspension and dismissal or removal from office as well as the judicial or other review mechanisms which apply to these processes. Reports should also indicate how the requirement for equal access is met, and whether affirmative measures have been introduced and, if so, to what extent” (*General Comment* No. 25, paragraph 24).

## 5. THE OBLIGATIONS WITH RESPECT TO THE RIGHT TO POLITICAL PARTICIPATION

The State has responsibilities in the area of participation and, besides guaranteeing the protection of rights, it is responsible for maintaining political structures in accordance with the democratic principle. The State has the obligation to establish a **participation system** to guarantee effective participation in compliance with these requirements.

**Availability:** the State Party must adapt the constitutional principle of participation by recognizing the right and establishing appropriate mechanisms for exercising representative functions and the selection of representatives through elections. A social state must facilitate - through service activities - the freedoms of expression, assembly and association.

**Accessibility:** the participation process must be open to citizens according to the more or less broad definition of participation in the Constitution.

- i) **non-discrimination:** the exercise of the right should not be limited to language, race, religion or any other social condition.
- ii) **physical accessibility.** Physical barriers that may limit the exercise of voting or representative functions must be eliminated (with, for example, postal voting, telematic voting).
- iii) **economic availability:** the exercise of the right must not entail any economic burden.

**Acceptability:** recognition and the manner in which the right is effectively implemented must respect International Declarations regulating this right and democratic beliefs of contemporary societies even if the political traditions of the country are very important.

**Adaptability:** This requires Party States to adopt relevant strategies, policies, programmes and measures in order to meet the changing needs of societies and communities in their different social and cultural contexts.

With respect to each of these dimensions of the representative system, the State has **obligations** with regard to the rights of political participation that are both complex and diverse. They range from legal obligations to practical measures, and include both actions and abstentions.

- a) **Obligation to respect:** States parties must not interfere in the rights of citizens to participate in elections, to stand for election and to aspire to a position in the public service. As a prerequisite, they must not interfere with the exercise of freedom of expression, assembly and association of citizens. States parties must adopt constitutional, legislative and other measures defining citizenship to ensure that rights can be exercised without discrimination, and ensure that local law recognizes the rights of political participation.
- b) **Obligation to protect:** States parties have a legal duty to take all appropriate measures to ensure third parties may not interfere with the exercise of political rights of citizens, including the rights associated with them. Political participation also requires States parties to take positive steps to organize elections, provide a space for political debate, etc. States parties also have the obligation to provide effective remedy for violations of political participation rights.
- c) **Obligation to apply:** States parties must take all appropriate measures to ensure the full exercise of political participation. These measures include voter education and registration campaigns. States parties are also obliged to undertake other promotional activities, as positive steps, if they are necessary to ensure that all citizens have access to posts in the public service on an equal basis.

"[...] Genuine periodic elections in accordance with paragraph (b) are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors. The rights and obligations provided for in paragraph (b) should be guaranteed by law" (General Comment. No. 25, paragraph 9).

"In conformity with paragraph (b), elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights.

Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind. Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party. The results of genuine elections should be respected and implemented." (General Comment No. 25, paragraph 19).

"An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant. States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees" (General Comment No. 25, paragraph 20).

"Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of "one person, one vote" must apply and, within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely" (General Comment No. 25, paragraph 21).

"States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community" (General Comment. No. 25, paragraph 11).

## 6. HOLDERS OF THE RIGHT TO POLITICAL PARTICIPATION

### 6.1. IN GENERAL

"Article 25 [...] deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol" (General Comment No. 25, paragraph 2).

“In contrast with other rights and freedoms recognized by the Covenant (which are ensured to all individuals within the territory and subject to the jurisdiction of the State), article 25 protects the rights of “every citizen”. State reports should outline the legal provisions which define citizenship in the context of the rights protected by article 25. No distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Distinctions between those who are entitled to citizenship by birth and those who acquire it by naturalization may raise questions of compatibility with article 25. State reports should indicate whether any groups, such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions” (General Comment No. 25, paragraph 3).

Regarding the right to free legal provision, States normally determine the exercise of the right but “Any conditions which apply to the exercise of the rights protected by article 25 should be based on objective and reasonable criteria. For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen. The exercise of these rights by citizens may not be suspended or excluded except on grounds which are established by law and which are objective and reasonable. For example, established mental incapacity may be a ground for denying a person the right to vote or to hold office.” (General Comment No. 25, paragraph 4).

“The right to vote at elections and referenda must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age limit for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification” (General Comment No. 25, paragraph 10).

“The effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates. Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable criteria. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person’s candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office” (General Comment No. 25, paragraph 15).

“Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office, public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by paragraph (b). The grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures” (General Comment No. 25, paragraph 16).

“The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties. If a candidate is required to have a minimum number of supporters for nomination this requirement should be reasonable and not act as a barrier to candidacy. Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election” (General Comment No. 25, paragraph 17).

“State reports should describe the legal provisions which establish the conditions for holding elective public office, and any limitations and qualifications which apply to particular offices. Reports should describe conditions for nomination, e.g. age limits, and any other qualifications or restrictions. State reports should indicate whether there are restrictions which preclude persons in public-service positions (including positions in the police or armed services) from being elected to particular public offices. The legal grounds and procedures for the removal of elected office holders should be described” (General Comment No. 25, paragraph 18).

The United Nations has observed that in some countries the rights of participation of women, indigenous peoples, minority groups, the disabled, and other vulnerable groups are limited:

## 6.2. THE PARTICIPATION OF WOMEN IN POLITICS

“[The Committee] identified a number of barriers to the equal participation of women in political and public life, including traditional cultural values and religious beliefs, absence of social services, violence against women, women’s economic dependence on men, negative societal attitudes towards women and harmful gender stereotyping. The Committee further noted that women were excluded from top-ranking positions in Government, the civil service, public administration, the judiciary and justice systems. As of 1 May 2015, the average proportion of women in parliaments worldwide was a mere 22.1 per cent” (A/HRC/30/26, paragraph 24).

“[...] other obstacles to women’s participation in political and public affairs, such as unwillingness of political parties to place women in realistic positions on their candidates lists; the fact that women tend to have fewer resources than men for election campaigns; attacks, threats and sexual harassment against women candidates; and non-recognition of the right of peaceful assembly and freedom of association. At the same time, women who are outspoken as leaders, community workers and politicians often face harassment and stigmatization, as they are perceived as undermining traditional family values. Furthermore, women human rights defenders are exposed to gender-specific threats and violence, including gender-based verbal abuse, sexual abuse or rape, intimidation and murder” (A/HRC/30/26, paragraph 25).

The struggle for women’s participation in politics was one of the main objectives of international and national women’s movements. Equal rights between the sexes in politics and public life is determined by Article 7 of the International Convention on the Elimination of All Forms of Discrimination Against Women of 1979. Article 8 requires the participation of women at the international level and in international organizations.

If almost all women around the world have the right to vote and the right to be elected, the proportion of women in political institutions and in decision making bodies is still very low. In 2002, the percentage of women in national parliaments was approximately 15% and in 1996 the percentage of women in governments was around 7%. Only Nordic countries have a sufficiently high percentage of female parliamentarians (39.7%) for the latter to exert effective influence on the politics of their countries (cf. EU report on women’s participation in policy in the Member States of the Council of Europe).

The UN commission entrusted with monitoring the implementation of the 1979 Convention on Women states in its General Recommendation No. 23 (§ 14) that the concept of democracy will have a lasting effect only when political decisions are taken by both women and men, and take into account equally each other’s interests.

The Council of Europe and the European Union also seek equal representation of women and men.

## 6.3 INDIGENOUS PEOPLES

“[They are] the most marginalized and disadvantaged of the world. The discrimination they suffered has had adverse consequences on their ability to freely determine the management of their own community, as well as their ability to control their natural resources and to participate in decision making on issues that affect their rights fundamentals, including legislation (A/HRC/30/26 paragraph 26)

In her 2014 annual report, the Special Rapporteur on the rights of indigenous peoples identified several obstacles that affect the ability of indigenous peoples to fully enjoy their right to participate in political and public affairs, including the failure or reluctance of governments to recognize indigenous peoples; challenges in the development of practical implementation measures; ongoing negative attitudes towards indigenous peoples on the part of broader societies in which they live; and social and economic conditions preventing the full exercise of indigenous peoples’ human rights<sup>446</sup>.

446. Véase A/HRC/27/52, párr. 11.



#### 6.4. MINORITY GROUPS

“The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities affirms the right of minorities to participate effectively in cultural, religious, social, economic and public life. Yet, such persons remain underrepresented in the political and public processes and governing institutions in most countries. They are either actively or intentionally restricted from participation or there is a lack of political will to dismantle structural barriers to their full participation (A/HRC/30/26, paragraph 28).

“Institutional discrimination can lead to multiple disfranchisements. For example, in many countries there is evidence of overrepresentation of minorities in the criminal justice system. Coupled with restrictions on the right of prisoners to vote, this has a disproportionate impact on the realization of the right of minority groups to participate in political and public affairs. In many cases, minorities also face systematic discrimination in access to civil registration and identity documentation, which further impedes the realization of their right to participate [in public and political affairs]. (A/HRC/30/26, paragraph 29).

#### 6.5. PEOPLE WITH DISABILITIES

“Some persons with disabilities are unable to participate fully in political and public affairs owing to their legal status, lack of access to information or prejudicial attitudes. In its General Comment No. 1 (2014) on equal recognition before the law (Article 12), the Committee on the Rights of Persons with Disabilities, noted that restrictions to legal capacity have been used to exclude persons with disabilities from political participation, especially the right to vote. Some States have an automatic or quasi-automatic exclusion provision in their legislation, denying the right to political participation for all people under a protective measure, regardless of their actual level of functional ability (A/HRC/30/26, paragraph 30).

“Furthermore, even when there are no legal obstacles to participation of persons with disabilities, such participation is often hampered by an inhospitable environment and practical restrictions, such as inaccessible polling stations, lack of information, campaign material in accessible formats and a general high level of prejudice” (A/HRC/30/26, paragraph 31).

#### 6.6. OTHER VULNERABLE GROUPS

Non-citizens, including migrants, refugees and stateless persons seldom have a voice in the public and political affairs of their country of residence. The Special Rapporteur on the human rights of migrants noted that groups of migrant origin were frequently underrepresented in the political process even when most of their members were nationals, and that effective citizenship depends on structural opportunities for participation and widespread disposition to use them. (A/HRC/30/26, paragraph 32)

“Discriminatory requirements or overly restrictive conditions for obtaining citizenship often impede effective participation. In many States, citizenship is unduly denied to minorities, long-term residents, foreign family members of citizens, stateless persons and other groups. Non-citizens, migrants and refugees are also frequently denied participation in the public and political affairs of their countries of origin, which creates a double disfranchisement” (A/HRC/30/26, paragraph 33)

“Homeless persons and intentionally displaced persons live on the margins of society and often face discrimination and lack of access to information. In addition, administrative restrictions, such as proof of residence or identity documents requirements, are likely to prevent them from exercising their right to vote” (A/HRC/30/26, paragraph 34).

“Lesbian, gay, bisexual, transgender and intersex individuals around the world face multiple obstacles to assert their right to participate in the conduct of public affairs including as a result of discrimination, stigma, violence, legal sanctions and arbitrary restrictions on their freedom of expression, association, and peaceful assembly on the basis of sexual orientation, gender identity or gender expression. In addition, since identity documents are a pre-requisite to effective enjoyment of many human rights, including electoral rights, transgender persons who are unable to obtain identity documentation that reflects their preferred gender are de facto disfranchised” (A/HRC/30/26, paragraph 35).



## 7. LIMITATIONS TO THE RIGHT TO POLITICAL PARTICIPATION

Several restrictions on political participation rights are however permissible. The right to vote in elections and referendums should be statutory and can be the subject of reasonable restrictions, such as setting a minimum age for exercising the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification. Only exceptions to political participation rights set out in the conditions of Article 4 of the ICCPR are eligible.

Depending on the type of election, the restrictions imposed by each State may vary. States normally recognize the right of voters and candidates to participate in administrative elections (at municipal or regional level), but this is not the case for parliamentary elections since they consider that in these cases only nationals should participate in the exercise of national sovereignty.

Sometimes the right to be elected is limited on grounds of incompatibility or ineligibility to guarantee the independence of representative institutions with respect to other state institutions. In addition, penal codes tend to restrict the right to participation of persons sentenced for committing ordinary offences or persons declared legally incapable.

## 8. GUARANTEES OF THE RIGHT TO POLITICAL PARTICIPATION

In interpreting the obligations of States under Article 25 of the Covenant, the Human Rights Committee anticipates that positive measures will be taken to ensure the enjoyment of full, effective and equal rights to participation, including through inclusive, constructive and non-discriminatory processes and mechanisms. States must also ensure full and effective access to justice and remedies for those who have been wrongly denied participation in public and political affairs (A/HRC/ 30/26 paragraph 3).

## 9. PARTICIPATION IN POLITICAL LIFE AND SUSTAINABLE DEVELOPMENT

**The lack of participation and the powerlessness of civil society:** The majority of third world states face obstacles to human development, where the centralization of state enterprises or the right of participation clashes with the desire to dominate the political scene and thus power. As a result, public freedoms and participation are restricted to a small minority.

Undemocratic systems seek to exclude others from participation, even organized political forces, and are unwilling to accept other persons with new policies coming to power, and thus possibly other persons and other political choices.

They have used various methods to bypass democracy, such as elections that allow presidents to rule for life and with a percentage of up to 99 per cent, and by revising laws to allow them to extend their terms in office, allowing their descendants to inherit the Presidency or exclude a group of citizens on the grounds of gender (women), racism or politics.

Furthermore, various states use referendums in presidential elections without any form of election system, and despite the dissolution of the single party, the balance continues to favour authoritarian parties where restrictions are imposed on associations, opposition parties and independent trade unions by any means, giving rise to a climate of doubt in which they are favoured by abstention from political participation and transforming them into secret and violent organizations, not to mention the lack civil society enterprises due to the domination of the state through laws preventing their freedom and participation in development.

**Interior reconstruction:** the right path to guaranteeing the right to development and the execution of the necessary reconstruction at national level is undoubtedly through the adoption of peaceful, conscious and organized measures in favour of democracy where global society has fully embraced the globalization of human rights in a cooperative manner

with participatory democracy, which is not treated as merely a tool for the realization of development built on the goals and principles of humanitarian rights, having become a matter of national security for peoples, as highlighted by the Arab Organization for Human Rights in its report on the events that took place in Iraq.

Democracy can only be achieved after the following are established:

- The opening space for political freedoms enabling the creation of versatile political parties and a free and effective civil society.
- True transparent and democratic elections ensuring participation, representing the people and questioning the government.
- Ensure that citizens are guaranteed full legal rights under a legal framework and protected by effective and free justice within the scope of respect for governance under the law and by the legal system.

An economic system must be developed adapted to society and through the removal of restrictions on liberal energy production and enable individual initiatives in the fields of invention and creativity, as a pillar for economic development in the medium and long term.

And based on the foregoing, these core democratic movements will help foster the construction of a sense of good governance built on the need to involve civil society and the private sector to guide governance in collaboration with state enterprises, with the goal of guaranteeing sustainable development, the rule of law and human prosperity.

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 2,10**

**Subject**

**2.4.9.** Rights to marriage and family

**Lecturer:**

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## SUMMARY OF THE TOPIC

The topic explores the main formulations applied to the right to marry and found a family, with a special focus on the Universal Declaration of Human Rights. It also provides a comprehensive review of the legal framework of Declarations and Recommendations in which these human rights are set out.

To this end, it addresses the right to marry, explaining its features and insisting on equality and non-discrimination in its exercise and on the free consent of both intending spouses, which is essential for the celebration of marriage. The topic also analyses the main features of the institution of the family.

Finally, it identifies the main threats to the institution of the family and the right to marry posed by undesirable phenomena, such as forced marriage or child marriage. It concludes with an overview of the legal mechanisms most suitable for its appropriate protection.

The 2030 Agenda for Sustainable Development is the most recent expression of an international policy framework highlighting the relevance of families in the development process. However, that international consensus has a much longer history and has been forged in recent decades as part of wider development and social protection debates, advocating for strong family-focused policies as part of national and international efforts to ensure the realization of the right to an adequate standard of living, sustainable development and poverty reduction.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in keeping with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations [General Assembly, 2010, p. 8; 2012, pp. 26 and 27], upon completion of the course the participating

teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and an orientation towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

#### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

- General comment No. 19: Article 23 (The family), Thirty-ninth session (1990)
- Report of the United Nations High Commissioner for Human Rights, Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development, 29 January 2016 (UN Doc. A/HRC/31/37)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

Video <https://www.youtube.com/watch?v=Daex1bLLk0k>

DURÁN, Paloma: "The protection of the family in the International organizations: The European case", in W. Rees, M.J. Roca, B. Schanda (Coords.): [\*Neuere Entwicklungen im Religionsrecht europäischer Staaten\*](#). Humblot Verlag, 2013, pp. 243-266. Duncker & Humblot. Berlin, 2013, pp. 133-158.

Inter-Parliamentary Union (IPU) and World Health Organization (WHO), [\*Child, early and forced marriage legislation in 37 Asia-Pacific countries\*](#), 2016.

Report of the Secretary-General, Celebration of the twentieth anniversary of the International Year of the Family in 2014, 18 November 2014 (UN Doc. A/70/61-E/2015/3).

Report of the Office of the United Nations High Commissioner for Human Rights, Preventing and eliminating child, early and forced marriage, April 2014 (UN Doc. A/HRC/26/22).

## LEARNING PROCESS RESULTS

At the end of the topic, the student will be able to:

- Knowing and identifying the content of the rights presented and be able to justify their formulation as fundamental rights.
- Being able to identify these rights as they are drafted in the Universal Declaration of Human Rights and other international regulations.
- Being able to refute arguments aimed at restricting the configuration of these rights.

## METHODOLOGY

Methodology	Educational tools
Exposition method	Reading of texts and/or watching of audiovisual material
Problem-solving	Carry out the following activity: Compose a 10-minute oral presentation in which at least the following questions are addressed: 1. How the right to marry is regulated in the Universal Convention? 2. What are the requirements for the celebration of marriage? 3. Why is forced marriage an undesirable practice?
Group discussions	The students will share the conclusions of their presentation in the group. The floor will then be opened to discussion in order to exchange impressions, and a single document will then be drafted containing the results of the learning activity. Students will also be able to work as a group on activity No. 6 of the learning activity schedule, which involves the commentary and discussion of general comment No. 19 of the Human Rights Committee.

## SCHEDULE OF LEARNING ACTIVITIES

**Activity 1.** Study the contents of the topic. Read the formulation of the rights and their corresponding articles.

**Activity 2.** Prepare a presentation on the description of the right and its consequences, addressing at least the following matters:

- How is the right to marry regulated in the Universal Declaration?
- What are the requirements for the celebration of marriage?
- Why is forced marriage an undesirable practice?

**Activity 3.** Each student will present his or her conclusions. After the end of all the presentations, the floor will be opened to discussion in order to exchange impressions, and a single document will be drafted reflecting the main results of the learning activity.

**Activity 5.** Please read general comment No. 19 of the Human Rights Committee on article 23 of the International Covenant on Civil and Political Rights (ICCPR) about the family. Break up in groups and extract the main ideas from the text. A speaker must present them to the other students, and a subsequent debate must be held.

The document can be found in [this address](#)

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activities 1 and 2: Personal work of the student: reading and preparation of the presentation.	40 minutes.	
Activity 3: Presentation in class and debate on the description of the right and its consequences.	Per student: 10 minutes of presentation, followed by approximately 20 minutes of open debate.	In addition to their personal presentations, the students' interventions in the round of suggestions, objections and proposals will be considered.
Activity 4: Reading of general comment No. 19 of the Human Rights Committee. Summary of its contents and drafting of report. Oral presentation and debate.	<ul style="list-style-type: none"> <li>• Reading: 15 minutes</li> <li>• Drafting of report: 20 minutes</li> <li>• Oral presentation: 10 minutes</li> <li>• Debate: 15 minutes</li> </ul>	<ul style="list-style-type: none"> <li>• Accuracy of interpretation and originality of ideas: 40%</li> <li>• Capacity of conciseness of ideas: 20%</li> <li>• Clarity in the presentation: 20%</li> <li>• Involvement in the debate: 20%</li> </ul>

## SELF-TEST

- Regarding the minimum age for marriage:
  - States must clearly define the minimum age for marriage in their legislation
  - The minimum age for valid marriage is 14 years for women and 16 years for men
  - There is no age limitation for marriage
  - None of the above answers is correct
- Indicate which statement is correct:
  - The origin of the marital bond is given by the presence of at least two witnesses at the time of entering into it
  - Marriage is originated by the presence of a civil or religious authority at the time of entering into it
  - Marriage arises from the exchange of the full and free consent of the intending spouses
  - Marriage is valid only if there has been a previous engagement
- Regarding the family, indicate which statement is true:
  - The concept and configuration of the family is decided by each married couple
  - The family is the natural and fundamental element of society
  - The family does not have any specific or essential elements; instead, it is defined by the elements reflected in the laws approved by the State
  - The family is important in society, but does not represent its basis or a key element of it



4. Regarding the right to marry, indicate which statement is correct:
- a) Only those allowed by law have the right to marry
  - b) All persons have the right to marry, with no possibility of waiving this right
  - c) All persons have the right to marry, but can waive this right
  - d) All persons have the right to marry, but in some cases the law can limit the possibility of marrying certain groups of people
5. Indicate which statement is incorrect:
- a) International organizations call on States to protect pregnant women and guarantee the relevant leave and social security benefits for them
  - b) States can draft family planning policies but cannot impose them
  - c) One of the main challenges regarding marriage and family stability lies in establishing satisfactory measures for the reconciliation of work and family life
  - d) The right to marry and found a family must be guaranteed, but this does not entail that it must be guaranteed that its members will live together

## SELF-TEST

Question	Correct response
Question 1	a
Question 2	c
Question 3	b
Question 4	b
Question 5	d

## SUBJECT 2.4.:

# 2.4.9 RIGHTS TO MARRIAGE AND FAMILY

## 1. INTRODUCTION

Adopted in September 2015, the 2030 Agenda for Sustainable Development highlights the role of families as development actors and expressly commits States to provide children and youth with a nurturing environment for the full realization of their rights and capabilities, including through cohesive communities and families<sup>447</sup>. The Sustainable Development Goals and targets reflect a broad range of objectives that are important for the protection of the family and its members, and for the realization of the right to an adequate standard of living for all families. In addition, families are recognized as key actors in the transmission of values that are vital for making the sustainable development agenda a reality, such as gender equality, respect for the environment and intergenerational solidarity. (...) In order to better reflect the role of families in the implementation of the 2030 Agenda for Sustainable Development, consideration needs to be given to human rights principles and standards as the foundation of the agenda, in particular those pertaining directly to family life<sup>448</sup>.

## 2. DEFINITION OF THE FAMILY IN INTERNATIONAL HUMAN RIGHTS LAW<sup>449</sup>

International human rights instruments have long recognized that the family is the fundamental unit of society and that it performs valuable functions for its members and for the community as a whole. For those reasons, States bear the primary obligation to provide protection and assistance to the family so that it can fully assume those functions. At the same time, international standards do not prescribe a specific concept of family, which varies depending on the concrete historical, social, cultural and economic make-up of the community and of the life circumstances of family members.

Institutional guarantees for the family (i.e. its legal recognition and specific benefits deriving from that status, and the regulation of the legal relationship between spouses, partners, parents and children, etc.) are intended to protect the social order and to preserve specific family functions (such as reproduction or bringing up children) – considered indispensable to a society's survival – rather than condone their transfer to other social institutions or the State. The human rights to marry and found a family, sexual and reproductive rights, equality between spouses, protection of motherhood and the special rights of children, as laid down in the CRC and CEDAW, are directly linked to the institutional guarantees relating to the family. Both parents have the same right to decide freely and responsibly on the number and spacing of their children; children have the right not to be separated from their parents; and both parents have equal rights and common responsibilities, irrespective of their marital status, for the upbringing and development of children. The rights to family reunification, foster placement and adoption are particularly important.

447. See General Assembly resolution 70/1, annex, para. 25.

448. UN Doc. A/HRC/31/37, paras. 18, 21.

449. Vid. UN Doc. A/HRC/31/37, paras. 24-27.

In addition to support under the Universal Declaration of Human Rights<sup>450</sup>, the institution of the family, as the “natural and fundamental group unit of society”, enjoys special protection under article 23 of CCPR<sup>451</sup>, article 10 of CESC<sup>452</sup>, article 16 of the European Social Charter<sup>453</sup>, article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>454</sup>, article 17 of American Convention On Human Rights “Pact of San Jose, Costa

450. Article 16: 1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

451. “1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

452. The States Parties to the present Covenant recognize that: 1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law ».

453. « With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means ».

454. « 1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others ».

Rica<sup>455</sup> and article 18 of African Charter on Human and Peoples' Rights<sup>456</sup>. This broad range indicates that the meaning of the term "family" transcends the concept of a nuclear family prevalent in highly industrialized countries, and encompasses much larger units, such as the extended family, for example in African societies. In addition to blood relations and statutory ties (marriage, adoption, registration of homosexual partnerships, etc.), cohabitation, an economic relationship and the specific social and cultural values in a given society are the key criteria used to determine whether a group with a given type of relationship between human beings constitutes a family.

There is no definition of the family under international human rights law. The Human Rights Committee notes that the concept of family may differ in some respects from State to State, and even from region to region within a State, and that is therefore not possible to give the concept a standard definition<sup>457</sup>. Similarly, the Committee on Economic, Social and Cultural Rights has stated that the concept of family must be understood in a wide sense and in accordance with appropriate local usage<sup>458</sup>. Other international human rights mechanisms have expressed similar views<sup>459</sup>.

The concept of family may also differ according to the specific rights and responsibilities at stake. For instance, in relation to the rights of the child, the concept of family may include a variety of arrangements that can provide for a young child's care, nurturance and development, including the nuclear family, the extended family and other traditional and modern community-based arrangements, provided these are consistent with the rights and the best interest of the child<sup>460</sup>. Likewise, the notion of "family environment" may encompass children's social ties in a wider sense<sup>461</sup>. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families defines "members of the family" as persons in a relationship that, under applicable law, produces effects equivalent

455. « 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

2. The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of nondiscrimination established in this Convention.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.

5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock ».

456. « 1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.

2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3. The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

4. The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs ».

457. See Human Rights Committee, general comment No. 19 (1990) on the family, para. 2.

458. See Committee on Economic, Social and Cultural, general comment No. 4 (1991) on the right to adequate housing, para. 6; and general comment No. 5 (1994) on persons with disabilities, para. 30.

459. See Committee on the Elimination of Discrimination against Women, general recommendation No. 21 (1994) on equality in marriage and family relations, paras. 13 and 18; and general recommendation No. 29 (2013) on the economic consequences of marriage, family relations and their dissolution, para. 24; Committee on the Rights of the Child, general comment No. 7 (2005) on implementing child rights in early childhood, para. 15; also A/HRC/29/40, paras. 23-24.

460. See Committee on the Rights of the Child, general comment No. 7, para. 15.

461. See Committee on the Rights of the Child, general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para 70.

to marriage, as well as their dependent children and other dependent persons recognized as such by applicable legislation [arts. 4 and 44 (2)].

States retain some leeway in defining the concept of family in national legislation, taking into consideration the various legal systems, religions, customs or traditions within their society, including indigenous and minority cultures<sup>462</sup>. However, international standards set forth at least two minimum conditions for the recognition and protection of families at the national level: first, respect for the principle of equality and non-discrimination, including the equal treatment of women; and second, the effective guarantee of the best interest of the child<sup>463</sup>. Given those parameters, human rights mechanisms have found that some forms of relationships, such as polygamy and child marriage, are contrary to international human rights standards and should be prohibited<sup>464</sup>.

In addition to the above principles, international mechanisms have called upon States to protect specific forms of the family in view of the vulnerability of their members in relation to the enjoyment of human rights. For instance, attention has been drawn to the discrimination suffered by women and children in de facto unions and there have been calls for the regulation of those unions in domestic law<sup>465</sup>. In similar terms, the Committee on Economic, Social and Cultural Rights has called upon States to legally recognize same-sex couples<sup>466</sup>.

The protection of the family is also guaranteed, directly or indirectly, in other provisions of the Covenant. Specifically, article 11 acknowledges every person's right to an adequate standard of living for themselves and their family, as well as a continuous improvement of their living conditions, while article 17 specifies that the family will not be subjected to arbitrary or illegal interferences. Additionally, article 24 specifically provides for the protection of children's rights, as under-age individuals or as members of a family. These rights are also referred to when regulating certain related matters, such as the legal status of workers, the status of women, or the protection of children. The first matter is addressed by the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990).

462. See Human Rights Committee, general comment No. 16 (1988) on the right to privacy, para. 5; and CCPR/C/60/D/549/1993/Rev.1, para. 10.3.

463. See International Covenant on Civil and Political Rights, art. 23(4); International Convention on the Elimination of All Forms of Discrimination against Women, arts. 2 and 5 (b); and Convention on the Rights of the Child, art. 18 (1).

464. See Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee of the Rights of the Child (2014) on harmful practices, paras. 24-26.

465. See Committee on the Elimination of Discrimination against Women, general recommendation No. 29, paras. 30-31; also A/HRC/29/40, para. 74 (c).

466. See E/C.12/BGR/CO/4-5, para. 17; E/C.12/SVK/CO/2, para. 10; the Committee's general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, paras. 26 and 31; and A/HRC/29/23, para. 79 (h).

Regarding the eradication of discrimination against women, article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (1979) pays particular attention to ensuring the equality of husband and wife within marriage and family. It therefore points out the rights to which they are both entitled as equals from a qualitative viewpoint<sup>467</sup>.

The importance granted to these rights regarding the correct development and upbringing of children is also significant. In fact, the preamble to the international Convention on the Rights of the Child of 1989 proclaims its conviction that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community. It additionally states that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.

The nature of family and marriage as natural institutions, as well as their relationship with the development and education of children, is again highlighted in article 10 of the International Covenant on Economic, Social and Cultural Rights. This right is also dealt with in the European context, specifically in the *Convention for the Protection of Human Rights and Fundamental Freedoms* of 1950. In article 12, it follows the direction set by the Universal Declaration stating more concisely that « men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right ».

Yet, the international legislator does not merely state the right to enter into marriage, but additionally issues two specific rules on this topic: a Convention and a Recommendation. The first, which dates from 1962 and is entitled *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, states « that all States should take all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty, establishing appropriate penalties where necessary and establishing a civil or other register in which all marriages will be recorded ». The second rule is a *Recommendation* from 1965 with the same title. This provision « recommends that, where not already provided by existing legislative or other measures, each Member State should take the necessary steps, in accordance with its constitutional processes and its traditional and religious practices, to adopt such legislative or other measures as may be appropriate to give effect to the principles of the text ». Neither of these two rules mentions the family, although it can be inferred from the time when they were issued that they stress the sociological fact that marriage is assumed to be at the origin of it.

- .....
467. 1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.
2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory ».

In much more recent times, the Charter of Fundamental Rights of the European Union, proclaimed in 2000, states in article 9 that « the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights ». The guarantee of these rights is contained in article 52.1 of the Charter<sup>468</sup>.

### 3. NATURE

From the reading of international declarations and covenants as well as interpretations made by bodies such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights, it clearly transpires that both marriage and family are institutions of natural law. This means that their essential distinctive contents define them as such and cannot be changed, as this would represent creating a new and different reality of marriage or the family.

This statement leads us to another: both the right to marry and the right to found a family or live within the family unit are natural rights or, in other words, human rights.

### 4. RIGHT HOLDERS

The assertion that the rights being dealt with in this topic are human rights implies that they are also universal rights, meaning that their right holders are all the people in the world, regardless of origin, religion, gender, ideology or any other characteristic.

These are also rights that cannot be waived. This does not mean that all people must get married. It means that any person is entitled to the right to get married and found a family, but is free to decide never to exercise these rights. If this is the case, it does not mean that the person loses his or her entitlement to these rights.

It is true that the various legal systems can set requirements establishing conditions for the validity of marital consent. In fact, the declarations and covenants referred to above address the right to enter into marriage when the intended spouses have both reached the age required for it and there is free consent from both of them. All of this implies that, in order to exercise this right, a specific capacity and ability are necessary, and these will be taken into account in this legal act. If these requirements are not met, the consent to marry will be invalid, regardless of appearances and accompanying formalities; in other words, it will have no legal effect and will not lead to the creation of the institution of marriage. This will also be the case when, even if consent has been given by a fully able person, such consent is corrupted, meaning that it has been granted through the use of deception, threats, physical force, or any other abnormal circumstance.

### 5. PROVISIONS OF INTERNATIONAL HUMAN RIGHTS LAW PERTAINING TO THE FAMILY<sup>469</sup>

A series of contents specific to the right to marry and the right to found a family, and even to the institution of the family itself, can be drawn from the texts quoted so far. These describe the essential elements that guarantee the content of the institution of marriage and the family as natural institutions. These contents are:

468. « 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others ».

469. Vid. UN Doc. A/HRC/31/37, pars. 28-47.



1. Marriage is constituted by man and woman.
2. Marriage originates from the free and full consent of man and woman, provided that they are of sufficient age. For this consent to be “free and full”, it is understood that the intending spouses have the sufficient capacity to get married and that consent must not be corrupted.
3. The spouses have equal rights. This equality extends to any possible crises that may develop in the marriage.
4. The right to marry has as a direct consequence another natural right: the right to found a family. This right includes the possibility to procreate and live together, as supported by the Human Rights Committee. The Committee adds that whenever the States adopt family planning policies, these must be compatible with the provisions laid out in the Covenant on Civil and Political Rights and, above all, must not be discriminatory or mandatory.
5. The family is not only an institution of natural law, which in itself would be enough to entitle it to the full protection of the State. More importantly, it is also the most basic and fundamental institution of society.
6. These institutions have a natural and fundamental character for society. As a result, they do not only entail private interests (i.e., those of each of the spouses and the remaining members of the family) but also a public interest. Because of this, the State has the unavoidable duty of protecting both the marriage and the family. Indeed, their stability and defence have an impact not only on the well-being of the individuals that compose them but also on society as a whole. Regarding this matter, there are many measures that apply, addressing educational, health and social aspects, among many others. Interestingly, the texts quoted above specifically mention these two:
  - a. Mothers must be granted extra protection for a reasonable period, both before and after childbirth.
  - b. The family must not be subjected to arbitrary or illegal interferences.

### 5.1. RIGHT TO MARRY AND TO FOUND A FAMILY

The Universal Declaration of Human Rights (art. 16) and the International Covenant on Civil and Political Rights (art. 23 (2)) affirm the right of men and women of full, or marriageable, age to marry and to found a family. That right is expressly linked to the principle of non-discrimination and applies to men and women without any limitation due to race, nationality or religion. The principle of non-discrimination in that context is also stated in the Convention on the Elimination of All Forms of Discrimination against Women (art. 16 (1) (a)) and in the Convention on the Rights of Persons with Disabilities (art. 23 (1) (a)).

#### A) RIGHT TO FREELY CHOOSE A SPOUSE AND PROHIBITION OF FORCED MARRIAGE

The Universal Declaration of Human Rights provides that marriage shall be entered into only with the free and full consent of the intending spouses (art. 16 (2)). The same provision is included in the International Covenant on Civil and Political Rights (art. 23 (3)), the International Covenant on Economic, Social, and Cultural Rights (art. 10 (1)), the Convention on the Elimination of All Forms of Discrimination against Women (art. 16 (1) (b)) and the Convention on the Rights of Persons with Disabilities (art. 23 (1) (a)).

A logical corollary of the right to freely choose a spouse is the prohibition of forced marriage, which especially affects women and girls. Forced marriages may take various forms, such as an exchange or trade-off; they may be servile, levirate or contractual; or they may be contracted through payment or preferment, all of which are considered practices similar to slavery. Such marriages should not be recognized by the State as legally valid or subsequently

rectifiable<sup>470</sup>. Similarly, international norms proscribe the forced dissolution of the marriage bond, including subjecting the change of legal gender to the requirement of dissolution of a previous marriage or civil partnership<sup>471</sup>.

## B) DEFINITION OF MARRIAGEABLE AGE AND PROHIBITION OF CHILD MARRIAGE

International and regional instruments are unanimous on the minimum age at which the right to marry or to found a family may be exercised. The Convention on the Elimination of All Forms of Discrimination against Women (art. 16 (2)), as well as the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (art. 2) require States to establish a minimum age for marriage in their domestic legislation. The Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights have stated that the minimum age for marriage should be 18 years and that the legal age of marriage should be the same for men and women<sup>472</sup>.

Correspondingly, child marriages as well as child betrothals — practices that disproportionately affect girls — are prohibited under international human rights law and when performed as a source of economic benefit or labour, such practices are considered analogous to slavery<sup>473</sup>. Marriage below the age of 18 should be allowed only in exceptional circumstances, provided that the child is at least 16 years old and the process is subject to judicial review<sup>474</sup>.

## C) RIGHT TO DECIDE ON THE NUMBER AND SPACING OF CHILDREN

The Convention on the Elimination of All Forms of Discrimination against Women states that women have the same rights as men to decide freely and responsibly on the number and spacing of their children (art. 16 (1) (e)). That right is reaffirmed in the Convention on the Rights of Persons with Disabilities (art. 23 (1) (a)). In order to support the exercise of that right, international law requires States to provide access to family planning as part of health-care services<sup>475</sup>. All individuals, including adolescents, have equal rights to access sexual and reproductive health services and information. That requires particular attention in order to prevent coercion and to remove third-party consent requirements for women and adolescents to access those services<sup>476</sup>.

470. See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), art. 1 (c); Committee on the Elimination of Discrimination against Women, general recommendation No. 21(1994) on equality in marriage and family relations, para. 16; and Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee of the Rights of the Child (2014) on harmful practices, para. 24.

471. See CCPR/C/IRL/CO/4, para. 7; also A/HRC/29/23, paras. 69-70 and 79 (i).

472. See Committee on the Elimination of Discrimination against Women, general recommendation No. 21, para. 36; Committee on Economic, Social and Cultural Rights, general comment No. 16, para. 27.

473. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), arts. 1(d) and 2.

474. See Committee on the Elimination of Discrimination against Women, general recommendation No. 21, para. 36.

475. International Convention on the Elimination of All Forms of Discrimination against Women, arts. 10 (h), 16 (1) (e), 12 (1) and 14 (2) (b); Convention on the Rights of the Child, art. 24 (2) (f); Convention on the Rights of Persons with Disabilities, arts. 23 (1) (b) and 25 (a).

476. Committee on the Elimination of Discrimination against Women, general recommendation No. 21, para. 22; and general recommendation No. 24 (1999) on women and health, paras. 17-18 and 23-28; Committee on the Rights of the Child, general comment No. 4 (2003) on adolescent health and development in the context of the Convention, para. 24; and general comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health, para. 69.

## 5.2. RIGHT TO PRIVACY AND FAMILY LIFE

The Universal Declaration of Human Rights provides that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence (art. 12). Similar provisions are found in the International Covenant on Civil and Political Rights (art. 17 (1)) and in other United Nations instruments<sup>477</sup>. That right has been interpreted broadly to encompass, inter alia, protection against forced evictions, demolition of homes or property, destruction of traditional burial grounds and expulsion of foreigners<sup>478</sup>. The right to family life also applies to persons deprived of their liberty, who should be allowed to communicate with their families, subject only to reasonable restrictions established by law<sup>479</sup>.

The right to family life is reflected in the general preference for preserving the family unit and not separating its members, particularly dependent members. The Convention on the Rights of the Child affirms the right of children not to be separated from their parents against their will, except where necessary for the best interest of the child, such as in cases of abuse or neglect (art. 9 (1)), following a judicial determination to that effect. Children deprived of their family environment should be provided with alternative care (art. 20) and, whenever possible, have contact with their parents (art. 9 (3)). According to the Convention on the Rights of Persons with Disabilities (art. 23 (4)), in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families requires States to ensure the protection of the unity of the families of migrant workers, including by facilitating the reunification of documented migrants with their spouses and dependent children (art. 44). The Convention on the Rights of the Child urges States parties to deal with such requests in a positive, humane and expeditious manner (art. 10).

## 5.3. RIGHT TO EQUALITY IN THE FAMILY

### A) EQUALITY BETWEEN MEN AND WOMEN

Equality between men and women is an essential component of the international protection of the family. This principle is codified in the Universal Declaration of Human Rights (art. 16 (1)) and in the International Covenant on Civil and Political Rights (art. 23 (4)), which affirm the equal rights of both men and women as to marriage, during marriage and at its dissolution, and is also mentioned in the International Covenant on Economic, Social and Cultural Rights<sup>480</sup>.

477. See Convention on the Rights of the Child, art. 16; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 14; Convention on the Rights of Persons with Disabilities, art. 22 (1).

478. See Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2005) on discrimination against non-citizens, para. 28; and general recommendation No. 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 37; CCPR/C/BGR/CO/3, para. 24; CCPR/C/KEN/CO/3, para. 24; CCPR/CO/78/ISR, para. 16; CCPR/C/60/D/549/1993/Rev.1, para. 10.3; also Committee on Migrant Workers, general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 50.

479. See Convention on the Rights of the Child, art. 37 (c); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 17 (5); International Convention for the Protection of All Persons from Enforced Disappearance, art. 17 (2) (d).

480. Committee on Economic, Social, and Cultural Rights, general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights, para. 27.

Achieving equality between men and women in the family is one of the objectives of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention requires States to take measures to modify practices based on stereotyped roles of men and women, including those based on social and cultural patterns of conduct, and to recognize the common responsibility of both men and women in the upbringing and development of their children (art. 5). Moreover, article 16 of the Convention recognizes the equality of men and women in all matters relating to marriage and family relations, including entering into marriage, during marriage and at its dissolution, including the right as parents to decide on the number and spacing of their children, guardianship of their children, choice of family name, profession and occupation, and ownership, administration, enjoyment and disposition of property. Those aspects have been the object of detailed discussion in international jurisprudence<sup>481</sup>.

In recent reports, the Working Group on the issue of discrimination against women in law and in practice has described the many legal, economic, social and cultural barriers that prevent women from achieving full equality in the family context. These include obstacles to economic opportunities for women resulting from reproduction and care functions, as well as State, religious or customary norms that reinforce patriarchal family structures<sup>482</sup>.

The principle of equality between men and women connects with the obligation of States to promote reconciliation between work and family responsibilities<sup>483</sup>. The main international instruments in this area are the International Labour Organization Workers with Family Responsibilities Convention, 1981 (No. 156), and Workers with Family Responsibilities Recommendation, 1981 (No. 165). Convention No. 156 requires States parties to adopt policies aimed at ensuring that persons with family responsibilities can exercise the right to work without discrimination, and to help them reconcile their employment and family responsibilities (art. 3).

## B) EQUALITY OF CHILDREN

International human rights law protects children from being discriminated against within the family on the basis of gender, disability, family status or any grounds and calls upon States to recognize children as rights holders<sup>484</sup>. In addition, family responsibilities should be discharged equally for boys and girls, especially in relation to access to education, food and health care<sup>485</sup>.

Furthermore, States should ensure that children with disabilities enjoy equal rights as other children in relation to family life, including preventing their concealment, abandonment, neglect and segregation<sup>486</sup>. Children born of de facto unions or out of wedlock should also enjoy equal rights in relation to those born to married couples, including the rights to be registered and to have a name<sup>487</sup>. The Committee on the Rights of the Child has called upon

481. Human Rights Committee, general comment No. 28; Committee on Economic, Social, and Cultural Rights, general comment No. 16; Committee on the Elimination of Discrimination against Women, general recommendations No. 21 and No. 29.

482. See A/HRC/26/39, paras. 81-97; and A/HRC/29/40, paras. 34-61.

483. Convention on the Elimination of All Forms of Discrimination against Women, art. 11 (2).

484. Committee on the Rights of the Child, general comments No. 5, para. 21; No. 7, para. 3; and No. 14, para. 16.

485. See Human Rights Committee, general comment No. 28, para. 28.

486. Convention on the Rights of Persons with Disabilities, art. 23 (3).

487. See Committee on the Elimination of Discrimination against Women, general recommendation No. 21, para. 19; and Human Rights Committee, general comment No. 17 (1989) on the rights of the child, para 7.

States to protect children from discrimination based on their own or their parents' or legal guardian's sexual orientation or gender identity<sup>488</sup>.

## 5.4. RIGHT NOT TO BE SUBJECT TO VIOLENCE OR ABUSE WITHIN THE FAMILY

### A) VIOLENCE AGAINST WOMEN

Family or domestic violence is one of the most insidious forms of violence against women and is prevalent in all societies<sup>489</sup>. The Declaration on the Elimination of Violence against Women (see General Assembly resolution 48/104) states that this form of violence includes battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation (art. 2 (a)). In addition, the Declaration puts forward the notion of State due diligence, which requires the State to prevent, investigate and punish acts of violence against women committed by private actors, including in the family context (art. 4 (c)). International mechanisms have also expressed concern about harmful traditional practices as forms of violence against women and girls in the family context<sup>490</sup>.

### B) VIOLENCE AND ABUSE AGAINST CHILDREN, INCLUDING CORPORAL PUNISHMENT

The Convention on the Rights of the Child (art. 19 (1)) requires States parties to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation in the family context. This prohibition includes all forms of abuse of children based on their gender, sexual orientation or disability<sup>491</sup>. According to the Committee on the Rights of the Child, the prohibition encompasses corporal punishment of children, as well as any other cruel or degrading forms of punishment within the family<sup>492</sup>.

Under the Convention, protection of the child against violence or abuse also encompasses sexual abuse (art. 19 (1)). As stated by the Special Rapporteur on the sale of children, child prostitution and child pornography, the family represents the first layer of a child's protective environment and the weakening of family structures put children at risk<sup>493</sup>. At the same time, families confronting poverty or social disruption may promote the exploitation of their children<sup>494</sup>.

### C) VIOLENCE AND ABUSE AGAINST PERSONS WITH DISABILITIES

The Convention on the Rights of Persons with Disabilities protects persons with disabilities from all forms of exploitation, violence and abuse, including within the home (art. 16 (1)). States parties must put in place effective legislative and policy measures in order to ensure that these practices are identified and investigated and that perpetrators are prosecuted (art. 16 (5)).

488. See Committee on the Rights of the Child, general comment No. 15 para. 8; also A/HRC/29/23, para. 79 (h).

489. Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, para. 6.

490. See Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee of the Rights of the Child; also Special Rapporteur on traditional practices, Halima Embarek Warzazi, "Study on traditional practices affecting the health of women and children" (1991); E/CN.4/2002/83; and A/HRC/4/34.

491. See A/HRC/19/41, para. 24; and A/HRC/29/23, paras. 22, 30 and 45.

492. Committee on the Rights of the Child, general comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, para. 5.

493. A/25/48, para. 32.

494. A/22/54, para. 38.

## D) VIOLENCE AND ABUSE AGAINST OLDER PERSONS

Older persons are vulnerable to neglect and to physical, psychological, emotional, sexual or financial abuse within the family.<sup>56</sup> The Madrid International Plan of Action on Ageing recommends specific actions to be taken by States to eliminate such abuse (para. 110). At the regional level, the Inter-American Convention on Protecting the Human Rights of Older Persons provides for the protection of older persons from any violence “within the family or household unit,” including abandonment or negligence. States parties undertake to prevent any form of violence in the family or household unit and to ensure that older persons are treated with dignity (art. 9).

## 6. LIMITATIONS

According to section 4 of general comment No. 9 of the Human Rights Committee, the legal provisions that regulate marriage and the family must be compatible with the full exercise of the other rights guaranteed by the Covenant; thus, for instance, the right to freedom of thought, conscience and religion implies that the legislation of each State should provide for the possibility of both religious and civil marriages. In the Committee’s view, however, the requirement by a State that a marriage celebrated in accordance with religious rites must also be conducted, confirmed or registered under civil law is not incompatible with the Covenant. It is also advisable to establish a minimum age for marriage in order to avoid abuse, particularly of women.

## 7. STATE OBLIGATIONS WITH REGARD TO THE PROTECTION OF THE FAMILY<sup>495</sup>

Analysis of the evolving standards and practice within the United Nations human rights system reveals the existence of a clear international normative consensus, built around the recognition of the family as the fundamental social unit and of the various educational, nurturing and caring functions families perform for their members. That makes families relevant actors in promoting the enjoyment of the basic human rights of their members, including the rights to an adequate standard of living, notwithstanding the primary obligations of States in that regard. From that perspective, the recognition of the family as a social institution in international human rights law concurs with and builds upon the recognition of the role of families in poverty eradication and sustainable development

Derived from this recognition, international norms, starting with the foundational article 16 (3) of the Universal Declaration of Human Rights, affirm States’ obligations with regard to the family. The International Covenant on Economic, Social and Cultural Rights calls upon States to accord the widest possible protection and assistance to families (art. 10), thus signalling that the implementation of State obligations in this area is not limited to formal recognition or non-interference, but also includes positive measures.

In implementing their international obligations, States should adopt a human rights-based approach that is grounded in international standards, as described above. Family policies should be guided by basic human rights principles, including equality and non-discrimination, and by respect for the rights of individual family members, notably those who might find themselves in a situation of vulnerability. A rights-based approach would provide substantive guidance for State intervention in priority areas, such as ensuring universal access to sexual and reproductive health services, including family planning, or promoting work-family balance.

Family policies may take a variety of forms. However, they are conventionally divided into two interrelated categories: explicit family policies, which are designed to achieve specific

495. Vid. UN Doc. A/HRC/31/37, pars. 48-50.



objectives relating to the family as a social institution; and implicit family policies, which, while not addressing the family unit directly, may have bearing on it<sup>496</sup>.

In order to effectively protect these institutions, States parties must adopt legislative, administrative or other measures as they deem appropriate, always respecting the international provisions examined above. In fact, in the case of Covenants, they must report the measures adopted to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, or the relevant committees of the other Covenants.

Reports submitted by the States to the Human Rights Committee must show how the State and other social institutions grant the necessary protection to the family, to what extent the State promotes the activity of these institutions, financially or otherwise, and how it ensures the compatibility of these activities with the Covenant.

## 8. THREATS TO THESE RIGHTS

The right to marry is fully recognized and guaranteed in international texts on human rights, along with other fundamental rights. However, it is subject to constant and serious threats and violations, even in the most protective democratic societies and legal systems. For example, the phenomenon of forced marriage or under-age child marriage is a worrying issue.

In a similar way, the World Conference on Human Rights, held in Vienna on 25 June 1993, warned of discrimination against women in the private sphere, including discrimination in the right to found a family. A great proportion of the discrimination women suffer takes place in their own home and comes from their husband, their family or their community. In certain societies, under-age girls and young women are forced into arranged marriages. In many parts of the world married women have little say in the number of children they will bear, their education and the possibility of getting a job or not.

The Conference additionally stated that, occasionally, this discrimination is based on ancient cultural or religious traditions. Therefore, this is one of the hardest areas to penetrate, and one of the most reluctant to any change. Nevertheless, it is fully understood that a change in this particular sphere is essential in order for women to achieve full equality. For this change to be feasible, States parties must first take all the appropriate measures to eliminate or modify the existing laws or legal instruments related to marriage or the family that promote discrimination against women. Such laws, for instance, include those that do not grant women the same legal rights as men; laws that do not recognize women's full right to property; and laws that do not grant them the same rights regarding the care and custody of their children, either in an existing marriage or after an eventual marital crisis. Secondly, States parties must take steps to actively guarantee that women can exercise the same rights as men, including the right to freely enter into marriage and the right to choose a husband. In accordance with this freedom to choose when and whom to marry, the law must establish a minimum age for marriage.

In addition, as the Committee on the Elimination of Discrimination against Women has pointed out, violence and abuse within the family represent a human rights problem that must also be addressed by States parties.

Moreover, the vagueness of what is understood as marriage and even family is a worrying factor, as these concepts are increasingly being emptied of their natural content, at least in the legislation of some countries. It must be remembered that article 16 of the Universal Declaration of Human Rights, along with several of the Covenants analysed here, identify the family as an institution of natural law. Marriage has always been understood as being constituted by the consent of man and woman, thus founding a stable unit with an intention of permanence. There has never been any doubt that this union may give rise to a generation of children, thus forming a family. This does not exclude the fact that, depending on the

496. Department of Economic and Social Affairs, [“Family policy in a changing world: promoting social protection and intergenerational solidarity”](#), Report of the Expert Group meeting (Doha, 14-16 April 2009), pp. 8-9.



cultural context, there are broader concepts of family that include the grandparents, or even uncles, aunts and cousins. However, the legislations of some countries have strayed from this natural paradigm, by accepting as marriage the union between persons of the same sex and even the adoption of children by these same-sex married couples. It would also be interesting to consider how this type of union and the families that originate from it benefit the child's best interests and his or her right to grow up in a natural environment, as stated in the preamble to the Declaration. Therefore, a natural feature of marriage such as heterosexuality is starting to be considered as not being part of this institution. It therefore becomes necessary to carefully consider how the names of the institutions are used and which are the defining elements of such institutions.

Finally, it would be worth ascertaining whether the family policies of States are aimed at achieving an effective protection of marriage and family or rather contribute to their instability by putting them at risk. The following paradox can be observed: there is agreement on the positive value of these institutions, deeming them worthy of full protection, and defining family as the basic institution of society; yet, at the same time, insufficient means are used to contribute to resolve marital crises and to strengthen the family. In fact, in a large number of countries the tendency is to progressively approve measures that simplify the dissolution of the marital bond instead of providing support to the spouses for the peaceful resolution of their issues and the restoration of their shared life. We also find that, instead of increasing support to pregnant women, access to abortion is simplified. In addition, measures for the reconciliation of work and family life, which are constantly referred to in the international covenants under study, also seem insufficient. The effect of all this is that married couples cannot have as many children as they wish, and their care of the ones they have is hindered, with the subsequent impact on their education and development. It would therefore be advisable to analyse how marriage and family are actually protected and correct the eventual shortcomings found.

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 30,5**

**Subject**

**2.4.10.** Right to an adequate standard of living: introduction. Right to food

**Lecturer:**

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## SUMMARY OF THE TOPIC

The Millennium Goals set by the United Nations in the year 2000 (goal number 2 regarding zero hunger) include the suitable right to food in the framework of an alliance among countries in favour of food security. In laws implemented since the mid 1990s, the right to adequate food is covered in strategies geared not only to the food supply but also that the food meets suitable nutritional qualities and fits the peoples' cultural traditions. First, the right to adequate food contributes to the mental and physical well-being of individuals and collectives alike. Second, the guarantees of this adequate food contribute to improving a fear-free life of dignity. Finally, the recommendations of the United Nations rapporteur on the right to food warns that it is not simply the minimum caloric intake, but that food should encourage a healthy, active lifestyle.

As per the UN rapporteur's recommendations, the right to food must meet the criteria of availability (food must be available regardless of natural and economic resources, and be accessible on the market and in shops), accessibility (aimed at the most vulnerable groups- the elderly, children and persons with disabilities, persons living in remote areas, victims of armed conflicts, imprisonment or natural disasters, for whom it may be more difficult to attain adequate food) and adequacy (the food must be suitable and culturally acceptable, and not go against eating habits and take into account any religious taboos in this matter). It should be borne in mind that the right to adequate food is contemplated as one of the most relevant obligations governments have.

The right to adequate food underlies the compliance of other rights linked to the right to health, life, water, or compliance of adequate housing. First, food is a component that favours the right to health and proper food. Secondly, malnutrition is linked to the risk of death and illness. Third, the right to food cannot be realised if people do not have access to safe water for personal and domestic use. Among them, the lack of basic equipment in the home-kitchen hinders the right to satisfy adequate food.

Finally, in the last part, two cases are provided to illustrate compliance with the right to food. That section covers two aspects. One is an attempt to connect the right to adequate food to other rights. The second aspect pursues the stages in the performance of human rights in the examples provided.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the general and specific competencies described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

### SPECIFIC:

- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives

## LEARNING PROCESS RESULTS

At the end of the topic, the student will be able to:

- Identifying vulnerable groups when analysing human rights programmes and the right to food.

- Justifying the implications of the lack of the right of adequate food in human development.
- Relating the violation of the right to adequate food with the lack of other rights such as participation, the environment or work.
- Identifying innovative experiences in the field of the right to adequate food.
- Formulating actions and interventions in the line of the resolutions proposed by the UN.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

International Standards: on the right to food:

General comment n° 12 CESCR: The right to adequate food (art. 11) 12/05/99 (UN Doc. E/C.12/1999/5)

Voluntary guidelines to support the progressive realization of the right to adequate food in the context of national food security, Adopted by the 127th Session of the FAO Council, November 2004.

FAOLEX Database: [FAOLEX](#) is a comprehensive and up-to-date legislative and policy database, one of the world's largest electronic collection of national laws, regulations and policies on food, agriculture and natural resources management. Users of FAOLEX have direct access to the abstracts and indexing information about each text, as well as to the full text of the legislation and policies contained in the database.

Special Rapporteur on the right to food

FAO :

Practical experiences (UNDP): [United Nations Development Programme](#)

Practical experiences (FAO):

- (2015) [FAO Policy on Indigenous and Tribal peoples](#). Rome: FAO
- (2015) [Nutrition and education in primary schools](#). Rome: FAO.

ATD Quart Monde et Franciscans International, *Faire des droits de l'homme une réalité pour les personnes qui vivent dans l'extrême pauvreté – Manuel pour la mise en œuvre des Principes directeurs des Nations Unies sur l'extrême pauvreté et les droits de l'homme*, Genève, 2015.

FAO (2015) FAO Statistical Pocketbook 2015. [World Food and agriculture](#). Rome: Food and agriculture Organization of the United Nations.

## METHODOLOGY

1. Expository method. Reading the practical experiences on the UNDP (United Nations Development Programme) website describing the practical experiences of combating extreme poverty.
2. Case study:
  - a. State the titles of potential projects that fit into the context of the student who has carried out the project. Think if there are similar needs in the student's own context.
  - b. Explain which goals can be achieved and what needs could be solved.

- c. Think of national and transnational actors who could be involved in solving the problems of extreme poverty.
- d. Of particular interest will be any projects that involve the students' professional perspective and incorporate actors related to their work context (laws, journalism or communication and social work).

## SCHEDULING OF LEARNING ACTIVITIES

1. **Choice of one of the four thematic areas proposed in the previous section** (Indigenous peoples; The role of the FAO in investing in agriculture; Biodiversity and ecosystem services, School food). to develop an example applied in the setting
2. **Reading basic texts and practical experiences proposed in each section.** The portfolio will show the theoretical aspects and key concepts of the section as well as an example of the non-compliance of the right in the geographical area near the one interviewed.
3. **Potential student meeting to exchange opinions on their work** in the forum, wiki or blog. Mainly, questions relating to the diagnostics run by the students.
4. **Presentation of a news item or example that permits reflecting on the right to an adequate standard of living.** In the last point of this paper, we find two experiences related to violation of the right to an adequate standard of living as well as the stages needed to identify rights violation, the role of the institutions and the accountability.

## OUTLINE OF THE PAPER PRESENTED

The paper presented shall be no more than two or three pages in length. Mainly, the purpose is to get the students to reflect on a problem involving the right to adequate food from the human rights-based approach. Some examples that may prove useful in solving this activity can be found in the last section of the paper or in the book published by the Mouvement International ATD Quart Monde and Franciscans International (2015) listed in the bibliography.

1. **Talk to the local population. An introduction on the relevance of the paper being presented may be done in this section.** The violation of the right to food and its relation with the violation of other rights shall also be identified. This may relate to the rights to health, social protection and adequate standard of living.  
  
At this stage of the paper, the students shall characterise the group in question. Some of the relevant data may refer to its historic origin, its belonging to some minority that is subject to some type of social discrimination or its particulars. Some of the examples may be found in section 4 herein giving actions on social groups with discrimination problems.
2. **Advocate grouping people for the purpose of sensitising and exchange of information.** This section shall provide a more detailed description of the population group subject to a violation of their human rights. This will mainly involve giving a brief description of any actions by this group that may be causing a claim from a rights approach. If the student cannot find information on this aspect, he should reflect on the reasons why the group does not exercise this defence.
3. **Identify potential partners and build potential alliances.** In this section, students must identify social groups that have made similar defences in other similar settings or population groups that have taken similar paths of legal defence in other contexts. Furthermore, in reference to the group affected by the violation of the right to food, the students must specify if there are any national or international alliances. If there are none, or they are unknown, the students must reflect on why this is the case.

4. **Try to systematise knowledge and share it with local authorities.** In this section, the students shall look for any precedents that can be used to claim their rights. The precedents may refer to a normative recognition, the decision taken by international and national courts on the violation of their rights or the recognition by other pertinent international bodies.
5. **Improve social conditions of the groups affected.** In this section, the students shall identify the main hindrances to improving the living conditions of these groups as well as the actions taken by the public powers to improve their problems. Furthermore, this section may also include whether some international decision has taken steps aimed at improving the living conditions of this population group.
6. **Establish adequate spaces for participation.** In this section students will make a list of follow-up activities by national and international public powers to improve their living conditions. For example, if there is a court sentence or international declaration on the problem concerned, they should include the actions the public powers take to improve their situation.

Note: The problems posed by the students do not necessarily need to feature all the stages of defence of the human rights approach.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1 Reading the topic	8 hours	Self-test
Activity 2 Bibliography / bibliographic cards	8 hours	Portfolio
Activity 3 Case study	8 hours	Portfolio
Activity 4. Proposal of the human rights approach in analysing the problem posed	12 hours	Portfolio
Activity 5. Sharing via blog or video conference	Exposition: 20 m Discussion: 10 minutes Attendance and participation on other expositions: 1h	Public defence and writing

## EVALUATION SELF-TEST

1. Are indigenous peoples vulnerable in the development of the right to adequate food?
  - a. No, indigenous peoples are in no case among those who are vulnerable to adequate food.
  - b. Yes, insofar as the right to adequate food includes elements that form part of their cultural distinction and historical baggage.
  - c. Yes, to the extent that their traditional nomadic nature hinders them from adapting to a new economic context.
  - d. There is no answer to this question.
2. Which of the following aspects links agricultural policy to the right to adequate food?
  - a. The right to adequate food is situated independently from agricultural policy.
  - b. Agricultural policy is needed to ensure a suitable volume of food for the most vulnerable population.
  - c. Agricultural policy must comply with any aspects linked to production and the sustainability of its production.
  - d. Agricultural policy is not one of the lines of action contemplated by the FAO.
3. Which of the following examples does not meet some criterion of the policy of biodiversity?
  - a. The startup of a rice plantation involves the elimination of native local species.
  - b. The creation of agricultural businesses that take into account native local species and respect for the natural landscape.
  - c. Multiplication of amount of cattle in an environment useful for cattle farming and crops alike.
  - d. Introducing new natural species because of their being more competitive than the ones the currently existing.
4. Actions in the field of education have an effect on the right to adequate food to the extent that...
  - a. The educational actions are only carried out with students who go to the school.
  - b. Intervention on aspects of food only influences the state of people's health.
  - c. To the extent that the actions carried out at the educational centre are incorporated by families, influence their learning or their learning habits, such as lowering absenteeism.
5. To what extent are cultural aspects considered as a basic element in guaranteeing the right to adequate food?
  - a. Cultural elements such as how to cook or what foods to use are considered superfluous.
  - b. The cultural tradition in terms of food is considered an element that reflects the very conscience of the social group being intervened.
  - c. Cultural diversity is an element that clearly hinders integration into other, broader social groups.



## SELF-TEST

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Question	Correct response
Question 1	b
Question 2	c
Question 3	a,c and d
Question 4	c
Question 5	b

## SUBJECT 2.4.:

## 2.4.10 RIGHT TO AN ADEQUATE STANDARD OF LIVING:

### INTRODUCTION. RIGHT TO FOOD

#### 1. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING <sup>497</sup>

##### Article 25 of UDHR

"1. Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

##### Article 11 of CESC

"1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent."

Article 25 of UDHR guarantees a social right that — in a way — is an umbrella entitlement: the right to an adequate standard of living. In addition to the right to social security, this right also comprises the following rights:

- The right to adequate food;
- The right to adequate clothing;
- The right to housing;
- The right to health.

Article 11 of CESC covers the core of the right to an adequate standard of living (food, clothing and housing) and recognizes the right to continuous improvement of living conditions. States parties to the Covenant commit themselves to "take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent". Under article 11 of CESC, the CESC Committee has also derived the right to water.

Hunger and poverty in the world fly in the face of the right to an adequate standard of living. The right should therefore form the basis of all national and international hunger and poverty-reduction plans and strategies.

#### 2. THE RIGHT TO CLOTHING

Governments must respect the way people, particularly members of minorities and indigenous people, dress, and must protect them against arbitrary or discriminatory dress codes, harassment and similar interferences by State and non-State actors. Moreover,

497. The topic was prepared with sections taken verbatim from the Inter-Parliamentary Union and Office of the High Commissioner for Human Rights, Human Rights Handbook for Parliamentarians N° 26, Geneva, 2016, pp. 191-195.

Governments must make adequate clothing available to those in need, including the poor, detainees, refugees and internally displaced persons. The type of clothing depends on local — cultural, social and climatic — conditions. At the very least, poor people are entitled to clothing that enable them to appear in public without shame.

### 3. RIGHT TO FOOD

#### A. INTRODUCTION

"1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food...

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."

International Covenant on Economic, Social and Cultural Rights, 1966 (article 11)

Although the international community has often reaffirmed the importance of respecting fully the right to adequate food, there are still considerable gaps in this area between international law standards and the situation actually prevailing in many parts of the world.

More than 840 million people throughout the world are chronically hungry, and millions of people suffer from famine caused by natural disasters, civil strife, wars and the use of food as a political weapon. Moreover, the CESCR Committee has observed that "malnutrition and undernutrition and other problems which relate to the right to adequate food and the right to freedom from hunger also exist in some of the most economically developed countries"<sup>498</sup>. The problem is therefore global, and needs the international community's full attention.

In 1996, the World Food Summit set the goal of halving the number of undernourished people by 2015; and the first Millennium Development Goal consists in halving both the proportion of people living on less than a dollar a day and those who suffer from hunger by the same year.

While some developing countries have succeeded in reducing hunger steadily, the overall picture remains grim. According to FAO estimates, although the proportion of people who are chronically undernourished continued to fall slowly between 1995-1997 and 2000-2002, the number of undernourished people actually increased by 18 million. In the period 2000-2002, it was estimated that some 852 million people were undernourished worldwide (9 million in industrialized countries, 28 million in countries in transition and 815 million in developing countries)<sup>499</sup>.

Further data on this topic can be found in the United Nations Food and Agriculture Organisation (FAO)'s statistical yearbook, which includes information on economics, work and investment in agriculture. In addition, the data projected by this organisation is related to climate change, crop yields, economic and political stability, malnutrition and the availability, access and use of food (FAO, 2015). Some data needed to interpret this right make reference to the following aspects:

498. CESCR, General comment No. 12 (1999).

499. Food and Agriculture Organization of the United Nations, *The State of Food Insecurity in the World 2004*, Rome, 2004.

- **Availability of food.** Having a sufficient food supply is necessary but not sufficient to ensure adequate access to individuals. Overall, the trends in food production have been positive. African has shown the lowest growth rates in the last 20 years. In some countries, food produced from roots, tubers and cereals makes up more than 80% of the food supply. Among them are Bangladesh, Lesotho, Madagascar, Afghanistan, Ethiopia, Mozambique, Benin, Laos and Togo.
- **Access to food.** Access to food is determined by income, food prices and availability of households and individuals to have access to these goods. The food price index went up between 2000-2020 in countries such as Mauritania, Haiti, Nepal, Senegal, Benin, Burkina-Faso and Armenia.
- **Utilisation of food.** The availability of nutrients in food is seen to be a relevant indicator of the satisfaction of wholesome food. Nutrients are an indicator of a healthy diet, respect for the environment, access to healthcare, a varied diet and the distribution of food. Thus, the number of underweight children younger than 5 occurs mainly in countries such as East Timor, Niger, Yemen and Bangladesh, where such rates are above 40%.

At the same time, the lack of food is related to the lack of schooling. The main results obtained point to the existence of countries with rates higher than 55%. Among them, the FAO yearbook includes countries such as Somalia, Tanzania, Pakistan, Mozambique and Ethiopia. Finally, the problems in access to food are related to health problems. Specifically, the number of minors younger than 5 with diseases is linked to diseases such as tuberculosis. Some of the main examples affect countries such as Southern Sudan, Djibouti, East Timor, Mali, Burkina-Faso and India.

In countries that have succeeded in reducing hunger, GDP per capita has increased more than five times faster (at 2.6 per cent per annum.) than in countries where undernourishment has risen (0.5 per cent per annum). The most successful countries also display faster agricultural growth, lower rates of HIV/AIDS infection and slower population growth.<sup>500</sup>

## B. DEFINITION OF THE RIGHT TO FOOD

The right to adequate food is inseparable from the inherent dignity of the person and indispensable to the enjoyment of other human rights.

A wide variety of international instruments address the different dimensions of the right to adequate housing<sup>501</sup>. In reaction to the World Food Summit organized by FAO in 1996, the Committee on Economic, Social and Social Rights issued its general comment No. 12 (1999), which defines the right to food: "The right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement". The Special Rapporteur on the right to food, Jean Ziegler (2000), defined the right to food as "the right to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear".

500. Ibid.

501. Article 2 and 11 of International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention of the Rights of the Child (CRC), article 12 and 14 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Article 6 of the International Convention on Civil and Political Rights (CCPR), article 24 and 27 of the Convention on the Rights of the Child (CRC), article 25 and 28 of the Convention on the Rights of Persons with Disabilities (CRPD), Article 20 of the Convention relating to the Status of Refugees, article 20 of the Convention relating to the status of Stateless Persons, Food Aid Convention (1999), Universal Declaration on the eradication of Hunger and Malnutrition (1974), article 8 of the Declaration on the Right to Development, the four Geneva Conventions and their two Additional Protocols

In 2004, FAO's member countries adopted the Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines), providing practical guidance to States in their implementation of the right to adequate food. Articles 55 and 56 of the UN Charter are relevant to the Right to Food Guidelines<sup>502</sup>.

### C. NORMATIVE CONTENT OF THE RIGHT TO FOOD

The right to food is an inclusive right. It is not simply a right to a minimum ration of calories, proteins and other specific nutrients. It is a right to all nutritional elements that a person needs to live a healthy and active life, and to the means to access them. The holders of the right to food are individuals. This means, in practice, that every person is entitled to this fundamental human right.

The right to food encompasses two separate norms contained in Article 11 of the ICESCR: the right to adequate food and the fundamental right of everyone to be free from hunger. It is not the same as a right to be fed and the right to safe food.

It is also different from food security and food sovereignty. The term 'food security' is an attempt at giving a vision on food production and the possibility of accessing a healthy, safe diet. This position has implications regarding social factors such as access to or distribution of food. However, food sovereignty refers to the connection between food production and the control carried out by the communities. The term 'food sovereignty' refers to the global alliance of social movements (farmers, producers, consumers, or activities) who have environmental sustainability as goal.

It is important to emphasize certain core elements of the right to food. Food must be available, accessible and adequate:

**Availability** requires on the one hand that food should be available from natural resources and that on the other hand, it should be available for sale in markets and shops.

**Accessibility** requires economic and physical access to food to be guaranteed. Economic accessibility means that food must be affordable. Physical accessibility means that food should be accessible to all, including to the physically vulnerable, such as children, the sick, persons with disabilities or the elderly, for whom it may be difficult to go out to get food. Access to food must also be guaranteed to people in remote areas and to victims of armed conflicts or natural disasters, as well as to prisoners.

No acts should disrupt access to adequate food (for instance, evicting people from their land arbitrarily, introducing toxic substances into the food chain knowingly, or, in situations of armed conflict, destroying productive resources and blocking the provision of relief food supplies to the civilian population).

It must be ensured that all, and particularly women, have full and equal access to economic resources, including the right to inherit and own land and other property, and access to credit, natural resources and appropriate technology.

**Adequacy** (and acceptability) means that the food must satisfy dietary needs, taking into account the individual's age, living conditions, health, occupation, sex, etc. Food should also

.....

502. Article 55: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56: All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

be safe for human consumption and free from adverse substances, such as contaminants from industrial or agricultural processes, including residues from pesticides, hormones or veterinary drugs. Adequate food should also be culturally acceptable. For example, aid containing food that is religious or cultural taboo for the recipients or inconsistent with their eating habits would not be culturally acceptable.

The **right to adequate food** shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients. The **right to adequate food** will have to be realized progressively. However, States have a core obligation to take the necessary action to mitigate and alleviate hunger even in times of natural or other disasters.

#### D. STATE PARTIES' OBLIGATIONS

The nature of the legal obligations of States parties are set out in article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

A framework law should be adopted as a key instrument for drawing up and implementing national strategies on food and food security for all. In reviewing the constitution and national laws, and in aligning them with international human rights law on the right to food, particular attention should be paid to the need to prevent discrimination in relation to the access to food or to related resources. The principal obligation is to take steps to achieve progressively the full realization of the right to adequate food. This imposes an obligation to move as expeditiously as possible towards that goal.

The Committee on Economic, Social and Cultural Rights in General Comment No. 12 also defined the obligations that States parties have to fulfill in order to implement the right to adequate food at the national level. These are as follows:

**The obligation to respect** requires States Parties to refrain from taking any measure – through actions, policies or the failure to act of its own agencies and public officials – that may result in preventing or denying individuals or groups to provide food for themselves.

**The obligation to protect** requires the adoption of specific legislative or other measures to prevent enterprises or individuals from impairing people's access to adequate food. The obligation to protect entails enactment of consumer protection laws and action if, for instance, a company pollutes water supplies or if monopolies distort food markets or the seed supply.

**The obligation to fulfil (facilitate)** means the State must pro-actively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Facilitating the realization of the right to food requires more far reaching measures on the part of the government in that it has actively to seek to identify vulnerable populations and implement policies and programmes to improve these people's access to food and their capacity to feed themselves. Whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to **fulfill (provide)** that right directly. This obligation also applies for persons who are victims of natural or other disasters.

The obligation to fulfil the right to food by providing food directly will only apply at times and for persons or groups that are not able to exercise their right to food by their own means. The obligation to provide also includes the obligation to ensure, as a minimum, that no one in a country suffers from hunger.

To guarantee and strengthen people's access to and use of resources and means of livelihood, measures should be taken to ensure that:

- People have adequate wages or access to land, respectively to buy or produce food;
- Vulnerable groups are identified and policies are implemented to provide them with access to adequate food by enhancing their ability to feed themselves (for instance,

through improved employment prospects, an agrarian reform programme for landless groups or the provision of free milk in schools to improve child nutrition).

Measures must be taken to respect and protect self-employment and remunerated work that ensures decent living conditions for workers and their families, and to prevent denial of access to jobs on the basis of gender, race or other discriminatory criteria, since such discrimination would affect the ability of workers to feed themselves.

Another important measure consists of maintaining land registries. The Government should devise adequate farmer-support programmes with particular emphasis on those most in need, for example by securing indigenous peoples' rights to their ancestral lands, empowering women and supporting small-scale producers and peasants in remote locations (such as mountains or deserts).

Food should be provided whenever individuals or groups are unable to feed themselves for reasons beyond their control, including natural or other disasters (forms of support might include direct food distributions, cash transfers or food-for-work programmes).

In a number of its recent General Comments, the CESCR considered that the obligation to fulfil also incorporates an obligation to promote. The state should promote awareness of human rights among its own agents and private actors. In recent years, the need to clarify state obligations and responsibilities for actions taken by themselves and also by other actors outside their borders has become stronger.

Like other economic, social and cultural rights, the obligation of States to fulfil and protect the right to adequate food is subject to progressive realization, which means that States are not required to achieve its full realization immediately, but must take measures to achieve it progressively by maximum use of available resources. However, the following obligations are not subject to progressive realization, and States have a duty to take immediate action in respect of them:

- Refraining from any discrimination in relation to access to food and to means and entitlements for its procurement on the grounds of race, colour, sex, language, age, religion, political or other opinion, national or social origin, property, birth or other status.;
- Providing basic minimum subsistence (thereby ensuring freedom from hunger);
- Avoiding retrogressive measures, i.e. deliberate measures which result in the deterioration of current level of fulfilment of the right to food.

The Covenant requires that States take whatever steps are necessary to ensure that everyone is free from hunger and as soon as possible can enjoy the right to adequate food but they have a margin of discretion in choosing the ways and means of implementing the right to adequate food.

In accordance with the indivisibility of human rights, some rights are underlying determinants of the right to food;

- **The right to health:** Nutrition is a component of both the right to health and the right to food.)
- **The right to life:** When people are not able to feed themselves and face the risk of death by starvation, malnutrition or resulting illnesses, their right to life would also be at stake.)
- **The right to water:** The right to food cannot be realized if people lack access to safe drinking water for personal and domestic uses
- **The right to adequate housing:** When a house lacks basic amenities, such as for cooking or storing food, the right to adequate food of its residents may be undermined.



## 4. THE FAO'S EXPERIENCE WORKING WITH THE RIGHT TO ADEQUATE FOOD

The topics considered by the FAO (United Nations Food and Agriculture Organization) include five that involving the right to adequate food: 1. Indigenous peoples. 2. Investment in agriculture 3. Biodiversity and ecosystem services. 4. Issues on school food.

### 4.1. INDIGENOUS PEOPLES:

Indigenous peoples include more than 390 million people across 70 countries. The diversity of traditions and customs make it hard to find a universally accepted definition of indigenous peoples. In terms of the right to adequate food, indigenous peoples have contributed to managing ecosystems by practices that are tied to culture and history. In contrast, the FAO has identified the indigenous groups that have faced the greatest hardships in satisfying their rights regarding adequate food. In particular, the exercises proposed shall attempt to include the rights to adequate food with the FAO recommendations in terms of the possibility of voluntary election of their cultural distinction (including issues linked to language, social organisation, religion or values), consciousness of self-identity and preventing the experience of subjugation, marginalisation, eviction, exclusion or discrimination.

The indigenous peoples that extend through Africa include Berbers or Amazigh (Algeria or Morocco), Peul (Niger) Tuareg (Mali), Mbroco (Central Africa), Pygmies (Cameroon and Gabon), pastoralists (Ethiopia), Maasai (Tanzania), Batwua (Burundi) and the indigenous peoples throughout Burkina Faso, Chad or the Congo.

### 4.2. THE ROLE OF THE FAO IN INVESTING IN AGRICULTURE

Eradication of issues regarding the lack of a right to adequate food or poverty is related to the lack of investment in agriculture. Specifically, regions with widespread hunger and poverty are conditioned by the lack of investment in agriculture in recent decades. Noteworthy regarding the FAO's investment is how food production is linked to investment in agriculture and in environmentally sustainable products

FAO's activities to encourage investment in agriculture and rural development include:

- Technical and economic advice to governments on policies and legislation that influence public and private investment
- Capacity development of governments to design and execute multi-sector and multi-partner investment strategies aligned with their own priorities
- Assistance for countries to design, implement and evaluate investments, not only for agriculture and rural development, but also to meet the food and nutrition needs of their citizens
- Technical support to partner International Financing Institutions to leverage additional investment
- Support to the development and implementation of the countries' agricultural, food security and nutrition investment strategies and plans under the Comprehensive Africa Agriculture Development Programme (CAADP) of the New Partnership for Africa's Development (NEPAD)
- Analysis of trends and impacts of foreign agricultural investment in developing countries
- Support to international consultations to develop principles for responsible agricultural investment.

### 4.3. ECOSYSTEM SERVICES AND BIODIVERSITY

One of the actions for providing a right to adequate food is the preservation of ecosystem services and the biodiversity of the environment. The actions included in the preservation of ecosystem services include preservation of an environment capable of providing nutritious food, clean water, pollination of crops, soil formation, disease prevention, and the capacity to offer different types of benefits (cultural, recreational and spiritual) to the collective whole. Furthermore, preservation of the biodiversity of species or of different ecosystems so that they can protect and manage themselves sustainably.

- Adequate management of agriculture and biodiversity in the environment provides landscapes of aesthetic value. Some of the negative effects of a lack of biodiversity include homogenisation of the landscape and a loss of resistance to plagues and climate change.
- The right to adequate food is intimately related to the maintenance of woodlands. Environmental conservation also helps to keep aquatic ecosystems healthy and to provide clean water. In contrast, the absence of a right to adequate food is conditioned by indiscriminate actions toward the environment (such as deforestation).
- Sustainable management of cattle farming is related to the stocking rate for the surroundings. Specifically, an excess of animal excrement leads to contamination of the water, thereby jeopardising the biodiversity of the environment.
- Sustainable management of fishing involves safeguarding against the destruction of aquifers and the destruction of natural habitats of numerous species conditions the food chain and destroys natural habitats.

### 4.4. SCHOOL FOOD

The FAO has geared interventions aimed at childhood, centred on food and nutritional matters. The actions incorporated in this topic are geared to providing adequate food and to teaching the knowledge and skill needed to choose the correct foods. This way, the main objectives focus on the prevention of diseases during childhood and throughout the entire life cycle.

Highlighted below are some of the FAO's interventions at schools:

- **Strengthen the role of schools:** FAO recognizes school children as a priority for nutrition interventions and views the school as an ideal setting for teaching basic skills in food, nutrition and health. In this framework, school acts as a nexus between families and the surrounding community.
- **Food and nutrition education:** Strengthen classroom learning with practical activities in the community. They carry out hands-on activities to experiment and practice and participate actively in learning about food, diet and health.
- **School gardens:** "Learning" gardens that produce a variety of nutritious foods and include educational goals can help students, school staff and families make the connection between growing food and good diets. Gardening activities, combined with eating the foods produced and learning about healthy dietary practices, can help promote better nutrition and raise environmental awareness.
- **School food.** Providing healthy meals and snacks in schools improves children's health and nutritional well-being, enabling them to grow well and learn well. In food insecure communities, school feeding programmes help fight malnutrition and help keep children in school. They can also improve incomes and food security when locally produced foods are supplied to the school.

## 5. STEPS TO PROTECT PERSONS LIVING IN EXTREME POVERTY FROM A HUMAN RIGHTS-BASED APPROACH

Based on the handbook written by ATD Fourth World and Franciscans International (2015). This section relates the six stages for the defence of the Human Rights-based Approach (HRBA) in two cases involving the violation of economic, social and cultural rights in Kenya and the indigenous community of Xákmok Kásek in Paraguay. Finally, a more detailed explanation of the stages for the defence of the HRBA can be found in the chapter on the right to an adequate standard of living.

### Constitutional Petition N°. 2 of 2011 (Garissa)

**Date of the Ruling:** Jun 23 2011

**Forum:** Kenyan High Court

**Type of Forum:** Domestic

This first case has been considered a precedent in the defence of human rights in Kenya, as the courts in Kenya had not ruled on the impact of forced evictions. Mainly, what is new about this resolution involves justification of the human rights based approach in aspects regarding medical attention, the right to information, the right to fair administrative decisions, the right to food and protection from hunger and the right to potable water.

Advocates hailed this decision as establishing an important normative precedent for the promotion of economic and social rights through national courts including areas not previously ruled on like the impact of forced evictions on the right to health care services, right to information, right to fair administrative decision, freedom from hunger and the right to clean and safe water. The Court broke new ground by ordering the reconstruction of demolished homes and buildings as a remedy for forced eviction cases and by awarding punitive damage<sup>503</sup>. It also has significant ramifications with regard to ensuring government accountability in administrative decisions. The ruling is likely to hold significance beyond Kenya's borders<sup>504</sup>.

*Table 1. Stages for the defence of the human rights based approach in the case of violating economic, social and cultural rights in Kenya.*

<b>Step 1.</b> Talk to the local population so as to gather information, meet the most disadvantaged groups and understand the hardships they must face.	<ul style="list-style-type: none"> <li>Know and denounce the detection of cases regarding more than 1000 people turned out of their homes. In some cases, the people were evicted violently from houses they had lived in since 1940.</li> </ul>
<b>Step 2.</b> Advocate grouping persons together so as to sensitise and exchange information.	<ul style="list-style-type: none"> <li>As a human rights organisation based in Nairobi, Hakjamii leads the defence of human rights in this case.</li> </ul>
<b>Step 3.</b> Identify potential partners and build potential alliances.	<ul style="list-style-type: none"> <li>Seek out national and international partners to support the rights of people evicted from their homes. This defence includes the ESCR-Net Enforcement Working Group.</li> </ul>

503. Ibid.

504. Okoth, Dann, "[Groups seek inclusion in community land case](#)", Special Report, Community at Crossroads, 2011.

<b>Step 4.</b> Try to systematise knowledge and share it with competent local authorities.	<ul style="list-style-type: none"> <li>• The Supreme Court recognised the interdependence of civil, political, economic and social and cultural rights.</li> <li>• Justification of the problems experienced on the basis of international jurisprudence or existing covenants. In this case, the economic, social and cultural rights of the African Court, or the International Covenant on Economic, Social and Cultural Rights.</li> </ul>
<b>Step 5.</b> Improve the social conditions of the affected groups	<ul style="list-style-type: none"> <li>• Issue a cautionary measure by the Supreme Court, addressed to rebuilding their homes and lands as well as providing alternative housing or installations, among which are schools.</li> <li>• Compensation for damage of 200,000 kes (approx. \$2000 USD).</li> <li>• Identify the main obstacles, counteract the dominant stereotypes and make our opinion known to opinion leaders.</li> </ul>
<b>Step 6.</b> Establish suitable spaces for participation with the local authorities.	<ul style="list-style-type: none"> <li>• Order the reconstruction of the houses and buildings demolished by the Supreme Court of Kenya to solve the cases of forced eviction and grant indemnities for damages.</li> <li>• Ensure the accountability of the government with respect to its administrative decisions.</li> <li>• Follow up on the government's compliance of these norms.</li> </ul>

Source: own work, based on Oketh, Dann, "Tiny Garissa community wins legal battle over land ownership", The Standard, 2 December 2011.

### Case of the Indigenous Community Xákmok Kásek v. Paraguay

**Date of the Ruling:** Aug 24 2010

**Forum:** Inter-American Court of Human Rights

**Type of Forum:** Regional

The next case claims the right to life, water, food and education on behalf of the **Indigenous Community Xákmok Kásek**. This community has been claiming for the right to territory, the claim joining others made by the indigenous communities of Paraguay. The ruling of the International Court of Human Rights on the existence of a right to property in some circumstances in which no official deed to the property exists. Mainly, it is justified in cases in which the survival of a community depends on its ties with the land.

This case confirmed the claim of an indigenous community which has been fighting for its land rights for over two decades, joining the claims of other indigenous communities in Paraguay, who have also been expelled from their territory. The decision issued by a regional court provides legal tools for communities and human rights defenders fighting for respect for the human rights of indigenous communities in Paraguay. This case strengthens the Inter-American Court's position regarding the existence of a right to property, under certain circumstances, regardless of whether there is an official title. Following the lines of its own case law, the Court established a relationship between land and survival of a community when the land is used with economic, cultural, social and religious purposes. The Court also recognized a relationship between the right to life and the rights to water, education, and food, among others.

*Tabla 2. Stages for the defence of the human rights based approach in the case of violating economic, social and cultural rights of the Xákmok Kásek community in Paraguay.*

<p><b>Step 1.</b> Talk to the local population so as to gather information, meet the most disadvantaged groups and understand the hardships they must face.</p>	<ul style="list-style-type: none"> <li>• Sale of lands to private individuals where indigenous communities lived.</li> <li>• Violation of the indigenous community's following rights:</li> <li>• Community property;</li> <li>• Judicial guarantees;</li> <li>• Judicial protection;</li> <li>• Protection of life;</li> <li>• Personal integrity, recognition of legal personality;</li> <li>• The rights of the child;</li> <li>• The right to non-discrimination</li> </ul>
<p><b>Step 2.</b> Advocate grouping persons together so as to sensitise and exchange information.</p>	<ul style="list-style-type: none"> <li>• The Indigenous Community Xákmok Kásek, originally from the Chaco Paraguayo area, filed a claim with the Inter-American Court of Human Rights to recognise their traditional homeland.</li> <li>• The claim joined those of other indigenous communities in Paraguay who have been expelled from their land.</li> </ul>
<p><b>Step 3.</b> Identify potential partners and build potential alliances.</p>	<ul style="list-style-type: none"> <li>• Recognition by the Inter-American Court on the area claimed by the community.</li> <li>• The claim joins those of other indigenous communities in Paraguay who have been expelled from their land.</li> </ul>
<p><b>Step 4.</b> Try to systematise knowledge and share it with competent local authorities.</p>	<ul style="list-style-type: none"> <li>• Violation of the right to collective property.</li> <li>• The public powers must take into account in their decisions the consequences that affect the use and enjoyment of the lands by the indigenous community.</li> <li>• Recognition in future sentences of everything that binds territory to cultural identity.</li> <li>• Recognition of the violation of rights linked to not having enough land: the impossibility of self-sufficiency and self-sustainability, insufficient state-granted access to water, education, healthcare and food violate the community's right to live with dignity.</li> <li>• Recognition of the relation between the community's traditional territory and its cultural identity.</li> <li>• The situation of poverty and the ensuing loss of culture and the wait for a solution are recognised as violations of the right to personal integrity.</li> </ul>
<p><b>Step 5.</b> Identify the main obstacles.</p>	<ul style="list-style-type: none"> <li>• The State does not comply with the sentence and does not return the lands to the indigenous community.</li> <li>• The State takes a stance unilaterally and blocks input from the community.</li> </ul>
<p><b>Step 6.</b> Establish suitable spaces for participation with the local authorities.</p>	<ul style="list-style-type: none"> <li>• Settlement by the Inter-American Court of the restitution of 10,7000 acres of land identified with the participation of the community, the publication of the Court's ruling and a public act acknowledging the State's responsibility.</li> <li>• Immediate steps to be taken by Paraguay to protect economic and social rights, including water, medical care and food and the creation of a community development fund.</li> <li>• Pressure from the Inter-American Court of Human Rights to ensure compliance with the indigenous community's human rights.</li> </ul>

Source: Own work based on <https://www.escr-net.org/es/node/365573>

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60**

**Subject**

**2.4.11. Right to adequate housing**

**Lecturer:**

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## SUMMARY OF THE TOPIC

The right to adequate housing must offer more than 'four walls and a roof'. Once past this restrictive interpretation, first and foremost it must be considered as the right to live somewhere in safety, peace and dignity. The actionability of this right should ensure that all the obligations are met that derive from its normative content. The conditions and characteristics of the content of this right i.e., for a particular type of housing to be considered 'adequate', are defined by the United Nations Committee on Economic, Social and Cultural Rights, mainly in General Comment No. 4 (1991) on the right to adequate housing and in General Comment no. 7 (1997) on forced evictions.

In this topic we present the nature of the right, the main situations in which it is violated or infringed and their consequences for special attention groups. Finally, the normative content of the right is described along with its limits.

In this topic, the students shall have a deeper understanding of the realisation of the right by identifying the main challenges facing the Maghreb.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

## GENERAL:

- **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

## SPECIFIC:

- Choose a specific situation in a university setting and plan the educational activity from a competency-based approach centred on learning human rights.
- Select and prepare valid measuring instruments to check the degree of achievement of the results expected in human rights learning, acknowledging their advantages and disadvantages for effective use during the evaluation process.
- Rigorously and precisely schedule the evaluation of competency-based human rights learning while attending to criteria of validity and reliability in the process.
- Suitably identify, interpret and apply the international, regional and national norms on human rights applicable to the different assumptions posed in their respective disciplines and professional spheres.
- Define and accurately distinguish who the possessors of rights are and the holders of obligations in relation to each human right in a particular situation.
- Identify the specific obligations of respect, protection and realisation of each human right and the minimum normative content needed for its realisation and for questioning its fulfilment in a particular situation.
- Design and orient a service learning project linked to the defence or promotion of human rights as regards the field of knowledge
- Assess, evaluate and reflect on the processes and results of the action carried out in contact with reality and the learning acquired by the students on service learning projects.
- Evaluate the needs and possible options by means of participatory methods to guide an intervention and management strategy aimed at ensuring that the activities undertaken fit the desired outcomes (results-based participatory management models).
- Identify, interpret and act to solve risk situations.

## REQUIRED READINGS AND RESOURCES

- 1) Presentation of the Topic
- 2) Committee on economic, social and cultural rights: General comment no. 4: the right to adequate housing (art. 11, par. 1), (UN Doc. E/1992/23) and General comment no. 7, Forced evictions (UN Doc. E/1998/22).
- 3) UNO- HABITAT, [The right to adequate housing](#). Fact sheet no. 21 / Rev.



## OPTIONAL READINGS AND RESOURCES

- Web page: [the Right to Adequate Housing Toolkit](#)
- [Compilation of Selected Adjudication on Housing Rights \(2002\) / \(HS/641/01 E\)](#)
- [Programme des NU pour les droits relatifs au logement](#)
- [Special Rapporteur on adequate housing](#)
- [Les Femmes et le droit à un logement convenable](#)
- [Le droit au logement: Le devoir de veiller à un logement pour tous : Conseil de l'Europe](#)
- [Commissaire aux Droits de l'Homme](#)
- [Human rights table 2.0](#)

## LEARNING OUTCOMES

At the end of the topic, the student will be able to:

- Understanding the nature and scope of the right
- Identifying right holders, and particularly, the risk groups and violation situations
- Managing the toolkit from the United Nations for the right to adequate housing
- Draining the challenges to the right to adequate housing in the Maghreb in general and in its particular context
- Titrating the right to housing in the curriculum, proposing a service learning project regarding an identified situation in which the right is violated.

## METHODOLOGY

Methodology:	Teaching tools
Expository method	Reading texts and/or viewing audiovisual material
Preparing projects	Blog / Forum / Wiki
Learning contract	Blog / Forum / Wiki

## DESCRIPTION OF TEACHING ACTIVITIES

A detailed description of the activities to be carried out by students, at individual or group level, specifying the expected results and, if applicable, the evaluation criteria.

### 1) READING THE EDUCATIONAL GUIDE OF THE TOPIC

By reading of the guide, participants will be given a general idea on the content of the topic and the activity to be carried out within.

## 2) READING THE PRESENTATION OF THE TOPIC AND FACT SHEET NO. 21.

By reading the presentation of the topic, students will be given a general idea (as a kind of summary) of the main elements of the right to adequate housing. This reading shall be complemented with Fact Sheet No. 21.

After this first reading the participants will identify the area of interest as it relates to their teaching for the purpose of further study of the right to adequate housing for practical application of the course.

## 3) ANALYSIS OF THE RIGHT TO ADEQUATE HOUSING TOOLKIT BY THE UNITED NATIONS

### The Right to Adequate Housing Toolkit

A general revision shall be made on the contents available on the web page, which are a basic resource of reference for learning more about the right. Especially important is the revision of the documents related to the Maghreb.

A short document shall be written logging the work done, which shall be included in the course participant's virtual portfolio. The log shall describe the main aspects analysed.

## 4) SEARCH FOR LITERATURE ON THE CHALLENGES OF THE RIGHT TO ADEQUATE HOUSING IN THE STUDENT'S COUNTRY AND CONTEXT.

Complementary to the previous activity, students will search any official literature and documents pertaining to the situation of the right to adequate housing in the Maghreb. This documentation shall show the constitutional protection of this right as well as the national legislation and public policies that deal with the right. Students will also search the recommendations made for the country by the various bodies of the United Nations that protect this right: monitoring bodies of the international treaties on human rights, special procedures and a Universal Periodic Review. In this section, at least 5 documents must be consulted. These searches will be used to draw up a document logging the work performed and clearly showing the country's degree of compliance with the international legal obligations derived from this right.

## 5) ANALYSIS OF THE CONTEXT ON THE RIGHT TO ADEQUATE HOUSING IN THE CHOSEN SITUATION OR COLLECTIVE, WITH AN INDICATION OF THE MAIN CHALLENGES FOR THAT COUNTRY.

The above searches will be used to analyse the context on the right to adequate housing. This will be done by applying the three-tier model of analysis (causal analysis, role analysis and analysis of gaps in capacity) as well as the bibliography seen in Module 2 of the course. A document shall be written outlining the methodology used in performing the analysis.

## 6) WRITING THE REPORT ON CHALLENGES OF THE RIGHT TO ADEQUATE HOUSING IN YOUR COUNTRY AND IN THE CONTEXT OF INTERVENTION.

A status report of no less than 5000 words presenting a diagnosis grounded on the consulted literature, and which may be taken as a starting point to orient a service learning project. A SWOT analysis is suggested to illustrate the situation synthetically.

## 7) DESIGN THE SYLLABUS BY INCORPORATING THE METHODOLOGY OF SERVICE LEARNING TO APPROACH THE TOPIC FROM THE STUDENT'S OWN BRANCH OF KNOWLEDGE (COMMUNICATION, LAWS, EDUCATION, SOCIAL WORK).

The practical part of the course involves designing a syllabus for a course or subject. The participants shall identify the situation of infringement or violation of the right to adequate housing one which to focus their service learning project and design the syllabus, integrating the concepts analysed in modules 1 and 3.

## TIMELINE OF ACTIVITIES

Activity Name	Estimated work time	Evaluation criteria
Reading the Educational Guide of the topic	15 minutes	
Reading the Presentation of the topic	45 minutes	Self-evaluation
Analysis of The Right to Adequate Housing Toolkit by the United Nations	2 hours	Portfolio: consultation log
Search for literature on the challenges of the right to adequate housing in the student's country and context.	2 hours	Portfolio: annotated bibliography
Analysis of the context on the right to adequate housing in the chosen situation or collective	5 hours	Portfolio: methodology used
Context report	10 hours	Portfolio: Status Report
Design the syllabus by incorporating the methodology of service learning to approach the topic from the student's own branch of knowledge (Communication, Laws, Education, Social Work).	40	Final practicum work
	60 hours	

## SUBJECT 2.4.:

# 2.4.11. RIGHT TO ADEQUATE HOUSING

## 1. INTRODUCTION

“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control” (art. 25.1 Universal Declaration of Human Rights, 1948).

A wide variety of international instruments address the different dimensions of the right to adequate housing<sup>505</sup>. Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), one of the key international instruments, indicates that State Parties ‘recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States parties will take appropriate steps to safeguard this right, recognising to this effect the essential importance of international cooperation founded on free consent’.

Several different UN declarations have affirmed the right including United Nations Declaration on Social Progress and Development (1969) and the United Nations Vancouver Declaration on Human Settlements (1976).

## 2. NATURE OF THE RIGHT

It is not easy to study the legal nature of this right, i.e., identifying whether it is a fundamental right or an entitlement. Universal declarations on human rights usually recognise everyone’s right to housing as a requisite for human dignity. Another matter is that each state’s legal system place the public powers in charge entitlement mechanisms, or simply, the obligation of creating a legal framework to enable the realisation of the right. From what we may call an anthropological point of view, there is no doubt of the fundamental nature of the right given that it is normally necessary -regardless what modality of title enables its enjoyment: ownership, rental, etc.- to guarantee personal or family intimacy, a living space away from the eyes of outsiders. Those rights are indeed fundamental rights in a strict sense. In fact, the constitutional jurisprudence in a number of countries, including Spain, has occasionally linked certain dimensions of this right to human dignity.

505. See Article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 14 (2) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 27 (3) of the Convention on the Rights of the Child (CRC), article 2 and 28 of the Convention on the Rights of Person with Disabilities (CRPD), article 43 of the International Convention on the Protection of the rights of all Migrant Workers and Members of their Families (CMW), article 21 of the Convention relating to the Status of Refugees (CSR), article 21 (1) of the Declaration on the Rights of Indigenous People, articles 49 and 85 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, article 21.1 of the Declaration on the Rights of Indigenous Peoples, article 10 of the Declaration on Social Progress and Development, section III (8) of the Vancouver Declaration on Human Settlements (1976), article 8 (1) of the Declaration on the Right to Development and the ILO Recommendation No. 115 Concerning Workers’ Housing (1961)

In the Spanish Constitution, as in other Social States of Law, even though it is mentioned as a right, it is configured as a main premise guiding social and economic policy whose effectiveness is outlined in art. 53.3: 'The recognition, respect and protection of the principles recognised in Chapter Three will inform the positive legislation, the judicial practice and the actions of the public powers. They shall only be claimed before the ordinary Jurisdiction in accordance with what is stated in the laws that develop them'. In other words, giving a certain effectiveness to the right obligates all the branches of State power: the legislature, the administration and the judges. However, citizens cannot invoke a right to housing from the courts unless it is in accordance with the law regulating that right, which makes it a legally configured social right. If there is no law, there is no right as such; consequently, the right grants no protection. The only possibility in this situation would be a judicial action directly invoking the Constitution vis a vis a case in which the person's dignity, understood as an existential minimum for a person's life, were endangered.

In any case, the Constitution offers a number of guarantees: any law that minimizes or distorts the content of the right would be unconstitutional. The administration is required to safeguard the right, and in some cases, to establish entitlements. When faced with a possible collision of the right to property and the right to housing, after weighing the circumstances, the judges should opt for favouring the individual in need of housing.

In conclusion, the State's action regarding this right may deal with the following aspects:

- a) The need to legislate on this matter such that failure to act may be construed as unconstitutional by omission;
- b) The need for the legal framework to act effectively in safeguarding the right;
- c) The need to include specific budget items to safeguard the right with activities managed directly by the State or through social initiatives;
- d) The need to act normatively on conditions that may affect the right: land, rental policies, etc.;
- e) Given the social nature of the right, the obligation to pursue positive discrimination for the right to be effective among the neediest social groups.

### 3. RIGHTHOLDERS

As a human right, all physical individuals are holders of the right. Nevertheless, there are some collectives or individuals who face specific hardships when trying to exercise their right to adequate housing because of who they are, due to discrimination, due to being the object of stigmatisation or due to a combination of both factors. To protect their right to adequate housing effectively, attention should be paid to the particular situation of those persons and collectives, and especially to those who are in a situation of vulnerability.

Listed below are the main vulnerable groups and the risk situations associated with failures to safeguard the right.

#### 3.1 WOMEN

Discrimination against women in the housing sphere can be caused, for instance, by discriminatory statutory laws; gender-neutral laws and policies that fail to take into account women's special circumstances (such as their vulnerability to sexual and gender-based violence); the predominance of customary laws and practices which discriminate against women; bias in the judiciary and public administration; lack of access to remedies, information or decision-making processes; and lack of awareness of rights.

The following chart summarises the main situations that affect women by violating their right to housing:

Chart 1: Vulnerable situations and consequences of the right to adequate housing for women

Vulnerable situation	Main consequences
Insecurity in tenure of housing	When the housing is registered only in the man's name, it leaves women vulnerable to abuse and dependence.
Discrimination in inheritance	Women are entitled to a smaller share than their male relatives, or are simply dispossessed of the inheritance from their deceased parent or spouse.
Forced evictions	Greater emotional stress deriving from their close ties to the home and the reproductive role played by women in the home. During evictions, there may be verbal abuse, beatings and rape. After eviction, women are more vulnerable to abuse and other forms of violence, including sexual violence.

Source: Own work, based on UNO-Habitat, Fact sheet No. 21.

**Insecurity in tenure of housing** is the result of certain practices that often tend to record or register properties in the man's name. Insofar as women have no control over the tenure or estate, women are vulnerable to mistreatment in the family, community and society in general.

In addition, women are subject to **discrimination in inheritance** in many parts of the world. Such discrimination can be enshrined in statutory laws as well as in customary laws and practices that fail to recognize women's equal rights to men in inheritance. As a result, women are either entitled to a lesser share than male relatives, or are simply dispossessed from any heritage of their deceased husbands or fathers.

**Forced evictions** are a violent situation for those who suffer them. Women undergo greater emotional stress because of their close ties to the home and their role as caregivers for the entire family. Furthermore, during evictions, verbal abuse, beatings and rape may take place.

Following an eviction, women are often more vulnerable to abuse and other forms of violence, including sexual violence, particularly if they have been forced to move to inadequate housing or informal settlements.

### 3.2. CHILDREN

Children's health, educational advancement and overall well-being are deeply influenced by the quality of housing in which they live. The United Nations Committee on the Rights of the Child has emphasized the universal character of the right to adequate housing, stressing that it applies to every child without distinction or restriction of any kind. Nevertheless, the violation of the right to housing affects millions of children around the world. The chart below synthesises how this violation affects them:

Chart 2: Vulnerable situations and consequences of the right to adequate housing for children

Vulnerable situation	Main consequences
Children living off the streets	Absolute violation of the right to adequate housing. Lacks in the child's integral development Vulnerability to threats, harassment and violence
Housing in precarious conditions	Higher infant mortality rates
Location and access to basic services	Risk of premature death due to poor conditions Overload of chores in minors due to having to search for safe drinking water
Forced evictions	Threaten the stability of the family and jeopardize the livelihood of the household.

Source: Own work, based on UNO-Habitat, Fact sheet No. 21.

The harshest example of the lack of housing for children is the situation of **street children**. In addition to lacking in nearly every aspect of their integral development (health, education, affectivity, etc.) these minors are particularly vulnerable to threats, harassment and violence from individuals as well as from the police.

**Precarious housing** also affects the integrity of minors. Cramped, poorly ventilated or inadequately equipped housing leads to higher rates of child mortality and illness.

The **location and access to basic services** such as safe drinking water and adequate sanitation are basic elements for ensuring children's health a preventing premature death from infectious disease. Furthermore, if safe drinking water is found far from the home, children are often in charge of this chore. This leads to an overload of activity in detriment to others, such as going to school or playing. Moreover, in the case of girls, they also run the risk of harassment or other threats on the way. The location of the housing is also relevant in relation to accessing community services such as schools and healthcare centres.

The impact of **forced evictions** on children has been compared to that of armed conflicts. Following forced evictions, family stability is often jeopardized and livelihoods threatened. As in the case of women, young girls also face the risk of rape if the settlements are inadequate or improvised.

### 3.3. SLUM DWELLERS

By the end of 2008, half of the world's population was thought to be living in cities, many without adequate infrastructure and services. UN-Habitat notes that the most insecure urban residents are the world's 1 billion poor people living in slums. More than 930 million slum-dwellers live in developing countries, where they constitute 42 per cent of the urban population. This proportion is particularly high in Sub-Saharan Africa, where slum-dwellers make up 72 per cent of the urban population, and in Southern Asia, where they represent 59 per cent.

Slum life is improvised in non-legal settlements lacking in clean water, electricity and other basic goods and services. Slum-dwellers often lack tenure security, which makes them vulnerable to forced evictions, threats and other forms of harassment. The effects of forced evictions on slum-dwellers are often disastrous, leaving them homeless and forcing them deeper into poverty.

### 3.4. THE HOMELESS

The Special Rapporteur on adequate housing has called homelessness 'perhaps the most visible and most severe symptom of the lack of respect for the right to adequate housing.'



The Special Rapporteur on adequate housing has highlighted that poverty is a common denominator in the experience of the homeless. Other causes or factors which make people more vulnerable to homelessness are unemployment, a lack of social security systems, a lack of affordable housing, forced evictions, non-availability of social housing, conflicts and natural disasters, as well as a lack of attention to the needs of the most vulnerable.

The 'deinstitutionalization' of mental health care in the 1960s and 1970s left many persons with mental disabilities in the street. Homelessness involves situations that violate other human rights, exposing the people affected to violence, threat and harassment.

### 3.5. PERSONS WITH DISABILITIES

There are an estimated 650 million persons with disabilities in the world, of whom approximately 80 per cent are living in developing countries. Disability is an element that multiplies the risks of a situation in violation of the right to adequate housing. In addition to the consequences listed about, when a person has a disability, there are others as well, as shown in Chart 3:

*Chart 3: Vulnerable situations and consequences of the right to adequate housing for the disabled*

Vulnerable situation	Main consequences
Lack of accessibility and architectural barriers	Difficulty for personal autonomy and carrying out activities in daily life.
No security of tenure	Vulnerable to situations of abuse or forced eviction

Source: Own work, based on UNO-Habitat, Fact sheet No. 21.

Architectural barriers and lack of accessibility is one of the biggest problems facing persons with disabilities. Housing, housing-related facilities and neighbourhoods are traditionally designed for people without disabilities.

Similarly, the most precarious housing and installations rarely have suitable facilities for people of reduced mobility, which presents serious challenges to their personal autonomy and ability to carry out the activities of daily life.

Added to the above is the issue of security of tenure. Persons with disabilities, in particular those with an intellectual or psychosocial disability, often need the involvement of a third person to access formal housing contracts for leasing or ownership. This sometimes makes them have to rely on less formal avenues to secure housing, which in turn make them more vulnerable to situations of abuse or forced eviction.

### 3.6. DISPLACED PERSONS AND MIGRANTS

Included in this category are refugees, asylum seekers, internally displaced persons (IDPs) and migrants. For all of them, leaving their country entails a process of change that affects their housing conditions.

In the case of refugee and IDP camps around the world, they are often dilapidated and overcrowded, providing inadequate shelter and services, especially when the displacement is over a long period of time. Once again, women and girls are more vulnerable to sexual violence in these living conditions.

In urban areas, the inadequate housing conditions of this population group, often with no access to a legal contract, lead them into overcrowded and unsafe living situations. Furthermore, those whose legal status in the country is irregular are exposed to risks of exploitation by mafias and other organised groups.

### 3.7. INDIGENOUS PEOPLES

Indigenous peoples suffer discrimination, especially compared to the majority population. This discrimination reveals itself in the insufficiency of basic services; their vulnerability as groups affected by displacement, the insecure tenure they often have over their traditional lands, and the culturally inappropriate housing alternatives often proposed by the authorities.

While the majority of indigenous peoples around the world still live in rural areas, increasing numbers are, voluntarily or involuntarily, migrating to urban areas, leaving behind their traditional lands, territories and resources, and often facing increased poverty.

## 4. MINIMUM NORMATIVE CONTENT OF THE RIGHT

### 4.1. DIMENSIONS OR ELEMENTS OF THE RIGHT

The characteristics of the right to adequate housing are mainly defined in the General Comments no. 4 (1991) on the right to adequate housing and no. 7 (1997) on forced evictions from the United Nations Committee on Economic, Social and Cultural Rights.

In the Committee's opinion, the right to adequate housing should not be interpreted in the narrow sense (i.e., as four walls and a roof in which people can take shelter, as if they were merchandise). Rather, it should be defined as 'the right of every woman, man, young adult and child to obtain and maintain a home and a healthy, safe community to live in peace and dignity' (first Special Rapporteur on adequate housing). As established in General Comment no. 4, a number of conditions must be met before particular forms of shelter can be considered to constitute 'adequate housing.' These elements are just as fundamental as the basic supply and availability of housing. For housing to be adequate, it must, at the very least, meet the following criteria:

- **Legal security of tenure:** Regardless of the type of tenure, everyone should enjoy a degree of tenure security which guarantees legal protection against forced evictions, harassment and other threats;
- **Affordability:** Personal and household expenses related to housing must not compromise the achievement and satisfaction of other basic needs (such as food, education, access to healthcare services);
- **Habitability:** Housing is not adequate if it does not guarantee physical safety or provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards;
- **Availability of services, materials, facilities and infrastructure:** Housing is not adequate if its occupants do not have safe drinking water, adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal, etc.;
- **Accessibility:** Housing is not adequate if the specific needs of disadvantaged and marginalized groups are not taken into account (such as the needs of people with few resources, who face discrimination, people with physical disabilities, victims of natural disasters);
- **Location:** Adequate housing must provide access to employment opportunities, health-care services, schools, childcare centres and other social facilities, and not be built in contaminated areas or located near sources of pollution;
- **Cultural adequacy:** Adequate housing must respect and take into account the expression of cultural identity and way of life.

In addition, protection against forced evictions is a key element of the right to adequate housing and is closely linked to security of tenure. When evictions are carried out as a last recourse, the people affected should receive guarantees of fair due process, which may have a dissuasive effect on the anticipated evictions.

## 4.2. LEGAL OBLIGATIONS ENTAILED IN THIS RIGHT

Through their ratification of human rights treaties, States are required to give effect to these rights within their jurisdictions. Some obligations are of **immediate effect**, including the fundamental undertaking to guarantee that the right to adequate housing is exercised on the basis of non-discrimination. There is also an immediate obligation to take steps, which should be concrete, deliberate and targeted, to fulfil the right to adequate housing. Each State should guarantee at least minimum essential levels of this right, for instance, ensuring that significant numbers are not deprived of basic shelter and housing. If a State cannot do so, it must at least demonstrate that it has made every effort to achieve it.

Under the International Covenant on Economic, Social and Cultural Rights, States have the obligation to achieve progressively the full realization of the right to adequate housing. This means that, given that resources are scarce, the States may act progressively to ensure the right, except for the obligation for non-discrimination, which must take immediate effect.

In other words, the Covenant acknowledges that States have resource constraints and that it may take time to ensure the right to adequate housing to everyone. Some components of the right to adequate housing are, therefore, deemed subject to **progressive realization**.

The States have specific obligations toward (i) respect, (ii) protection and (iii) fulfilment of the rights in the Conventions. Non-compliance with these obligations constitutes a violation of those rights.

- i) The *obligation to respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to adequate housing.

States should refrain from:

- carrying out forced evictions and demolishing homes
- denying security of tenure, housing, land and property restitution to particular groups
- imposing discriminatory practices that limit access to and control over housing, land and property to specific groups
- infringing on the right to privacy and protection of the home
- polluting water resources.

- ii) The *obligation to protect* requires States to prevent third parties from interfering with the right to adequate housing.

States should adopt legislation or other measures to ensure that private actors—e.g., landlords, property developers, landowners and corporations—comply with human rights standards related to the right to adequate housing.

States must:

- regulate the housing and rental markets in a way that promotes and protects the right to adequate housing;
- guarantee that banks and financial institutions extend housing finance without discrimination;
- ensure that the private provision of water, sanitation and other basic services attached to the home does not jeopardize their availability, accessibility, acceptability and quality;
- ensure that third parties do not arbitrarily and illegally withdraw such services; prevent discriminatory inheritance practices affecting women's access to and control over housing, land and property;
- ensure that landlords do not discriminate against particular groups;
- ensure that private actors do not carry out forced evictions.

- iii) The *obligation to fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to adequate housing.

States must:

- adopt a national housing policy or a national housing plan (with a focus on disadvantaged and marginalized groups)
- progressively and to the extent allowed by their available resources, prevent and address homelessness
- provide the infrastructure required for housing to be considered adequate (including taking steps towards ensuring universal and non-discriminatory access to electricity, safe drinking water, adequate sanitation)
- ensure adequate housing to individuals or groups unable, for reasons beyond their control, to enjoy the right to adequate housing, for example in cases of natural disasters, (through housing subsidies and other measures)
- identify the resources available to meet these goals; specifies the most cost-effective way of using them; outline the responsibilities and time frame for the implementation of the necessary measures; monitor results and ensure adequate remedies for violations.

In addition to all the above, it should not be forgotten that the obligation on States to protect human rights includes ensuring that non-State actors do not infringe upon the right to adequate housing.

#### State obligations of immediate effect:

- Guarantee that the right to adequate housing is exercised on the basis of non-discrimination
- Give due priority to social groups who live in disadvantaged conditions by paying special attention to them.
- Adopt a national housing strategy (an almost invariable requirement)
- Guarantee effective follow-up on the housing situation
- Prohibit forced evictions
- Ensure coordination among ministries and regional and local authorities so that related policies (economy, agriculture, the environment, energy, etc.) match up with the obligations derived from article 11 of the Covenant.

In addition to all the above, it should not be forgotten that the obligation on States to protect human rights includes ensuring that non-State actors do not infringe upon the right to adequate housing.

## 5. LIMITS

The right to adequate housing is often confused with demands that overstep the scope of the right. In this section on limits we include a set of misconceptions about this right:

- The right to adequate housing does NOT require the State to build housing for the entire population.
- The right to adequate housing is NOT only a programmatic goal to be attained in the long term.
- The right to adequate housing does NOT prohibit development projects which could displace people.
- The right to adequate housing is NOT the same as the right to property.
- The right to adequate housing is NOT the same as the right to land.
- The right to adequate housing includes ensuring access to adequate services.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 15****Subject****2.4.12.** Right to social security**Lecturer:**

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## SUMMARY OF THE TOPIC

The right to social security<sup>506</sup> is a set of prerogatives regarding protection from risk and need by means of benefits in cash or in kind. The international norms of the United Nations and its specialised institutions declare it an integral part of basic human rights indispensable for dignity and the free development of human personality. It is one of the claim rights (against the State) whose conception and achievement must be a collective work with different agents. Its normative content is defined as per the principles that govern international human rights law (on availability, non-discrimination, transparency, participation, etc.). Furthermore, it is tributary of the conception of compensation or alimony adopted by each State. Listed in the HRBA, the right to social security presents several advantages: on the specific level, the reduction of poverty and of social exclusion, and on the general level, of better governance and therefore the effectiveness of social protection systems. The right to social security is joined to the rights of man by a common denominator: the obligations of respect, recognition and protection.

The effects vis-à-vis third parties of the right to social security should be guaranteed, as per the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the comments from its Committee, by a system of adequate legal resources (accessible, affordable, pertinent and effective) of a legal and administrative nature by permitting reparation of potential violations of this right.

ICESCR stipulates that the States are obliged to promote this right by means of a “minimum essential obligation” particularly in reference to guaranteeing basic social security for the most underprivileged and vulnerable groups. They must come up with strategies and programs and take steps aimed at the progressive realisation of the right to social security. These steps must be deliberate, concrete and stated as precisely as possible.

506. The notion of social security refers to all the endeavours, institutions and techniques that protect people from social risks and safeguard them from neediness.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Adaptation to the environment:** to face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** to positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** to understand and accept social and cultural diversity as an enriching personal and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** to analyse and evaluate the consistency of the approaches, in particular, the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** to be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in this way.

### SPECIFIC:

- Suitably identify, interpret and apply the international, regional and national norms on human rights applicable to the different assumptions posed in their respective disciplines and professional areas.
- Define and accurately distinguish between the rights-holders and the holders of obligations in relation to each human right in a particular situation.
- Identify the specific obligations of respect, protection and realisation of each human right and the minimum normative content needed for its realisation and for questioning its fulfilment in a particular situation.
- Identify, analyse, argument and evaluate the critical deviations and gaps in the capability and responsibility of the holders of rights and obligations that hinder the action or transformation of a particular situation in which human rights are being violated.
- Contrast and evaluate situations, practices, legislation, local and national policies in accordance with the legal instruments on human rights ratified in your country, and suggest and plan out some efficient alternatives.

- Identify and apply the international and regional protection mechanisms for human rights.
- Seek out, select and analyse information from a variety of sources (legal, social, financial, etc.). Plan and document this task appropriately.
- **Systemic thinking:** the participant will consider the education problems of the right to social security through universal references and within a local context. He must be able to find and structure different information on a universal topic while also considering the local social, economic and political perspectives.
- **Prospective thinking:** in a shifting context, the student develops capabilities of vigilance, which implies permanent analysis and assessment of ideas and facts on both an international and a local scale with an eye to the future, and able to transform and even rebuild the right to social security.

## LEARNING PROCESS RESULTS

At the end of the topic, the student will be able to:

- Identifying the international and national norms on social protection with the general principles of human rights.
- Assessing whether a policy or norm on social protection meets the legal obligations deriving from this right.

## METHODOLOGY

Methodology:	Teaching tools
Expository method	Reading texts and/or viewing audiovisual material
Case studies	Blog / Forum
Group discussions	Blog / Forum

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

[International Covenant on Economic Social and Cultural Rights, 1966](#)

[A compendium of resources on the right to social protection](#)

United Nations Committee on economic, social and cultural rights:

- General comment nº 19 (2008) The right to social security (article 9)
- General comment nº 5 (1994): Persons with disabilities
- General Comment nº 16 (2005) The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3).

ILO: International labour norms on social security

[Selection of pertinent instruments from the ILO](#)



- [Social Security \(Minimum Standards\) Convention, 1952 \(num. 102\)](#)
- [Social Protection Floors Recommendation, 2012 \(N° 202\)](#)
- [Equality of Treatment \(Social Security\) Convention, 1962 \(No. 118\)](#)
- [Maintenance of Social Security Rights Convention, 1982 \(N° 157\)](#)

Social protection schemes in the ABDEM consortium countries:

- [Moroccan scheme](#)
- [Algerian scheme](#)
- [Tunisian scheme](#)
- [Spanish scheme](#)
- [Italian scheme](#)
- [British scheme](#)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

Video: [A Social Protection Floor for All](#)

The Social Protection Floor offers everyone access to social rights, services and basic infrastructure. The last is particularly necessary in times of economic hardship. The United Nations, under the leadership of the ILO and WHO, launched a worldwide initiative promoting social protection for all. Different countries have already taken steps toward making it happen, and are showing that it can work even if the economic situation is difficult.

- Webs: <http://socialprotection-humanrights.org/>
- I.L.O.: [Social Protection](#).
- [Special Rapporteur on extreme poverty and human rights](#)
- [Social protection measures and MDGs \(2010\)](#)
- [Older persons and social protection \(2009\)](#)

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MOUELHI, Abdessatar (coord.): Droits économiques et sociaux: quelle protection ? par quelles garanties ?, Ed. l'INTES-Un, Carthage, 2015

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SEPÚLVEDA, Magdalena and NYST, Carly, The Human Rights Approach to Social Protection, Ministry of Foreign Affairs of Finland, 2012.

## DESIGNING A SYLLABUS OF LEARNING ACTIVITIES

A detailed description of the activities to be carried out by the student, at an individual level or in a group, specifying the expected results and, if applicable, the evaluation criteria.

1. **READINGS:** Text on the topic The Right to social security (text by the teacher and proposed bibliography as a guide).
2. **INDIVIDUAL WORK:** Synthesis of the readings (500 words maximum).
3. **POSTS IN FORUM:** Brief reflection (500 words max.) in the forums, on the essential knowledge acquired by the participant in the HRBA to social security.
4. **GROUP WORK:** Collective reflections (describe a typical situation regarding social security in your country in which the student finds real opportunities to apply the knowledge acquired regarding human rights).

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time
Activity 1	2 hours
Activity 2	15 minutes
Activity 3	15 minutes
Activity 4	2 hours and 15 minutes

## SUBJECT 2.4.:

# 2.4.12. RIGHT TO SOCIAL SECURITY

### THE RIGHT TO SOCIAL SECURITY

“Everyone, as a member of society, has the right to social security” (UDHR, Art. 22).

“Everyone has the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (UDHR, Art. 25.1).

“The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.” International Covenant on Economic, Social and Cultural Rights (Art. 9)..

## 1. THE HRBA TO THE RIGHT TO SOCIAL SECURITY

### 1.1. ORIGINS OF THE HRBA TO MATTERS OF SOCIAL SECURITY

The origin of the HRBA in matters of social security is basically found in the relation between the promotion of human rights and the issue of poverty. It is relatively recent:

- It was evoked for the first time in the framework of the ILO conference in 2001 during which social security was reaffirmed as being a basic human right, while also insisting on the need to ensure a basic income for all.
- It was later evoked to tackle the question of vulnerable groups and the impact of discrimination, presented in the 2008 report of the United Nations on the relationship between extreme poverty and the existence of the right to social security for the purpose of achieving the first goal of the millennium: the eradication of extreme poverty and hunger.
- Finally, the origin of the HRBA to social security was added to the perspective of guaranteeing a basis for regulating social protection. Development of its essential aspects began in 2009 in a set of basic social guarantees for everyone (the horizontal dimension) and the progressive application of higher norms (the vertical dimension). These two dimensions can then be used to create a set of social devices aimed at ensuring security in income as well as access to basic social services for all. In 2012, a detailed report<sup>507</sup> was drafted on “the human rights-based approach to social protection”, now used as a reference document and basis for any reflection on this topic.

507. Cfr. Magdalena Sepúlveda and Carly Nyst. Also see: B.I.T., La sécurité sociale et la primauté du droit, Genève, 2011, pp. 154-293.

## 1.2 ADVANTAGES OF THE HRBA TO SOCIAL SECURITY

The human rights approach to social protection consists of applying the main principles of human rights: *equality* and *non-discrimination* (including *accessibility*, *adaptability*, *acceptability*, *adjustment* (and the incorporation of the *gender perspective*), *participation*, *transparency* and *accountability*) in designing, implementing, monitoring and evaluating social protection systems.

Human rights obligations relate not only to the final outcome of social protection programmes but also to the process through which such programmes are designed and implemented. There is strong evidence that social protection systems can assist States in fulfilling their obligations under national, regional and international human rights law to ensure the enjoyment of at least minimum essential levels of economic, social and cultural rights. In particular, social protection systems have the potential to assist in the realisation of the *right to an adequate standard of living*, (including the right to adequate food and housing), the right to *social security*, the right to *education* and the right to the highest attainable standard of *health*. However, human rights standards require that States ensure compliance with human rights obligations both in the content of their social protection policies, as well as in the process by which they implement them. The binding legal obligations that States have voluntarily assumed must guide the conduct and performance of all social policies. The human rights approach to social protection also has numerous practical advantages – human rights standards assist in building social consensus and mobilising durable commitments at the national and international level, facilitate a more efficient use of resources by promoting access to information and fighting corruption, and ensure participation of the beneficiaries in all stages of the programmes.

In social security matters, the HRBA offers many advantages, such as the reduction of poverty and social exclusion and in general better governance and thus effective social protection systems.

- This approach facilitates clear measurement and analysis of the phenomenon of poverty and the obligations of the various different protagonists.
- The approach is meant to facilitate the sustainability and effectiveness of the fight against poverty, inequalities and any form of discrimination with its mechanisms for empowering the protagonists (conception, execution and control of the programmes for the empowerment of the beneficiaries) and with the planning of a consensual framework of work based on universal, morally and legally fair values;
- Transparency of the consensual framework (easy access to information, identification of needs, fighting against corruption, etc.) helps in the optimal assignment of resources.

## 2. LEGAL CONTENT OF THE RIGHT TO SOCIAL SECURITY

### 2.1. SCOPE AND PURPOSE OF THE RIGHT TO SOCIAL SECURITY

The right to social security is part of the second generation of human rights, i.e., economic and social rights. The right to social security is fundamentally important for ensuring the human dignity of all persons when they are faced with circumstances that deprive them off

fully realising their rights vis à vis the Covenant. The right to social security is unequivocally recognised by international law<sup>508</sup>.

General Comment N° 19 (2008) from the Committee on Economic, Social and Cultural Rights states that the right to social security includes the right to have access to the benefits, in cash or in kind, and without discrimination in order to secure protection, inter alia, from:

- **Lack of work-related income** caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member;
- **Unaffordable access to health care;**
- **Insufficient family support**, particularly for children and adult dependants.

Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion. Such measures may be used to protect the citizen from a social risk (an assistance conception) or to protect him from need (a universal conception) or both objectives at the same time. The measures that are to be used to provide social security benefits may include:

- **Contributory or insurance-based schemes such as social insurance.** These generally involve compulsory contributions from beneficiaries, employers and, sometimes, the State, in conjunction with the payment of benefits and administrative expenses from a common fund.
- **Non-contributory schemes such as universal schemes** (which provide the relevant benefit in principle to everyone who experiences a particular risk or contingency) or targeted social assistance schemes (where benefits are received by those in a situation of need). In almost all States parties, non-contributory schemes will be required since it is unlikely that every person can be adequately covered through an insurance-based system.
- **Other forms of social security** are also acceptable, including: (a) privately run schemes, and (b) self-help or other measures, such as community-based or mutual schemes.

The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions on existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.

## 2.2. THE PURPOSE OF THE RIGHT TO SOCIAL SECURITY: SOCIAL RISKS AND CONTINGENCIES

According to the (ILO) Convention n° 102 of 1952 on the minimum standards of social security, a social security system should in principle include the following nine contingencies:

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508. Articles 22 and 25 (1) of the Universal Declaration of Human Rights (UDHR), article 5 (e) (iv) of the International Convention on the Elimination of all forms of racial discrimination (ICERD), articles 12, 13 and 11, par. 1 (e) and 14, par. 2 (c) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDW), article 25 of the International Convention on the Rights of the Child (ICRC), ILO Convention No. 102 (1952) on social security (minimum standards), regulation 4.5 of the ILO Maritime Labour Convention(2006), the 1944 Declaration of Philadelphia, General Comment Nos. 5 on persons with disabilities, no. 6 (1995) on the economic, social and cultural rights of older people; no. 12 (1999) on the right to adequate food (art. 11) ; no. 14 (2000) on the right to the highest attainable standard of health (art. 12), no. 15 (2002) on the right to water (arts. 11 and 12); no. 16 (2005) on The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 13); and no. 18 (2005) of the right to work (art. 6). Cfr. the Statement from the Committee on Economic, Social and Cultural Rights: An evaluation of the obligation to take steps to the “maximum of available resources” under an optional protocol to the covenant 21 September 2007 [(UN Doc. E/C.12/2007/1).

- **Healthcare** - A social security system should include preventive and curative care (medical attention from general practitioners, including house calls), specialist care, essential pharmacy products by prescription, care before, during and after childbirth, hospitalisation if necessary. States parties have an obligation to guarantee that health systems are established to provide adequate access to health services for all. In cases in which the health system foresees private or mixed plans, such plans should be affordable. The Committee notes the particular importance of the right to social security in the context of endemic diseases such as HIV/AIDS, tuberculosis and malaria, and the need to provide access to preventive and curative measures.
- **Sickness** - Economic benefits (period payments in cash) should be provided to those incapable of working due to ill-health to cover periods of loss of earnings. Persons suffering from long periods of sickness should qualify for disability benefits.
- **Old age** - States parties should take appropriate measures to establish social security schemes that provide benefits to older persons, starting at a specific age, to be prescribed by national law. As per Convention 102, the benefits shall be assigned as periodic payments for a calculated amount that comes to at least forty percent of the base salary. The States are obligated to revise the amounts of these benefits when there are noticeable variations in the general level of income and/or cost of living.
- **Unemployment** - In addition to promoting full, productive and freely chosen employment, States parties must endeavour to provide benefits to cover the loss or lack of earnings due to the inability to obtain or maintain suitable employment.
- **Employment injury** - States parties should also ensure the protection of workers who are injured in the course of employment or other productive work. The social security system should cover:
  - The costs and loss of earnings from the injury or illness (medical care and periodic payments of a percentage of the reference salary for cases of temporary or permanent disability),
  - The loss of support for spouses or dependants suffered as the result of the death of a breadwinner (survivor benefits for widowed spouse and dependent children, in case of death of breadwinner, with periodic payments for a percentage of the reference salary);
  - The possibility of turning the periodic payments into a single capital payment, in some cases.
  - The obligation to revise the amounts of the periodic payments in case of noticeable variations in the cost of living.
- **Family and child support** - Benefits for families are crucial for realising the rights of children and adult dependents to protection under articles 9 and 10 of the Covenant. In providing the benefits, the State party should take into account the resources and circumstances of the child and persons having responsibility for the maintenance of the child or adult dependent, as well as any other consideration relevant to an application for benefits made by or on behalf of the child or adult dependent. Family and child benefits, including cash benefits and social services, should be provided to families, without discrimination on prohibited grounds, and would ordinarily cover food, clothing, housing, water and sanitation, or other rights as appropriate.
- **Maternity** - Convention N° 102 guarantees medical care including prenatal, childbirth and postnatal care given by a doctor or a licensed midwife, and periodic payments corresponding to a percentage of the reference salary. Article 10 of the Covenant expressly provides that “working mothers should be accorded paid

leave or leave with adequate social security benefits". Paid maternity leave should be granted to all women, including those involved in atypical work, and benefits should be provided for an adequate period. Appropriate medical benefits should be provided for women and children, including prenatal, childbirth and postnatal care and care in hospital where necessary.

- **Disability** - In its general comment N° 5 (1994) on persons with disabilities, the Committee emphasized the importance of providing adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost, or received a reduction in, their income, have been denied employment opportunities or have a permanent disability.
- **Survivors and orphans** - States parties must also ensure the provision of benefits to survivors and orphans on the death of a breadwinner who was covered by social security or had rights to a pension.

### 3. PRINCIPLES GOVERNING THE RIGHT TO SOCIAL SECURITY

In essence, these principles have been established by the CESCR and involve determining the normative content of the right to social security and of its characteristics in accordance with international human rights law.

#### The principle of availability:

The right to social security requires, for its implementation, that a system, whether composed of a single scheme or variety of schemes, is available and in place to ensure that benefits are provided for the relevant social risks and contingencies. The system should be established under domestic law, and public authorities must take responsibility for the effective administration or supervision of the system. The schemes should also be sustainable, including those concerning the provision of pensions, in order to ensure that the right can be realised for present and future generations.

#### The principle of adequacy:

Benefits, whether in cash or in kind, must be adequate in amount and duration in order that everyone may realise his or her rights to family protection and assistance, an adequate standard of living and adequate access to health care.

#### The principle of admissibility:

Qualifying conditions for benefits must be reasonable, proportionate and transparent. The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law.

#### The principle of non-discrimination:

The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions on existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.

It is important to highlight some central elements of the right to social security (in their interpretation it should be borne in mind that social security should be treated as a social good, and not primarily as a mere instrument of economic or financial policy).

Thus, any measure that hinders the enjoyment on equal terms of the right to social security (equal opportunity and access to the goods and services) whose effect is in law or in fact, directly or indirectly, is expressly prohibited so as to prevent some groups (women, migrants, persons with disabilities, etc.) from being permanently harmed. For example, we can cite the statement by the ICESCR of the following different aspects where there is a risk of discrimination:

- **Non-discrimination and equality** - the obligation of States parties to guarantee that the right to social security is enjoyed without discrimination and equally



between men and women includes all of the obligations under Part III of the Covenant. Thus, the Covenant prohibits any discrimination, whether in law or in fact, whether direct or indirect, on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security. States parties should also remove de facto discrimination on prohibited grounds, where individuals are unable to access adequate social security. Whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right.

- **Gender equality** - In general comment No.16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3), the Committee noted that implementation of ICESCR requires, inter alia, equalization of the compulsory retirement age for both men and women; ensuring that women receive equal benefits in both public and private pension schemes; and guaranteeing adequate maternity leave for women, paternity leave for men, and parental leave for both men and women.
- **Workers inadequately protected by social security (part-time, casual, self-employed and homeworkers)** - Steps must be taken by States parties to the maximum of their available resources to ensure that the social security systems cover workers inadequately protected by social security, including part-time workers, casual workers, the self-employed and homeworkers. Where social security schemes for such workers are based on occupational activity, they should be adapted so that they enjoy conditions equivalent to those of comparable full-time workers.
- **Informal economy** - States parties must take steps to the maximum of their available resources to ensure that the social security systems cover those persons working in the informal economy. The informal economy has been defined by the International Labour Conference as “all economic activities by workers and economic units that are - in law or in practice - not covered or insufficiently covered by formal arrangements.”
- **Indigenous Peoples and Minority Groups** - States parties should take particular care that indigenous peoples and ethnic and linguistic minorities are not excluded from social security systems through direct or indirect discrimination, particularly through the imposition of unreasonable eligibility conditions or lack of adequate access to information.
- **Non-nationals** (including migrant workers, refugees, asylum-seekers and stateless persons) - Article 2, paragraph 2, prohibits discrimination on grounds of nationality and the Committee notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.
- **Internally displaced persons and internal migrants** - internally displaced persons should not suffer from any discrimination in the enjoyment of their right to social security and States parties should take proactive measures to ensure equal access to schemes.

The principle of non-discrimination implies the existence of a social protection system that brings together the following four points:

**Coverage** - All persons should in law and in fact be covered by the social security system without discrimination, especially individuals belonging to the most disadvantaged and marginalised groups. In order to ensure universal coverage, non-contributory schemes will be necessary.

**Accessibility** - This criterion concerns how easy it is to access social services.

It may involve:

- **Affordability:** If a social security scheme requires contributions, those contributions should be stipulated in advance. The direct and indirect costs and charges associated with making contributions must be affordable for all, and must not compromise the realisation of other Covenant rights. This also involves preventing any geographical placement that would oblige beneficiaries to long and onerous travel or simply at dissuasive costs of the services for some persons or groups.
- **Physical accessibility:** Benefits should be provided in a timely manner and beneficiaries should have physical access to the social security services in order to access benefits and information, and make contributions where relevant. Particular attention should be paid in this regard to persons with disabilities, migrants, and persons living in remote or disaster-prone areas, as well as areas experiencing armed conflict, so that they, too, can have access to these services.
- **Accessibility of information:** The system should be established under national law and ensure the right of individuals and organisations to seek, receive and impart information on all social security entitlements in a clear and transparent manner.
  - **The principle of transparency:** Transparency helps prevent patronage and corruption. This is not limited only to the financial management of the programmes but reaches all levels, i.e.: the selection of people and risks, the criteria for eligibility, the content and levels of benefits and the means of redress.
  - **The principle of participation:** this principle is based on the wish for transparency and conditions the efficacy of the programmes and correct assignation of resources. Beneficiaries of social security must be able to participate effectively in the administration of the conception, application and evaluation of the schemes in order to ensure their rights are being respected.
  - **Principle of eligibility:** Qualifying conditions for benefits must be reasonable, proportionate and transparent.
  - **Principle of affordability:** If a social security scheme is based on contributions, those contributions should be stipulated in advance. The direct and indirect costs and charges associated with making contributions must be affordable for all, and must not compromise the realisation of other Covenant rights.
  - **The obligation of accountability and liability:** debtors have the obligation of submitting a result that must be registered in a legal framework of obligations and rights inspired from the international legislation. This obligation is also associated with the principle of transparency in that non-respect may lead to excesses, corruption, wasteful spending and inefficiency of the programmes.

## 4. OBLIGATIONS OF THE STATES PARTIES

### 4.1. COMMON HUMAN RIGHTS OBLIGATIONS

The HRBA is based on a number of obligations and principles for the States. The following obligations are general in nature and are linked to the defence of human rights.

The Covenant establishes some obligations for the States whose application is progressive and acknowledges the constraints imposed by limited resources. Nevertheless, it also imposes other obligations regarding the right to social security that have a more immediate effect, such as the guarantee of exercising the right without discrimination of any kind and equal rights between men and women.

The right to social security requires three types of obligations from the States Parties: the obligation to respect, protect and fulfil.

- **The obligation to respect:** The obligation to respect requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to social security. The obligation includes, inter alia, refraining from engaging in any practice or activity that, for example, denies or limits equal access to adequate social security; arbitrarily or unreasonably interferes with self-help or customary or traditional arrangements for social security; arbitrarily or unreasonably interferes with institutions that have been established by individuals or corporate bodies to provide social security.
- **The obligation to protect** requires that State parties prevent third parties from interfering in any way with the enjoyment of the right to social security. States Parties shall, in particular, take measures legislative and other measures, for example, to restrain third parties from denying equal access to social security schemes operated by them or by others and imposing unreasonable eligibility conditions.
- **The obligation to fulfil** requires States parties to adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realisation of the right to social security. The obligation to fulfil can be subdivided into the obligations to facilitate, promote and provide.
- The obligation to **facilitate** requires States parties to take positive measures to assist individuals and communities to enjoy the right to social security. The obligation includes:
  - according to sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation;
  - adopting a national social security strategy and plan of action to realise this right;
  - ensuring that the social security system will be adequate, accessible for everyone and will cover social risks and contingencies.
- The obligation to **promote** obliges the State party to take steps to ensure that there is appropriate education and public awareness concerning access to social security schemes, particularly in rural and deprived urban areas, or amongst linguistic and other minorities.
- States parties are also obliged to **provide** the right to social security when individuals or a group are unable, on grounds reasonably considered to be beyond their control, to realise that right themselves, within the existing social security system with the means at their disposal.

## 5. CORE OBLIGATIONS REGARDING SOCIAL SECURITY

States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. This requires the State party:

- (a) to ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.
- (b) to ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalised individuals and groups;

- (c) to respect existing social security schemes and protect them from unreasonable interference;
- (d) to adopt and implement a national social security strategy and plan of action;
- (e) to take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalised individuals and groups;
- (f) to monitor the extent of the realisation of the right to social security.

## 6. RELATIONSHIP OF THE RIGHT TO SOCIAL SECURITY WITH OTHER RIGHTS

The right to social security plays an important role in supporting the realisation of many of the rights in the Covenant, but other measures are necessary to complement the right to social security. For example, States parties should:

- Provide social services for rehabilitation of the injured and persons with disabilities;
- Provide childcare and welfare, advice and assistance with family planning and the provision of special facilities for persons with disabilities and older persons;
- Take measures to combat poverty and social exclusion and provide supporting social services;
- Adopt measures to prevent disease and improve health facilities, goods and services;
- Consider schemes that provide social protection to individuals belonging to disadvantaged and marginalised groups, for example, crop or natural disaster insurance for small farmers or livelihood protection for self-employed persons in the informal economy.

## 7. CEB SOCIAL PROTECTION FLOOR INITIATIVE <sup>509</sup>

Since the onset of the global financial and economic crisis, people around the world face lower income, fewer employment and livelihood opportunities, as well as reduced access to social services, benefits, remittances and credit. As recognised by the United Nations System Chief Executives Board for Coordination (CEB), this follows the deep structural imbalances that intensified during the latest phase of globalisation and resulted in slow progress towards achieving the MDGs. The Secretary-General of the United Nations has called for the Member States to pay urgent attention to the social impacts of the current global financial and economic crisis.

On 5 April 2009, the High-Level Committee on Programmes of the CEB committed to decisive and urgent multilateral action to address the global crisis, deploying all UN resources and capacities to rapid and effective responses. An agreement was reached on nine joint initiatives. The sixth initiative is the Social Protection Floor Initiative. It foresees essential services and transfers to all in need of such protection in order to not fall into abject poverty<sup>510</sup>.

509. The text is an excerpt from the following source: B.I.T., / O.M.S., Initiative des Nations Unies pour un Socle de protection sociale. Initiative 6 du CCS sur la crise économique et financière mondiale et son impact sur le fonctionnement du système des Nations Unies. Manuel et cadre stratégique pour les opérations conjointes des Nations Unies au niveau national, Genève, 2009, pp.

510. Communiqué from the CEB on 5 April 2009, Paris.

## 8. DEFINITION OF THE SOCIAL PROTECTION FLOOR CONCEPT

The concept of a social protection floor (SPF) is founded on the common principles of social justice and is enshrined in the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and on the ILO Conventions on social security.

The term Social Protection Floor is a global and coherent social policy concept that promotes nationally defined strategies that protect a minimum level of access to essential services and income security for all in the present economic and financial crisis and beyond. A national Social Protection Floor is a basic set of rights and transfers that enable and empowers all members of a society to access a minimum of goods and services and that should be defended by any decent society at any time. Any decent society should defend this concept in all circumstances.

The Social Protection Floor does not define new rights. It contributes to the realisation of the human right to social security and essential services as defined in Articles 22, 25 and 26 of the Universal Declaration of Human Rights (1948). Furthermore, it encourages the observance of ILO Convention 102 on Social Security (Minimum Standard).

Based on the list of services and transfers of the Universal Declaration the main elements of the Social Protection Floor Initiative have been defined as:

- 1) essential services: geographical and financial access to essential services (such as water and sanitation, adequate nutrition, health and education, housing, and other services including life and asset saving information);
- 2) essential social transfers: social transfers, in cash and in kind, paid to the poor and vulnerable to provide a minimum income and health security.

Guaranteeing access to essential services and transfers that are part of the social protection floor empowers people to cope with the economic fallout of the crisis maintaining their dignity. The realisation of these guarantees would also contribute to alleviating the social consequences of the underlying systemic crisis that left forty percent of the global population living on less than US\$ 2 per day even before the onset of the current economic crisis. Governments and UN agencies have developed a range of possible interventions to strengthen social protection of all and particularly the most vulnerable. These include for example health insurance, school feeding programmes, public works programs or guaranteed employment schemes or cash transfers targeting different populations groups: the elderly, children, pregnant women, people with disability, people with HIV/AIDS, the poor.

The systematic relationship between services (the “supply side” of the Social Protection Floor) and means to ensure effective access including transfers (the “demand side” of the Social Protection Floor) is described in the following matrix (Table 1 below). By working on both demand and supply side measures, the social protection floor takes a holistic approach to social protection. On the one hand, social protection floor activities will work on means to ensure the availability of goods and services in the areas of health, water and sanitation and housing, education, food and related information. At the same time, the floor will secure rights and transfers that guarantee effective access to these goods and services for all throughout the life cycle: children, active age groups and older persons, paying particular attention to vulnerable groups by considering further key characteristics that cut across all age groups (gender, socio-economic status, ethnicity, disabilities, population exposed and/or highly sensitive to adverse external effects such as natural hazards, intense climate phenomena, etc.). Strategies to ensure effective demand will require identification of those which currently do not have access to essential services and the barriers they are facing.

Chart 1: The Social Protection Floor: supply and demand side means to secure effective access to an essential level of quality goods and services to all

Means to ensure the supply of an essential level of: Rights and transfers to ensure effective demand* from:	Health services	Water and sanitation Housing	Education	Food	Other social services as defined by national priorities (including life and asset saving)
Children					
People in active age groups with insufficient income from work					
Older persons					

\*Effective demand is defined as actual demand for goods and services, backed by people's capacity to pay, as opposed to notional demand.

To remain sustainable, Social Protection Floor entitlements should:

- build on existing social protection measures/schemes/systems and national development strategies;
- avoid creating long-term dependencies (at household and at macro level) and moral hazards;
- encourage and facilitate market and social inclusion (be demand-driven and user-oriented);
- be based on a clear definition of rights and duties, that govern the relationship between the citizens and the state, and
- ensure continued and predictable (preferably domestic) funding.

The selection of activities or instruments that can be adopted into this framework will be tailored to meet context-specific needs and challenges, taking into account the diverse institutional, technical and financial capacities.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 15****Subject****2.4.13.** Human rights and extreme poverty**Lecturer:**Domingo Carbonero Muñoz, temporary lecturer,  
Email: [domingo.carbonero@unirioja.es](mailto:domingo.carbonero@unirioja.es)

## SUMMARY OF THE TOPIC

In Amartya Sen's human needs theory, extreme poverty prevents the development of the human being's basic human capabilities. Some of these involve basic needs such as health and food which govern the ways in which people and groups of communities can participate. The topic is grounded in this argument and tackles various implications of extreme poverty and possible responses to these through social intervention projects. Effectively, the projects we have chosen involve the education and training of social groups in agriculture. Consequently, the material for this proposal comes from information available on the United Nations Development Programme (UNDP) website. As this is topic is cross curricular in nature, there may be links with gender and the environment.

Our aim is for students to identify similar situations in their own immediate contexts and, on this basis, formulate potential projects which could be applicable. During the course of these activities, we shall explore the implications of these projects in their immediate environment and seek to identify principal actors and institutions, essentially the University.

## GENERAL AND SPECIFIC SKILLS

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.



## GENERAL

- **Teamwork:** work together actively with other people, areas and organisations to achieve common goals.
- **Adaptability to one's environment:** tackle critical situations in one's psychosocial environment, while retaining a state of physical and psychological well-being which allows individuals to continue working effectively.
- **Appreciate diversity and multiculturalism:** understand and accept social and cultural diversity as a source of personal and collective enrichment and develop coexistence between individuals without any discrimination on the grounds of sex, age, religion, social, political and/or ethnic group.
- **Critical reasoning:** analyse and evaluate the consistency of arguments, especially those statements or ideas that society accepts as true in the immediate context of people's lives.
- **Ethical awareness and commitment:** take a positive stance in favour of one's own moral good and that of others (in other words, do everything that is good or stands for good, live according to these principles, strive for personal self-fulfilment and a sense of fairness) and pursue this moral good.

## SPECIFIC

- Identify the specific obligations involved in complying with, protecting and implementing each human right and the minimum regulatory content required for its implementation and verification of its proper implementation in a particular situation.
- Contrast and assess situations, practices, legislation and local and national policies against the backdrop of those human rights instruments ratified by one's own country; and propose and plan effective alternatives.
- Identify, select and analyse information from a variety of (legal, social, economic, etc.) sources). Make proper plans and seek suitable documentation for this task.

## LEARNING OUTCOMES

At the end of the topic, the student will be able to:

- Identifying vulnerable groups in the analysis of human rights programmes.
- Substantiating the implications of an unsatisfactory level of human development.
- Relating extreme poverty to a lack of other rights relating to participation, the environment and work.
- Identifying innovative experiments in the field of poverty and the right to adequate standards.
- Formulating actions and interventions along the lines of the resolutions proposed by the UN.

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[Special Rapporteur on extreme poverty and human rights](#)

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ATD Fourth World and Franciscans International, *Making Human Rights Work for People Living in Extreme Poverty – A handbook for implementing the UN Guiding Principles on Extreme Poverty and Human Rights*, Geneva, 2015.

Doyal, L. and Gough, A. *A Theory of Human Need*. Guilford: New York, 1991.

## PRACTICAL EXPERIENCES (UNDP)

- In Egypt, [small farmers embrace the entrepreneurial spirit](#)
- In Sierra Leona, [with a little help, businesses thrive after Ebola](#)
- In South Sudan, [Strengthening the Civil Service to continue vital support](#)
- Sudan, [new techniques to help farmers adapt to climate change in Sudan](#)
- [Businesses Bloom in Sudan](#)
- [Morocco Medicinal plants empower women and save oases in Morocco](#)

## TEACHING METHODS

1. Reading. Read about practical projects outlined on the UNDP (United Nations Development Programme) website which describe practical projects designed to fight against extreme poverty.
2. Case studies:
  - a) Formulate titles of potential projects which might be appropriate to the environment of the student producing the project. Consider whether similar needs exist in the student's own environment.
  - b) Consider which objectives are achievable and what precise needs would be addressed.
  - c) Identify national and transnational actors who could play a role in resolving problems of extreme poverty.
  - d) Preference is given to projects which involve the students' professional perspective and include actors from their work environments (law, journalism and communication and social work).

## TIMETABLE OF TOPIC ACTIVITIES

Identification of the activity	Estimated work time	Submission date
Reading about practical experiences	1 hour	
Formulation of titles of potential projects which cover the contents of potential projects.	30 minutes	
Identification of contexts in which these projects could be produced.	30 minutes	
Identify objectives achievable in the long term.	30 minutes	
Identify national and transnational actors that could be involved	30 minutes	

## SCHEDULING LEARNING ACTIVITIES

Detailed description of the activities to be completed by the student, individually or as part of a group, with specified expected outcomes, and, where relevant, assessment criteria.

1. Read basic texts and literature about practical experiences. Identify, in A. Sen's text, the definition of extreme poverty and capabilities and choose an appropriate case study of basic experiences. These two points must be covered in the portfolio.
2. Students should submit a summary of two to four sheets of A4 as part of their portfolio containing a proposed project title, its national context, its short- and long-term objectives and all potential actors who could be involved.
3. Students could possibly meet to exchange ideas about their work via a forum, wiki or blog. Mainly, issues related to the proposals within their immediate context.

## SCHEDULE FOR SUBMITTED WORK

- a) Introduction. Objectives and aims of this study and relevance to successfully tackling extreme poverty (1 sheet of A4)
- b) Outline of the problem (1 sheet of A4)
  - (i) Current concerns: include all literature covered in the module
  - (ii) Relate the literature to the issue raised
- c) Experience described and its relationship with the issue raised
  - (i) Presentation of relevant content
  - (ii) Actors who should be involved in resolving the problem. Preferably, actors close to the professional activities of the interviewee
- d) Most relevant findings and personal opinions of the authors
  - (i) Findings of the project submitted (contributions, implications, etc.)
  - (ii) Relate findings to the personal opinions of the authors

## SELF-ASSESSMENT TEST

- 1 Based on Amartya Sen's definition, how would you define poverty?
  - a) a series of measures designed to study living conditions
  - b) as including possible alternatives to the development of people's living conditions and future opportunities
  - c) there are no universal needs, only relative needs
  - d) none of the answers above is correct
  
2. If we take Egypt as an example, the obstacles to the eradication of extreme poverty are found in...
  - a) the wrong environmental conditions
  - b) an absence of farmer training
  - c) the instability affecting the region and no links with mass markets
  - d) none of the answers above is correct.
  
3. The Makeni's market development model includes proposals that...
  - a) simply seek to palliate the impact of Ebola on extreme poverty
  - b) include the variables required for sustainable development which are linked to the environment, gender equality and the organisation of cooperatives and companies
  - c) have the aim of entering mass markets
  - d) None of the answers above is correct
  
4. Difficulties in the "New techniques to help farmers adapt to climate change in Sudan" model include
  - a) the wrong environmental conditions
  - b) the need to invest in order to adapt to climate change challenges
  - c) collective work with groups of farmers
  - d) all the above answers are correct
  
5. The main [links](#) to development of involve:
  - a) combating environmental challenges
  - b) combating environmental challenges using women as the main actors in implementing development programmes
  - c) strengthening partnerships between farmers in Morocco and others outside the country
  - d) none of the answers above is correct

## SELF-ASSESSMENT TEST

Question	Key answer
Question 1	B
Question 2	C
Question 3	B
Question 4	D
Question 5	B

## SUBJECT 2.4.:

# 2.4.13.HUMAN RIGHTS AND EXTREME POVERTY

## 1. INTRODUCTION

Human rights and extreme poverty are linked to the right to an appropriate standard of living and the right to development. Within human needs theories, extreme poverty, in the sense of an absence of adequate living standards, stands in the way of the development of human capabilities. The most relevant concerns here include an absence of the basic needs essential to human functioning (food and health) along with other needs related to the right to a life of freedom, dignity and social participation. Extreme poverty occurs in extremely degraded environments. Based on UNDP studies, it is habitually accompanied by serious health problems, impacts from environmental problems and a difficulty in finding alternatives to current circumstances.

The case studies analysed are intended to help students reflect upon three issues. Firstly, we want to see whether there are similar cases to those described in the texts in their countries of origin or in their home regions. Secondly, we want to identify similar cases and formulate possible alternatives in forging a right to development. Finally, when formulating future or alternative strategies, we need to identify actors close to their professions (law, communications, information, social work and educational sciences, etc.) who could potentially get involved.

The topic breaks down into three parts. The first part involves the definition of the concept of poverty and how it fits into a Human Rights framework. The second part studies the actions and mechanisms used by the United Nations to tackle issues related to the human rights aspect of poverty. These include its inspiring principles, the work of its rapporteurs and the presentation of different experiences and best practices. The third part includes examining the most important experiences included in the work and using these to propose actions linked to other rights.

## 2 THE THEORETICAL UNDERPINNINGS OF NEEDS THEORY

Sen (1984) and Doyal and Gough (1991) have taken a critical stance on economics-oriented approaches to poverty. These authors refer, in particular, to concepts such as human development, needs and capabilities. In their essays, they seek to look for grounds for a universal Human Rights approach to serve as a basis for comparative work. They deem this to be a suitable approach given the need to interpret similarities and differences in human development and capabilities.

Traditionally, the terms poverty and development have been constructed from an economic approach which looks at the availability of income. However, when we approach poverty from an economics perspective, we ignore social and cultural barriers and alternative criteria which could be used to identify the absence of opportunity in contemporary societies. Relevant examples could include family inheritance or membership of a particular ethnic group or geographical region.

Sen seeks to link the absence of a decent standard of living with the development of capabilities and the availability of resources to devote to human development. In his argument, the concept of capabilities is related to the possibility of achieving adequate levels of human functioning which allow individuals to develop their potential. Specifically, Sen includes criteria such as freedom of expression, human dignity, respect and participation in society with the aim of maximising the development of the potential for freedom and well-being. In this respect, social, community, individual and cultural issues are also relevant.

Doyal and Gough (1991), in their article on needs theory, identify different types of existing needs and their impact on the development of human capabilities. These authors build on the concepts advanced by Sen, and link the notion of capabilities to autonomy. In this way, the development of autonomy within human needs theory provides for the development of three basic characteristics: understanding, learning and mental health.

In terms of the possibilities of developing human capabilities, a distinction is made between basic and intermediate needs. Basic needs refer to factors such as physical health. Intermediate needs are more relative in nature as their definition is rooted in relative facts and history. Consequently, their definition is determined more by the type of society and the characteristics of the social groups in question. Nevertheless, these needs must be included in this study, insofar as factors such as long-term residence in a home, physical security in one's home environment, healthcare, the right to be free from hunger, to drinking water and food, appropriate socialisation during infancy and safety at work all have effects on human needs.

This brings us back to Sen's capabilities approach. Specifically, Doyal and Gough argue that these needs must be satisfied for capabilities and autonomy to be fully developed. The satisfaction of these minimum living needs allows individuals to obtain the minimum cognitive skills they need to participate in society and also gives them the capabilities and opportunities they need to generate new actions. Effectively, the potential for autonomy is linked to three key factors: understanding, learning and mental health.

As a result of these debates over poverty and its inclusion in social needs theory, at least 3 main issues arise:

- whether needs should be considered as an individual or a social sphere. Effectively, capacities theory and human needs theory raise the issue of the importance of the individual vis-à-vis the importance of society when interpreting needs. Within these theories, it is now possible to include an individual approach to needs when defining social norms and regulations. It is essential to include the individual level, as it allows for the performance and free exercise of capabilities, but it should not be disassociated from the individual's participation in society (Sen, 1985);
- whether needs are universal or relative. On the one hand, from a human rights perspective, an argument can be made for a degree of relativism. In particular, this includes factors which require the recognition of diversity and respect for the distinctive features of different social groups (Geertz, 1973). On the other hand, a human rights approach seeks to achieve a minimum universal consensus. Sen and Doyal and Gough offer insights on the minimum needs that must be fulfilled by living in society. For example, the United Nations Development Programme (UNDP) Human Development Index (HDI) was developed as a result of discussion about a minimum-needs approach. This programme includes three dimensions (education, standards of living and health) used to analyse the development of different countries;
- the distinction between ends and means which emerges in the Human Rights approach and in human needs theories. On the one hand, Doyal and Gough, within their needs theory approach, distinguish between basic and intermediate needs. This is a useful distinction insofar as it helps us explore the seriousness of different situations and its influence when it comes to discussing autonomy and development. On the other hand, Sen makes a distinction between ends and means. Ends are related to the idea of freedom and the possibility that human beings can develop their capabilities in the greatest of freedom. Means are linked to the availability of resources in the immediate vicinity which allows human beings to make the best possible use of their capabilities.

### 3. CONTRIBUTIONS AND GUIDELINES IN THE FIELD OF HUMAN RIGHTS

The UN (2004) designed a conceptual framework for the fight against poverty on the basis of needs theories and a capabilities approach. This regulatory framework is based on at least five principles: autonomy; a recognition of the regulatory framework; accountability; the principle of equality and non-discrimination; and participation.

- The principle of autonomy. The contribution of human rights to the eradication of poverty is based on allowing people from the poorest populations to take control of their lives and be able to take their own decisions. The aim is to guarantee freedom of choice so that these decisions serve to develop their autonomy and capabilities.
- Explicit recognition of national and international regulatory frameworks. All states must enshrine the obligation to respect human rights and this involves states and actors arriving at a minimum agreement.
- Obligations of accountability. In terms of the previous principle, agreements must not only be respected but should be fulfilled responsibly and all decisions taken should be explained. Consequently, accessible, transparent mechanisms should be used to allow the population to ascertain to what extent their rights are being implemented and upheld.
- Non-discrimination and equality. In most cases, poverty leads to inequalities in access to resources, mobility opportunities, information and opportunities to exercise power. These inequalities are linked to ethnic origin, sex, religion and social status. The most salient effects of this can be seen in a lack of recognition of political status, the neglect of certain social categories and groups and persistence of values that determine the relationships between different groups in society.
- Participation. From the point of view of human rights, this means that groups should be involved with those who direct actions. Specifically, it involves trying to achieve active participation in the formulation, application and monitoring of strategies to combat poverty. Insofar as participation involves different groups in society, this means that groups with greater power should recognize groups which do not enjoy such power. This mental shift presupposes a change in the position that each occupies in society.

In the United Nations formulation, participation is a broad concept, linked to of the rights of association, freedom of expression, freedom of assembly, freedom of information and the fulfilment of the right to a decent standard of living.

#### 3.2 THE DUTIES OF THE UNITED NATIONS SPECIAL RAPPORTEUR IN THE AREA OF EXTREME POVERTY

Professor Philip Alston is the current Special Rapporteur on extreme poverty and human rights. The Special Rapporteur is an independent expert appointed by the Human Rights Council and undertakes the following main tasks: (1) conducting research and analysis to be presented in separate thematic reports to the Human Rights Council and the General Assembly; (2) undertaking country visits and reporting on the situation in those countries in relation to the concerns of the mandate; (3) sending letters to governments and other relevant entities in situations in which violations of human rights of people living in extreme poverty are alleged to have taken place.

The mandate on extreme poverty was first established in 1998 by the United Nations Commission on Human Rights, and was taken over by the Human Rights Council in June 2006. The mandate was established to give greater prominence to the plight of those living in extreme poverty and to highlight the human rights consequences of the systematic neglect to which they are all too often subjected. The expert is required by the Human Rights Council to examine and report back to member States on initiatives taken to promote and protect



the rights of those living in extreme poverty, with a view to advancing the eradication of such poverty.

*Table 1. Objective of the mandate and main activities of the United Nations Special Rapporteur in the area of extreme poverty*

### Objectives of the mandate

Through its [resolutions 8/11](#) and 26/3, the Human Rights Council requests the Special Rapporteur to:

- Identify approaches for removing all obstacles, including institutional ones, to the full enjoyment of human rights for people living in extreme poverty.
- Identify, including in cooperation with international financial organizations, the most efficient measures taken at the national, regional and international levels to promote the full enjoyment of human rights of persons living in extreme poverty.
- Make recommendations on how persons living in extreme poverty can participate in the process towards the full enjoyment of their human rights and the sustainable improvement of their quality of life, including through empowerment and resource mobilization at all levels.
- Study the impact of discrimination and to pay particular attention to the situation of women, children and other vulnerable groups, including persons with disabilities living in extreme poverty.
- Participate in the assessment of the implementation of the Second United Nations Decade for the Eradication of Poverty and to submit recommendations on the realization of Millennium Development Goals, in particular the first goal.
- Develop cooperation with United Nations bodies dealing with the same subject and to continue participating in relevant international conferences on extreme poverty.

### Main activities

In the fulfilment of the mandate, the Special Rapporteur:

- Undertakes [country visits](#);
- Responds to information received concerning the human rights situation of people living in extreme poverty;
- Develops constructive dialogue with Governments, international organizations, civil society and other relevant actors with a view to identifying ways to remove all obstacles to the full enjoyment of human rights for people living in extreme poverty;
- Submits [annual reports](#) to the Human Rights Council and to the General Assembly;
- Communicates with States and other concerned parties with regard to alleged cases of violations of the human rights of people living in poverty and social exclusion (See [Individual Complaints](#)) and other issues related to the mandate.

Source: personal compilation of information provided by the [United Nations rapporteur](#) about the objectives of his mandate and his activities.

Some of the most important outcomes are to be found in report writing, individual complaints and country visits.

- In the first place, the United Nations Rapporteur produces regular reports on specific subjects. Some of the most important of these over the last 5 years concern the situation of cholera victims, the implementation of economic and social rights, unpaid labour, access to justice and participation by people living in poverty.
- Secondly, the Rapporteur acts as a voice against injustice. To a great extent, he or she receives complaints from all over the world and has the duty of making urgent appeals for solutions and advancing pleadings to try and alleviate these problems.
- Thirdly, visits have allowed a number of countries (China, Mauritania, Romania and Chile) to be brought within the international human rights framework. Principally,

extreme poverty is related to the violation of democratic rights and an absence of economic and social rights.

### 3.3 MEASURES TO DEFEND PERSONS LIVING IN EXTREME POVERTY FROM A HUMAN RIGHTS APPROACH

Extreme poverty is largely linked to an absence of other rights. Firstly, a distinction can be made between the means that exist to demand these rights and the experiences involved in their exercise. Consequently, Table N° 1 identifies different means which help to eradicate extreme poverty. These include the right to participation, a safer environment, health protection, family support, the right to sufficient food, the right to employment, education and respect from companies.

There are different recommended experiences or actions for the performance and the exercise of each of these rights. In this sense, there is a direct relationship between the right to proper housing and the creation of a safe environment. Furthermore, there are other connections such as the one which holds between the right to water and sanitation and the performance of the health services.

Table 2. Means to demand rights and main plans of action

Means to demand rights	Recommended experiences or plans of action
The right participation: the key to autonomy Promote social inclusion through cultural participation and combating stigmatisation	Adopt a law intended to combat poverty. Demand the right to housing.
Create a safer environment.	Provide the right to proper housing.
Resource proximity services which are crucial to good health	Provide the right to water and sanitation Work with populations which do not have access to water, electricity, teaching or healthcare
Support families; protect and respect the rights of each family member	Provide the right to register births Provide governmental support for the family
Provide the right to food: the fight against hunger and malnutrition	The fight for land for indigenous populations
Guarantee the right to employment and a decent standard of living	Provide young shantytown dwellers with the financial means to support themselves
Guarantee full access to quality education	Advance the right to education
Ensure that human rights are respected by corporations	Tackle child labour

Source: Prepared from *ATD Fourth World and Franciscans International (2015)*.

The manual produced by the *ATD Fourth World and Franciscans International (2015)* distinguishes six stages in applying a human rights perspective to a population living in extreme poverty. Each of the following steps can be applied to each of the rights described in the table above:

- Step 1. Speak with the local population, with the aim of gathering information, getting to know the most disadvantaged groups and understanding the difficulties that they face.

- Step 2. Advocate for the group of persons, with the aim of raising awareness and exchanging information. This is a way of informing the most vulnerable groups of people about their rights and helping them reflect about their experiences and aspirations. The main aim is to make them aware of their circumstances and any potential they have for change.
- Step 3. Identify potential partners and build potential partnerships. Make contact with other persons and groups who are in disadvantaged circumstances to see if they face common challenges.
- Step 4. Systematise this knowledge and share it with the relevant local authorities to achieve an understanding of the desired changes.
- Step 5. All improvement for groups who are in living in extreme poverty depend on making society aware of the problems that these groups face. We therefore need to identify the main obstacles to this, challenge prevailing stereotypes and make our opinions known to leaders.
- Step 6. Set up suitable participation spaces with local authorities. The aim here is to organise working meetings or informal meetings on a regular basis. A flexible work guide therefore needs to be developed which also contains full, up-to-date information.

## 4. EXPERIENCES AND CONTENTS DEVELOPED BY THE UNDP IN THE FIELD OF HUMAN RIGHTS

We have selected a variety of experiences that can help in the understanding of the action plans implemented to break the vicious circle of poverty. Specifically, extreme poverty is linked to a variety of social problems in the experiences we have seen. These problems include, notably, the absence of any organisation to generate added value for products, a lack of synergies between farmers to help them tackle structural problems such as unemployment and the inability to respond to the effects of climate change. At the same time, some of the experiences covered focus on the most vulnerable groups. Specifically, populations with the greatest difficulties are those with health or women-related problems in some regions. The examples we cover include experiences by the UNDP and other organisations in Egypt, Sudan and Morocco. A list of references to the experiences can be found in the bibliography for this topic.

### 4.1 SMALL BUSINESS INITIATIVES TO TACKLE THE RISKS OF POVERTY

In the case of Egypt, there is the SALASAL initiative. This experience is located in Upper Egypt. This region is characterised by massive unemployment and a proximity to conflict zones. Specifically, the data provided in papers about the initiative show an area lived in by at least 25% of the Egyptian population. Two thirds of this population are poor, and poverty is mainly centred on the towns. The SALASAL initiative came from a farmer, Mohamed Embarak, who set up a project for investing his savings in agriculture. This project was advised by a team of agricultural engineers who tried to organise community work with small farmers. The main objectives of this project were as follows:

- to organise joint work between small farmers;
- to create a company in which the owners are Egyptian farm producers;
- to connect the production generated by the farmers directly to the distribution markets;
- to improve productivity through advice and the acquisition of farming techniques.

## 4.2 NEW TECHNIQUES FOR ADAPTING TO CLIMATE CHANGE

In Sudan, a number of different pilot projects have been set up to adapt agriculture to the effects of climate change. Traditional practice in northern Sudan was based on subsistence farming. Basically, agricultural production depended on the climate and the functioning of the rivers. The main drawbacks of this mode of production are related to the effects of climate change, particularly the impact of desertification and irregular rainfall on the amounts of land available for pasture and agricultural production.

A National Action Programme was produced by the Sudanese government and supported by the UNDP. The aim of this initiative was to adapt to the effects of climate change and the impact of a fragile ecosystem on the living conditions of subsistence farmers. Consequently, the objectives were as follows:

- to advise farmers on water-conservation techniques;
- to improve farmers' living conditions;
- to respond to the unexpected effects of climate change and reduce farmers' dependence on the climate.

## 4.3 IMPROVEMENTS IN THE TOOLS AVAILABLE FOR FARMING

Traditional tools, such as the *gadga*, are used in harvesting plants. Particularly *hibiscus* plants. This tool is mainly known for its small size and the allergic reactions it causes to the skin. Previous work carried out by the UNDP has explored the unsurmountable difficulties in finding suitable tools for this particular harvest and the high costs to farmers' health from the use of the *gadga*.

Currently, this harvest is used as an additive to fruit tea and is the most important source of income for Sudanese farmers. It should also be mentioned that agricultural production in the Sudan has been affected by armed conflict which has led to a lack of equipment and means of transport and to abandoned crops.

Currently, there is a project financed by USAID and the Swiss government, which is trying to take advantage of demand in Germany for this product and seeking a viable alternative for the thousands of refugees who are returning home. Effectively, according to our information, it is hoped that at least 1500 farmers can be integrated into this productive system with the generation of 12,000 jobs. The objectives of this project are as follows:

- to improve agricultural productivity;
- to reduce the effects of disease caused by the use of unsuitable tools;
- to improve transport.

## 4.4 THE EMPOWERMENT OF WOMEN, THE PRODUCTION OF PLANTS AND THE PROTECTION OF OASES IN THE DESERT

This project is aimed at the women of Ksar Tizagharine, an oasis situated in Errachidia, a province of Morocco. This population used to depend on their husbands, fathers and sons. This project seeks to improve the position of women by fostering their active role as producers and their involvement in gaining market access. For this purpose, the Annama Association (Association for the Development of Rural Women) has initiated an intervention project, under the UNDP, supported by the Sustainable Development Programme. The main objectives of these projects are as follows:

- to improve women's organisation and foster their active role in the economy;
- to adapt agricultural production in oases to climate change;
- to protect biodiversity in a strategic agricultural sector;
- to establish a municipal information and coordination plan;
- to protect the economy from disasters caused by climate change and reduce risks.

One outcome of this Project is the opportunity to benefit from the production of medicinal and aromatic plants, which require little investment in water-related infrastructure, as this type of plant is particularly abundant in arid and desert areas. Furthermore, this sector potentially offers many future job opportunities.

Approximately 1500 farmers have been trained in the production of medicinal plants and species and in their commercial distribution. Oases play a particularly fundamental economic, social and ecological role. This sector offers numerous future opportunities and, indeed, oases offer a micro-climatic barrier to the advance of desertification.

Furthermore, women living in oases are especially badly affected given the difficulties they face in gaining access to resources and land ownership. In oases, 90% of economic activity comes from agriculture and the woman's role is to prune and harvest. This programme tries to promote groups of women and associations and make them capable of developing local products.

Traditionally, the medicinal and aromatic plants sector was the preserve of men, as it was of particular interest to the Moroccan economy. In such circumstances, the inclusion of a group of 38 women may lead to their financial independence. Specifically, a number of hectares of land have been purchased thus professionalising the sector, allowing the purchase of further land and the search for new marketing partners and enabling this experience to be extended to other oases and areas of land.

#### 4.5 THE ORGANISATION OF AN INTERNATIONAL CIVIL SERVICE TO COMBAT THE HUMANITARIAN CRISIS IN SOUTH SUDAN

The UNDP programme offers instruction in the shape of a civil service in South Sudan. The programme started in 2010 is a response to the important humanitarian crisis in this region and was extended until 2016. Currently, the 2014-2016 budget is \$26 million, funded by the Norwegian Government.

South Sudan is embroiled in armed conflict and the state has lost all authority. Given an absence of basic social protection services, a civil service has been implemented under the UNDP to cover urgent educational and healthcare needs. This service has been promoted by the UNDP which has offered two-year contracts to professionals from a variety of different countries. Their salaries are paid by the countries of origin and topped up by the Norwegian government.

These services not only aim to alleviate needs but also to train the population in the areas of legislation, education, health, implementation of therapies and professional training. Specifically, in the area of training, project data show that more than 200 young people have been trained in areas including plumbing, carpentry, mechanics and building.

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60**

**Subject**

**2.4.14.** Human rights and drinking water and sanitation

**Lecturer:**

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## SUMMARY OF THE TOPIC

Water is essential for life, and yet the Right to Water took a long time to be acknowledged as such by the international community. The 1948 Universal Declaration of Human Rights tacitly recognised it in article 25, which stated that *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services*, but neither water nor sanitation is mentioned specifically. In 2002, the United Nations Committee on Economic, Social and Cultural Rights issued General Comment 15 stating that the right to water is understood as *the right everyone has to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses*. However, in no case does it include water needed for tasks other than strictly personal use, such as farming, fishing, livestock, energy production, transport or people and merchandise and gardening. It is a right that is acknowledged in other basic rights such as the rights to food, to education and to work, because without water none of the other basic rights are possible.

Resolution 64/292 of the 2010 General Assembly of the United Nations explicitly recognised the human right to water and sanitation, reaffirming that clean drinking water and sanitation are essential for exercising all human rights. In addition, this resolution urges the States and international organisations to provide financial resources and to encourage the training and transfer of technology to help countries have a clean, accessible and affordable potable water supply and sanitation for all. Water and life go hand in hand.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

#### GENERAL:

- **Teamwork:** to become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Adaptation to the environment:** to face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** to positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** to understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** to analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** to be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- Suitably identify, interpret and apply the international, regional and national norms on human rights applicable to the different assumptions posed in their respective disciplines and professional areas.
- Define and accurately distinguish who the possessors of rights are and the holders of obligations in relation to each human right in a particular situation.
- Identify the specific obligations of respect, protection and realisation of each human right and the minimum normative content needed for its realisation and for questioning its fulfilment in a particular situation.
- Identify, analyse, argument and evaluate the critical deviations and gaps in the capability and responsibility of the holders of rights and obligations that hinder the action or transformation of a particular situation in which human rights are being violated.
- Contrast and evaluate situations, practices, legislation, local and national policies in accordance with the legal instruments on human rights ratified in your country, and suggest and plan out some efficient alternatives.
- Identify and apply the international and regional protection mechanisms for human rights.
- Seek out, select and analyse information from a variety of sources (legal, social, financial, etc.). Plan and document this task appropriately.



## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### Human rights treaties with explicit reference to safe drinking water and sanitation

- Universal Declaration of Human Rights 1948
- International Covenant on Economic, Social and Cultural Rights 1966 : arts. 11 and 12.
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) : art. 14.2.
- Convention on the Rights of the Child (CRC) : art. 24.
- Convention on the Rights of Persons with Disabilities (CRPD) : art. 28.

### UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

General Comment n° 6 : [The economic, social and cultural rights of older persons](#) (1996), UN Doc. E/1996/22.

General Comment n° 14 : [The right to the highest attainable standard of health](#), (2000), UN Doc. E/C.12/2000/4.

General Comment n° 14 : [The right to water](#), (2002), UN Doc. E/C.12/2002/11.

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

### General Assembly of the United Nations:

- Resolution A/RES/64/292, The human right to water and sanitation, 28 July 2010.
- Resolution A/HRC/15/31, Report of the independent expert on the issue of human rights obligations related to access to safe drinking water and sanitation, 2010.
- Resolution A/HRC/33/49, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, 2016.

### Human Rights Council

- Resolution on human rights and access to safe drinking water and sanitation, 2010 (UN Doc. A/HRC/RES/15/9).
- Human rights and transnational corporations and other business enterprises, 2011 (UN Doc. A/HRC/RES/17/4).

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## LEARNING PROCESS RESULTS

At the end of the topic, the student will be able to:

- Understanding the nature and scope of the right
- Identifying the holders of the right to water, particularly those who belong to risk groups (women, children, migrants, elderly workers, the disabled)
- Locating situations of risk of infringing on the right to water.
- Integrating a module on the right to water into their curriculum.
- Understanding the governments’ obligations.

## METHODOLOGY

The teaching tools and methods proposed for carrying out the activities are as follows:

Methodology:	Teaching tools
Expository method	Reading texts and/or viewing audiovisual material
Case studies	Blog / Forum
Group discussions	Blog / Forum

## DESIGNING A SYLLABUS OF LEARNING ACTIVITIES

### 1. *Reading the Educational Guide of the topic*

The guide introduces the student to the study of the right to water, providing precise information on the main and complementary bibliography for reference and on activities to achieve the learning results associated with the module.

### 2. *Study of the recommended bibliography, audio-visuals, etc.*

By consulting the various different information resources listed in the guide, the student can delve deeper into the different aspects regarding the right to water, identifying the most vulnerable people and the main problems for exercising the right.

### 3. *Active search for information on the right to water*

The students will identify the main and complementary bibliographic resources for study of water-related rights in the area where they live. The student will draw up a bibliographic repertory that will include a reference card for each publication identified, stating at least the following data: author, title, publisher, place and date of publication, brief comment on the main aspects for further research into this study.

### 4. *Watching a film*

The participants will choose one of the following films and design a practicum for their students in accordance with the discipline or degree of their teaching so as to focus on the questions on the right to water that come up in the film, using whatever other complementary materials are indicated by the teacher and the general ones stated in the Educational Guide. The practicum must help the student to relate the problems detected to the national and international legal framework and the explanations received in class. The films involving the right to water are:

[“A Thirsty World”](#) is a documentary directed by photographer Yann Arthus-Bertrand that amazed the world with images showing the beauty of water in nature while also illustrating the serious problems that exist about water and the urgent need to find a solution. The quality of the images and the photographer’s insightful point of view lets us enjoy and reflect on the subject.

[“The Island President”](#) is an excellent documentary based on a true story. The film follows Mohamed Nasheed, the ex-president of the Maldives, in his fight to achieve a worldwide commitment to control climate change, as the resultant rising sea levels would mean the disappearance of his land. The documentary reveals the deeper political questions at play in environmental problems, with resolutions that may be painful to viewers.

[“180° South”](#) is a documentary that places water as its axis. The protagonists’ passion for surfing is the means the director uses to connect with the viewer, who in turn connects with nature and the environment. The film is quite enjoyable.

“[Sushi, the global catch](#)” represents a curious audiovisual film that shows that lurking behind the growing gastronomic trend of eating sushi is an alteration in the ecological life in the oceans. After learning about the history of this Japanese dish and its consequences on the environment, the views will think twice before ordering food at a restaurant.

“[Rango](#)” is a film made for children. Creativity, humour and wit are combined to show the hardships brought on by the shortage of water and the rise of parallel businesses around it. It provides an excuse for family entertainment and talking about the subject with the little ones.

“[Erin Brockovich](#)” is a film based on a true story. Julia Roberts stars as a woman who fights against the company where she works because they are polluting the water, and that affects her health and the health of her family. The viewer feels like part of the investigation that reveals the most extreme corruption and in which it becomes impossible not to be moved by the life stories told.

“[A Civil Action](#)” is a cinematographic portrayal of water pollution and the corruption of the system. This thriller treats the problem with a critical view on the work carried out by institutions, governments and industry.

“Planet Ocean” is a documentary that is a both visual treat and a motive for inner reflection. It uses a compilation of photos a film footage by various different photographers inspire viewers to preserve the oceans.

“[Flow: For the love of water](#)” is a documentary that shows the crisis of the right to water in all its forms all over the world. It is supported by testimony from scientists, businessmen, writers and specialists who offer a theoretical look and a subjective diversity regarding the environmental issues affecting the present and future of mankind.

“[Ganga: from the ground up](#)” is a film that takes conveys the deep spiritual significance of the Ganges River in the Hindu culture. Along the way, it presents the problems of water management faced by the population of India and the degree to which multinationals and governments are responsible. It is an innovative proposal.

### 5. Syllabus

Students will develop a module/topic to incorporate into the syllabus of their field so as to work with their students on some aspects on the right to water, incorporating whatever competencies are deemed worthwhile and the APS methodology.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Assessment criteria
Activity 1	1 hour	Self-evaluation
Activity 2	5 hours	Portfolio: consultation log
Activity 3	5 hours	Portfolio: bibliography cards
Activity 4	20 hours	Portfolio: report
Activity 5	29 hours	Development of the syllabus

## SUBJECT 2.4.:

# 2.4.14. HUMAN RIGHTS AND DRINKING WATER AND SANITATION

## 1. INTRODUCTION

*"We forget that the water cycle and the life cycle are one"*  
Jacques Y. Cousteau

Water is the essence of life. Lack of clean water and basic sanitation destroys more lives than any war or act of terrorism. Drinking water and sanitation are essential for life and health, and fundamental for the dignity of every human being. However, 884 million people lack access to improved drinking water sources and 2.5 billion do not have improved sanitation services.<sup>511</sup> The real figures are even more alarming because millions of poor people are not recorded in the statistics. The causes of the current water and sanitation crisis lie in poverty, inequality and disparity in power relationships, worsened by social and environmental challenges such as ever-faster urbanization, climate change and increasingly polluted and dwindling sources of water.

It has many taken years for international treaties to recognise the right to water as a separate human right. During those years, international human rights norms comprised specific obligations regarding access to a sufficient amount of drinking water for personal and household use consisting of drinking, sanitation, washing clothes, cooking and personal and household hygiene.

Access to drinking water and sanitation are indispensable requirements for exercising other basic human rights. The 1948 Universal Declaration of Human Rights implicitly recognised it in article 25, stating, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services".

Water is a global asset without substitute for human life and ecosystems. This is affirmed by the group of experts from UNESCO who define water as "the essential lifeblood of our planet, with the power to generate, sustain, receive, and ultimately to unify life". People are dependent on water for direct consumption (drinking, washing and hygiene) but also because it is a determining factor in many other activities, such as farming, livestock, energy production, fishing, transporting people and merchandise and gardening. In addition, water is also an element that can jeopardise life and health due to its relation with natural phenomena such as floods, draughts and tsunamis or to being a vector for diseases when it is contaminated or has not been properly treated before it is consumed.<sup>512</sup>

The international community needs to become aware of the fact that access to drinking water and sanitation must be encompassed in the framework of human rights. That access

511. Cfr. United Nations International Children's Emergency Fund and the World Health Organisation, *Progress on Drinking Water and Sanitation: Special Focus on Sanitation* (2008); Who / UNICEF [Joint Monitoring Programme \(JMP\) for Water Supply and Sanitation](#).

512. Cfr. ONGAWA e IPADE, *Crisis ambiental y Derecho humano al Agua. Derecho al Agua y al medioambiente sano para una vida digna*, nº 5, 2012, pp. 32-54, specially pp. 32-36.

is mentioned expressly in the Convention on the Rights of the Child,<sup>513</sup> the Convention on the Elimination of All Forms of Discrimination against Women<sup>514</sup> and the Convention on the Rights of Persons with Disability.<sup>515</sup> In 2002, the United Nations Committee on Economic, Social and Cultural Rights issued General Comment 15 stating that the right to water is understood as *the right everyone has to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses*. Three years later, the United Nations Subcommission on the Promotion and Protection of Human Rights approved the guidelines for realising the right to drinking water and sanitation.<sup>516</sup> The United Nations Development Programme (UNDP) also underscored on a number of occasions that the starting point and main unifier of public action regarding water and sanitation is the recognition of the right to water as a basic human right.

Despite the relevance of water for life, the human right to water and sanitation was not formally recognised until Resolution 64/292 of the United Nations General Assembly of 28 July 2010 when it was established that *the right to drinking water and sanitation is an essential human right for enjoying life and all the human rights*. With this resolution the Assembly urged the States and international organisations to provide financial resources and to encourage increased capacity and transfer of technology to provide the entire population with affordable access to drinking water and sanitation for all.

Therefore, safe access to safe drinking water and sanitation was recognised as a basic human right for the complete enjoyment of life and all other human rights, which are universal, indivisible, interdependent and interrelated, and as such, must be treated globally, fairly and equitably and must all receive the same attention. Universal access to sanitation not only holds a fundamental importance for human life and dignity, but also constitutes one of the main mechanisms for protecting the quality of water resources. [Resolution 15/9](#) of the 2010 of the United Nations Human Rights Council stated that the right to water and sanitation is part of current international law and confirmed that this right is legally binding for the States.

In May 2011, resolution 64/24 of the World Health Organisation (WHO) called on all member States to ensure that their national health strategies contribute to achieving the Millennium Development Goals (MDGs) in water and sanitation matters while also supporting the realisation of the human right to water and sanitation. On September 28, 2011, the Human Rights Council passed resolution 18/1 encouraging the compilation of good practices on the right to drinking water and healthy sanitation. All these measures are aimed at raising awareness and creating a special sensitivity regarding the right to water. Also noteworthy in this regard is the Report of July 27, 2016 by the Special Rapporteur on the human rights to safe drinking water and sanitation promoting (among other things) gender equality between

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513. See art. 24(2): "States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (...) c) combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; (...) e) ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents".

514. Article 14(2)(h) stipulates that: "States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

515. Article 28 defines the right of persons with disability to an adequate standard of living for themselves and their families and 28 (2) "States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: (a) to ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs".

516. Vid. UN Doc. E/CN.4/Sub.2/2005/25.

men, women and the lesbian, gay, bisexual and transgendered (LGBT) collectives in their exercise and enjoyment of this right.<sup>517</sup>

## 2. THE RIGHTS-BASED APPROACH TO THE PROVISION OF SAFE DRINKING WATER

Approaching the provision of safe drinking water and sanitation from a human rights perspective can act as a fillip to mobilize individuals, in particular the poor and marginalized, inform them of their legal rights and empower them to realize these. A human rights approach brings a new paradigm to the water sector: the provision of safe drinking water is no longer perceived as charity, but as a legal entitlement, with individuals at the centre.

While a human rights framework does not automatically resolve difficult policy issues about financing, delivery or regulation, it does provide international standards to guide political and economic decisions over the allocation of water resources; enables individuals to be heard in decision-making related to water and sanitation; and can strengthen States' accountability for the delivery of water and sanitation services.

A central feature of a human rights-based approach is also its focus on accountability, which underlines the obligations of the State, as dutybearer, to ensure access to safe drinking water and sanitation to rightsholders. In practice, accountability requires the development of laws, policies, institutions, administrative procedures and mechanisms of redress to promote and protect access to safe drinking water and sanitation.

## 3. NATURE OF THE RIGHT TO WATER

The United Nations Human Rights Commission developed the basic human rights recognised in two different conventions. On one hand is the International Covenant on Civil and Political Rights (ICCPR) and on the other, the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Until 2010, the right to water was not recognised as a basic human right. This left the population unprotected in accessing water resources due to the fact that private enterprises had taken over from the public sector in the control of water, thereby making the supply of water subject to the laws of the market. In almost every instrument of international law, the right to water went no further than a moral aspiration rather than being positively recognised right.

In 2002, the United Nations Committee on Economic, Social and Cultural Rights issued General Comment 15 recognising the right to water as the obligation of ensuring everyone has an adequate standard of living, which necessarily implies basic access to water and sanitation. From this recognition, it followed that the right to food was indissolubly linked to the access to water, not only because water is essential for human beings and permits use of other foods, but also because the communities' lack of adequate access to water leads to groups of humans not being able to achieve nutritional sovereignty, a fact to be aspired to within the right to food.

General Comment 15 regulated the right to water as the right everyone has to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. Therefore, the nature of the right to water is one of a universal, progressive right that affects everyone in the world without any discrimination at all and has a progressive scope because it is not immediate, due to the fact that improvements and investments in it must be made gradually. This right is encompassed in the ones known as economic, social and cultural rights (ESCRs), and therefore, all the States that have ratified ICESCR are committed to ensuring it fully.

517. Resolution A/HRC/33/49, Report of the Special Rapporteur on the human right to safe drinking water and sanitation, 2016.



## 4. HOLDERS OF THE RIGHT TO WATER

The holders of the right to water and sanitation are all persons without regard to sex, age, sexual orientation, ethnic background, religious beliefs marital or financial status or any other condition. The right involves:

- a) access to water and sanitation services at established standards of availability, accessibility, affordability and quality
- b) the right to equality and non-discrimination in access to it
- c) the right to information and to participation in decision-making that may affect their exercising the right to water and to be an integral part of all policies, programmes and strategies regarding water
- d) reparation in any cases in which the exercise of this right was violated, by means of which every person or group who has been a victim of infringement of the right to water shall have effective recourse, legal or otherwise, both nationally and internationally.
- e) sustainability of the right to water in the future General Comment No. 15 points out that free trade agreements must not restrict or undermine a country's capacity to guarantee full exercise of the right to water and sanitation. The Party States shall ensure that international agreements pay due attention to the right to water, and to that end, they shall draw up new legal instruments as necessary<sup>518</sup>.

The United Nations notes that there are groups or persons who have difficulties in exercising their right to water due to discrimination, stigmatisation or both factors at once. Effective protection of the right to water requires paying attention to the specific situation of the people and groups, especially the most vulnerable one. The States must adopt positive measures to ensure that certain individuals and groups are not discriminated against. The States must adapt their policies on water and sanitation to help those most in need of assistance instead of merely attending to the majority. They must also assign financial and human resources to groups that have historically suffered from discrimination to ensure that they can enjoy their rights equally with other groups in society. A few cases are analysed below.

### 4.1 THE URBAN AND RURAL POOR

Most of the people lacking access to drinking water and sanitation are poor people from urban or rural areas. Poor people are less likely to have drinking water and sanitation, and also have less capacity to deal with the effects of that lack. The rural poor make up the largest segment of population without drinking water and sanitation. More than 1 billion inhabitant in such areas have to do their business in the open air, thereby leading to important consequences for health, privacy and physical safety<sup>519</sup>.

The urban poor, who live in precarious settlements that make up 42% of the urban population in developing nations, also face particular difficulties. Local and national authorities are often reticent to hook up these settlements to the water and sanitation grid because of their precariousness. The service providers claim a number of reasons for not supplying these places, such as that the inhabitants are in no condition to pay and ensure that they recover their costs, that they do not have the documents needed to prove their right to receive the services or that there is a risk of eviction. Consequently, the inhabitants of precarious settlements must collect water from unsafe sources such as wells or irrigation ditches, or purchase it at

518. DE LUIS ROMERO, E., FERNÁNDEZ ALLER, C. y GUZMÁN ACHA, C., "Derecho humano al agua y al saneamiento: derechos estrechamente vinculados al derecho a la vida", *Documento Social* n° 170 Tribuna Abierta, 2013, pp. 217-236, specially pp. 228-229.

519. UNITED NATIONS Office for the Office of the High Commissioner for Human Rights, UN-Habitat, WHO, Factsheet No. 35 *The Right to Water*, Geneva, pp. 1-64, especially pp. 19-28.

a higher price than what people connected to the water mains pay. Furthermore, their supply is usually cut back at times of shortage so as to keep the supply to the wealthier areas.

#### 4.2 WOMEN

Lack of access to drinking water and sanitation affects women specifically<sup>520</sup>. When there is no drinking water in the homes, women and girls are mainly the ones who must go out and get it. This takes time and is also a heavy burden. According to the UNDP, this task also partly explains the great disparity in school attendance between boys and girls in many countries. It is not unusual to find women walking four hours, queuing up and carrying water back home instead of spending that time on other productive activities or household chores or taking care of the children. In many cases, the water they gather is dirty and comes from unsafe sources. Women's health may be greatly affected by the heavy weight of the water they bear, as well as by the diseases they catch from contact with the water, such as schistosomiasis<sup>521</sup>. Quite often, women are excluded from adopting decisions about water and sanitation. As a result, their needs and specific circumstances are not taken into consideration when making or expanding programmes to supply water and sanitation.

#### 4.3 CHILDREN

The health, educational development and general welfare of children largely depend on their having access to basic services such as drinking water and sanitation, which are proven to be fundamental to children's health.

In countries with a high child mortality rate, diarrhoea causes more deaths of children under 5 than any other cause, more than pneumonia, malaria and HIV/AIDS together. More than 90% of the cases of child mortality are related to contaminated water and inadequate sanitation<sup>522</sup>. The lack of drinking water increases children's vulnerability to disease. Their immune system and detoxification mechanisms are not fully developed, so they have fewer defences to water-related infections. Children also have less body mass than adults. This means that water-borne chemical substances may be harmful to them at concentrations that are relatively harmless to an adult. Another right affected is the girls' right to education. One important reason why parents do not send their daughters to school in many countries is because there are not separate sanitary services for girls. In Nigeria, for example, parents take their daughters out of school because they would have to go outdoors. Some countries give fines for defecating outdoors<sup>523</sup>. In Uganda, 94% of the girls reported that they had trouble at school during menstruation, and 61% noted that they did not attend school during those periods.

#### 4.4 PEOPLE WITH DISABILITY

The possibility of accessing water supply and sanitation services is also crucial for persons with disability who have historically marginalised or discriminated against on account of, among other things, the fact that their special needs have not been taken into account in the design of buildings, services and infrastructures. However, access to water and sanitation services is indispensable to independent living and dignity. Small changes to the design and low-cost adjustments would in many cases be enough for water and sanitation services and facilities to become accessible again. Universal design should be a priority as well in the construction of new housing, services and facilities<sup>524</sup>. General Comment No. 15 makes it clear

520. Vid. Transformative Agenda, [Gender equality in the human rights to water and sanitation](#).

521. WHO, January 2017, available at: <http://www.who.int/mediacentre/factsheets/fs115/en/>

522. UNICEF, "Children and Water, Sanitation and Hygiene: The Evidence", In the Human Development Report of 2006.

523. A/HRC/27/55, paragraphs 19 and 22.

524. WATER AID, Inclusive Wash, [Building skills towards inclusive water, sanitation and hygiene](#); FEDERACIÓN IBEROAMERICANA DE OMBUDSMAN, VII Informe sobre Derechos Humanos, Personas con discapacidad, Trama Editorial, Madrid, 2010.

that physical accessibility is a significant dimension of accessibility as an intrinsic component of the right to water. In turn, the Convention on the Rights of Persons with Disability expressly refers to access to water by persons with disability in relation to the right to an adequate standard of living and social protection.

The Convention also asks the States to hold consultations and to collaborate with persons with disability through their representative organisations in drafting, applying and enforcing legislation and policies to comply with the obligations spelled out in the Convention and in adopting all other decisions that affect them. Consultation is a fundamental mechanism for avoiding inaccessibility in new facilities and services and finding suitable technical solutions that ensure mobility.

#### 4.5. DISPLACED AND INTERNALLY DISPLACED PERSONS

According to the United Nations, each year more than 30 million people flee from their homes due to armed conflicts or natural disasters, and more than 200 million people are affected by natural hazards<sup>525</sup>.

In emergency situations, displaced people have particular hardships in accessing drinking water and sanitation services, which may put their lives in danger. Displaced people are especially vulnerable to discrimination, racism and xenophobia, which may lower even further their ability to obtain drinking water and sanitation services. Refugee camps and camps for displaced persons around the world are characterised, especially when the displacement goes on in time, by dilapidated conditions and overcrowding, where even basic services such as drinking water and sanitation are inadequately supplied. Deficient sanitation and lack of access to drinking water at these camps often lead to the spread of water-borne diseases such as cholera. The women and children who go a certain distance from the camp to get water are exposed to harassment, threats and sexual violence. They may also be asked for sexual favours in exchange for drinking water. As regards sanitation services, even in cases in which such services are located inside the camp, they generally do not take into account the specific needs of women, children, the elderly or people with disability. In many countries, the internally displaced and refugees that live in camps have less water than the rest of the population, and many survive on 2 to 3 litres per day. The situation of refugees, asylum-seekers and internally displaced people is not much better, because in practice or due to their legal status, they cannot obtain suitable housing and thus lack drinking water and sanitation services.

#### 4.6. INDIGENOUS PEOPLES

Water plays an important role in the daily life of indigenous peoples as it is a central component of their traditions, culture and institutions. It is also a key element to their survival. Indigenous people's access to drinking water is closely related to the control over their lands, territories and ancestral resources. Lack of legal recognition or protection of these lands, territories or resources may have major consequences on their enjoyment of the right to water. The natural sources of water used traditionally by indigenous peoples, such as lakes or rivers, may no longer be accessible due to forced expropriation or gradual expropriation of the lands by others. Access may also be threatened by illegal contamination or overexploitation. Furthermore, the indigenous people's sources of water may have been re-routed to supply drinking water to urban areas. In many cases, to ensure the indigenous peoples' right to water, it may be necessary to adopt means to ensure their rights to ancestral lands, reinforce their traditional systems of water use and protect their natural resources. Although most indigenous peoples live in rural areas, a growing number of them are migrating, voluntarily or not, to urban areas, where they often end up living in inadequate conditions, without access to drinking water or sanitation services. Indigenous peoples are usually excluded from the process of adopting decision regarding water and sanitation, which may constitute yet another barrier to accessing those services.

525. UNITED NATIONS Office for the Office of the High Commissioner for Human Rights, UN-Habitat, WHO, Factsheet No. 35 *The Right to Water*, Geneva, pp. 1-64, especially pp. 19-28.1-64, especially pp. 19-28.

#### 4.7. STIGMATIZATION IN THE REALIZATION OF THE RIGHTS TO WATER AND SANITATION

Stigma, as a deeply entrenched socio-cultural phenomenon, lies at the root of many human rights violations and results in entire population groups being disadvantaged. Stigma can broadly be understood as a process of dehumanizing, discrediting and devaluing people in certain groups, often based on a feeling of disgust. Stigma attaches itself to an attribute, quality or identity that is regarded as “inferior” or “abnormal” and is based on a socially constructed “us” and “them” divide.

The Special Rapporteur focused her 2012 [Human Rights Council annual report](#) to stigmatization in the realization of the rights to water and sanitation. The report examines different manifestations of stigma, and situates it in the human rights framework considering, in particular, human dignity, the human rights to water and sanitation, non-discrimination, the prohibition of inhumane or degrading treatment and the right to privacy. It explores recommendations for policy-making and solutions to prevent and respond to human rights violations resulting from stigma.

### 5. NORMATIVE CONTENT OF THE RIGHT TO WATER

In 1966, the International Covenant on Economic, Social and Cultural Rights recognised the right to maintain access to a water supply as necessary for exercising the right to water and the right to not being the object of interference in the supply. A system for supplying and managing water must be ensured that offers the population equal opportunities to enjoy their right to water at reasonable prices. The elements of the right to water must be suited to human dignity, life and health as per articles 11 and 12 of the ICESCR. Water should be treated as a social and cultural good rather than an economic good.

Article 11 states that “Everyone has the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”. Although the Covenant did not expressly mention the right to water, the Committee underscored that this right forms part of the right to an adequate standard of living, just as the rights to food, suitable housing, and clothing. The Committee also noted that the right to water is indissolubly associated with the right to health. This has been the basis for constructing a human right to water on an international scale.

The concept of the amount of water needed to meet basic human needs was articulated for the first time at the United Nations Water Conference held in Mar del Plata, Argentina in 1977. Its Action Plan states that all peoples, whatever their stage of development and social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic needs.

In interpreting the right to life within the framework of the ICCPR, General Comment No. 6 of the Human Rights Committee (1982) underscored that, in addition to protection against deprivation of life, the right also obligates States to guarantee access to the means of for survival and requires them to adopt positive measures to reduce infant mortality and increase life expectancy as well as eliminating malnutrition and epidemics. Water is implicitly present throughout.

In General Comment No. 14 (2000) on the right to the highest possible level of health, the Committee on Economic, Social and Cultural Rights highlighted that the wording of art. 12.2 of the ICESCR constituted recognition of the fact that the right encompasses the basic determining factors for health, such as access to drinking water and sanitation.

In November 2002, the Committee on Economic, Social and Cultural Rights adopted General Observation No. 15 on the right to water. Article 1.1 establishes that “The human right to water is indispensable for leading a life in human dignity”. Comment 15 also defines the right to water as **the right everyone has to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.**

In 2006, the Sub-commission on the Promotion and Protection of Human Rights approved guidelines for realising the right to drinking water and sanitation. The guidelines use the Committee’s definition of the right to water, and the right to sanitation is defined as the right

every person has to access a suitable and safe sanitation service that protects public health and the environment. In the Abuja Declaration, approved at the First Africa-South America Summit in 2006, the Heads of State and Government declared that they would promote their citizens' right to accessing drinking water and sanitation within their respective jurisdictions. Even though these declarations are not legally binding at that moment, they reflect a consensus and a political declaration of intent on the importance of recognising and realising the right to water.

## 5.1 DIMENSIONS OR ELEMENTS OF THE RIGHT TO WATER

In General Comment No. 15, the Committee on Economic, Social and Cultural Rights clarified the scope and content of the right to water, explaining what it means to have sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. A sufficient supply of safe water is needed to prevent death by dehydration, to lower the risk of water-related diseases and to satisfy the needs for drinking and cooking and the needs for personal and domestic hygiene.

- a) Availability. The water supply for each person must be continuous and sufficient to cover personal and domestic uses** that comprise consumption, drinking water, personal sanitation, laundry, food preparation, personal hygiene and household cleaning. Most people need at least 2 litres of safe water per day for food preparation<sup>526</sup>. A lactating woman who engages in moderate physical activity requires at least 7.5 litres of water per day<sup>527</sup>.

According to the WHO, between 50 and 100 litres of water are needed per person per day to ensure their basic needs are met and that no great health threats arise. Access to 20-25 litres per person per day represents a minimum, but this amount raises health concerns because it is not enough to cover the basic needs of hygiene and consumption. These amounts are indicative only as they depend on the particular case and may differ from one group to another depending on the state of health, job, weather conditions and other factors. Lactating mothers and pregnant women need more than 50-100 litres of water per day. Living with HIV/AIDS requires washing frequently and paying close attention to personal hygiene due to the care required by their wounds and lesions, as well as fevers accompanied by sweating, which increases the need to drink more water. Likewise for people with tuberculosis, who need to live in clean, well-aired houses with sufficient reserves of water. The right to water does not give people the right to unlimited amounts of water, nor does it include the water used for swimming pools or gardening.

Water is essential for life, but is also key to food security, income generation and environmental protection. The right to water covers only personal and domestic uses, i.e., water for drinking, washing clothes, food preparation and personal and household hygiene. It does not cover water for agriculture or pastoralism or to sustain ecological systems. The right to water prioritises the use of water for agriculture or pastoralism only when they are activities needed to prevent starvation.

The right to water has implications for water management, as it requires giving priority in water allocation to personal and domestic uses for all. These uses represent a minimal fraction of the total use of water, generally less than 5%, whereas irrigation is still one of the activities that uses the most water and currently absorbs more than 80% in developing nations. Access to drinking water is a basic prerequisite for executing the rights to education, housing, health, work and protection against cruel, inhuman or degrading treatment. It is also a key element in achieving gender equality and in eradicating discrimination.

- b) Quality. Water for personal and domestic use must be safe and acceptable.**

The water required for personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to health.

526. World Health Organisation, *The right to water*, 2003.

527. UNDP, Human Development Report, 2006. *Beyond scarcity: Power, poverty and the global water crisis* 2006.

Measures of drinking-water safety are usually defined by national and/or local standards. WHO's Guidelines for drinking-water quality provide a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking-water.

Everyone is entitled to safe and adequate sanitation. Facilities must be situated where physical security can be safeguarded. Ensuring safe sanitation also requires substantial hygiene education and promotion. This means toilets must be available for use at all times of the day or night and must be hygienic; wastewater and excreta safely disposed and toilets constructed to prevent collapse. Services must ensure privacy and water points should be positioned to enable use for personal hygiene, including menstrual hygiene.

Water should be of an acceptable colour, odour and taste for personal or domestic use. These requirements apply to all sources of supply, such as running water, water in tanks, water purchased from a supplier and protected wells. All water and sanitation facilities and services must be culturally appropriate and sensitive to gender, lifecycle and privacy requirements. Sanitation should be culturally acceptable ensured in a non-discriminatory manner and include vulnerable and marginalised groups. This includes addressing public toilet construction issues such as separate female and male toilets to ensure privacy and dignity. The absence of adequate sanitation systems in many parts of the world has led to widespread pollution of water sources that communities rely upon for survival. Ensuring access to adequate sanitation is one of the principal mechanisms for protecting the quality of drinking-water supplies and resources.

- c) **Acceptability:** Sanitation facilities, in particular, have to be culturally acceptable. This will often require gender-specific facilities, constructed in a way that ensures privacy and dignity
- d) **Accessibility.** Water and sanitation facilities must be physically accessible and within safe reach for all sections of the population, taking into account the needs of particular groups, including persons with disabilities, women, children and the elderly.

Accessibility has four overlapping dimensions:

- (i) **Physical accessibility:** water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace.<sup>528</sup> All water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements. Physical security should not be threatened during access to water facilities and services;
- (ii) **Economic accessibility:** Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights;
- (iii) **Non-discrimination:** Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds; and
- (iv) **Information accessibility:** accessibility includes the right to seek, receive and impart information concerning water issues.<sup>529</sup>

While the right to water does not imply that everyone should have access to water and sanitation at home, it requires such facilities to be in close proximity to, or at a reasonable

528. See also General Comment No. 4 (1991), para. 8 (b), General Comment No. 13 (1999) para. 6 (a) and General Comment No. 14 (2000) paras. 8 (a) and (b). Household includes a permanent or semi-permanent dwelling, or a temporary halting site.

529. See para. 48 of this General Comment.



distance from, each house. Water and sanitation should also be provided in schools and hospitals, at the workplace, in detention centres, as well as in camps for refugees and IDPs.

As the amount of water accessed every day is largely determined by the distance to the water source and the collection time, a reasonable distance is one that allows everyone to collect sufficient water to cover personal domestic uses. According to WHO, in order to have a basic access to 20 litres per day, the water source has to be within 1,000 metres of the home and collection time should not exceed 30 minutes. When water is piped into the home, access is optimal and at least 100 litres per person per day is likely to be ensured. The UNDP Human Development Report 2006 states that having a regular supply of clean water piped into the household is the optimal type of provision for human development. Access to a regular supply of water within the home also eliminates the need for women and children to spend time and physically exert themselves to collect water from distant sources, thereby ensuring their physical integrity.

**e) Affordability. Water services must be affordable to all.**

Water and sanitation facilities and services must be available and affordable for everyone, even the poorest. The costs for water and sanitation services should not exceed 5% of a household's income<sup>530</sup>, meaning services must not affect peoples' capacity to acquire other essential goods and services, including food, housing, health services and education

## 5.2. OBLIGATIONS FOR THE STATE

In order to be able to speak of full recognition of the right to water, the States must take on obligations in their internal code of laws as well as make commitments on the international stage.

In other words, the Covenant acknowledges that States have resource constraints and that it may take time to ensure the right to water to everyone. Some components of the right to water are, therefore, deemed subject to progressive realization. However, obligations such as non-discrimination are of immediate effect and not subject to progressive realization.

While not all aspects of the right to water can or may be realized immediately, general comment N°. 15 stresses that States must, at a minimum, show that they are making every possible effort, within available resources, to better protect and promote this right. Available resources refer to those existing within a State as well as those available from the international community through international cooperation and assistance, as outlined in articles 2 (1), 11 and 23 of the Covenant.

General Comment No. 15 also underlines that there is an immediate obligation to take steps, which should be concrete, deliberate and targeted, to fulfil the right to water. In addition, any retrogressive measures would require the State to demonstrate that it carefully weighed all the options, considered the overall impact on all human rights and fully used all its available resources. As the most feasible means for implementing the right to water will vary from State to State, general comment No. 15 does not offer set prescriptions. The Covenant simply states that the full realization of the rights contained in it must be achieved through "all appropriate means, including particularly the adoption of legislative measures."

The Committee has also stated in general comment N°. 15 that certain measures must be taken immediately in order to guarantee the right to water, for instance ensuring that significant numbers of people are not deprived of the minimum amount of safe drinking water to prevent disease; ensuring that people's personal security is not threatened when they venture out to access water and sanitation; preventing, treating and controlling water-related diseases, in particular ensuring access to adequate sanitation; and effectively monitoring the extent to which people have access to safe drinking water and sanitation.

The role of international assistance and cooperation is reflected in other instruments as well, such as the Charter of the United Nations, the Universal Declaration of Human Rights and the Convention on the Rights of the Child. It is not a substitute for domestic obligations,

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530. The UNDP suggests it should not exceed 3% of household income.



but it becomes particularly relevant if a State is unable to give effect to economic, social and cultural rights, and requires support from other States to do so. International cooperation is particularly incumbent upon those States that are in a position to assist others in this regard. States should thus have an active programme of international assistance and cooperation, and provide economic and technical assistance to enable other States to meet their obligations in relation to the right to water. This is reflected in the Committee's general comments No. 3 (1990) on the nature of States parties' obligations and No. 14 (2000) on the right to the highest attainable standard of health.

Internally, the States must adopt specific measures to meet the commitments expressed in international plans. They must adopt the measures within reasonable time frames and make efficient use of the human, natural, technological, informational and financial resources at their disposal for complete implementation of the rights. They must ensure that enjoyment of the rights is free of any form of discrimination. They must act and give priority to the most vulnerable groups and guarantee the minimum content of the rights in times of crisis.

The main obligations of the State on the international stage consist of respecting the enjoyment of the right to water in other countries and stopping third parties from violating it, remaining vigilant to ensure that international agreements pay due attention to this right and do not attack it. In particular, it must be avoided that free trade agreements and agreements on financial institutions undermine a country's capacity to guarantee the right to water. Countries must cooperate to provide aid in cases of natural disaster and emergencies, giving priority to the most vulnerable groups, cooperate on controlling diseases related to lack of water or water of poor quality and refrain from imposing embargos or similar measures that restrict the supply of water to a country.

In addition to their internal and international obligations, the States have three specific obligations as actors of International Law and guarantors of human rights. States have the primary obligation to protect and promote human rights. The obligations are normally defined and generally guaranteed by means of international treaties on human rights that create legally binding obligations for the ratifying States. The specific obligations are:

- a) *The obligation to respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to water. For example, States should refrain from: polluting water resources; arbitrarily and illegally disconnecting water and sanitation services; reducing the provision of safe drinking water to slums in order to meet the demand of wealthier areas; destroying water services and infrastructure as a punitive measure during an armed conflict; or depleting water resources that indigenous peoples rely upon for drinking.

International law is clear on this matter, and even if a State privatises the management of water and sanitation, it still has the obligation of overseeing who provides the service and watching over that private management to ensure it is done consistently with effective exercise of the right. The fact of having delegated the supply of drinking water and/or sanitation services to third parties does not waive the State of its obligations on matters of human rights; the supply of water and sanitation must be respected. This implies that businesses that take over that job are committed to meet international standards and the categories and elements that comprise the right to water and sanitation, thereby making them duty-holders responsible for the right.

- b) *The obligation to protect* requires the States to prevent third parties from interfering with the right to water. States should adopt legislation or other measures to ensure that private actors—e.g., industry, water providers or individuals—comply with human rights standards related to the right to water. States should, for instance, adopt the necessary legislative and other measures to ensure that third parties do not arbitrarily and illegally disconnect water and sanitation services. Communities must be protected against third parties' unsustainable extraction of the water resources they rely upon for drinking. The physical security of women and children must not be at risk when they go to collect water or use sanitation facilities outside the home. Landownership laws and practices must not prevent individuals and communities from accessing safe drinking water; the third parties controlling or

operating water services must not compromise the equal, affordable and physical access to sufficient safe drinking water.

The States must demonstrate that they are doing everything in their power, within the constraint of their available resources, to better protect and promote this right. Available resources are understood to mean the ones that exist inside the State and also the ones made available to them by the international community through international cooperation and aid, as indicated in articles 2. 1), 11 and 23 of the ICESCR. There is an immediate obligation to take concrete, deliberate and targeted steps to fulfil the right to water. Full realisation of the rights contained in the Covenant must be achieved through all appropriate means, including particularly the adoption of legislative measures.

Certain measures must be taken and made effective immediately to guarantee the right to water, for instance ensuring that significant numbers of people are not deprived of the minimum amount of safe drinking water to prevent disease; ensuring that people's personal security is not threatened when they venture out to access water and sanitation; preventing, treating and controlling water-related diseases, in particular ensuring access to adequate sanitation; and effectively monitoring the extent to which people have access to safe drinking water and sanitation.

- c) *The obligation to fulfil* requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures to fully realize the right to water. States must, among other things, adopt a national policy on water that: gives priority in water management to essential personal and domestic uses; defines the objectives for the extension of water services, with a focus on disadvantaged and marginalized groups; identifies the resources available to meet these goals; specifies the most cost-effective way of using them; outlines the responsibilities and time frame for implementing the necessary measures; monitors results and outcomes, including ensuring adequate remedies for violations.

States must also extend the accessibility of water and sanitation services and ensure that there is appropriate education about the proper use of water and sanitation, protection of water sources and methods to minimize waste. The States that ratified the ICESCR agreed to advance as quickly and effectively as possible toward full realisation of the right to water and sanitation. At this point, it is important to take into account that economic, social and cultural rights are subject to progressive realisation, given that full realisation or achievement requires vast economic resources

In general comment No. 15, the Committee on Economic, Social and Cultural Rights stressed that, under the Covenant, States have the obligation to achieve progressively the full realization of the right to water. In other words, the Covenant acknowledges that States have resource constraints and that it may take time to ensure the right to water to everyone. Some components of the right to water are, therefore, deemed subject to progressive realization. However, obligations such as non-discrimination are of immediate effect and not subject to progressive realization.

The role of international assistance and cooperation is reflected in other instruments as well, such as the Charter of the United Nations, the Universal Declaration of Human Rights and the Convention on the Rights of the Child. It is not a substitute for domestic obligations, but it becomes particularly relevant if a State is unable to give effect to economic, social and cultural rights, and requires support from other States to do so. International cooperation is particularly incumbent upon those States that are in a position to assist others in this regard. States should thus have an active programme of international assistance and cooperation, and provide economic and technical assistance to enable other States to meet their obligations in relation to the right to water. This is reflected in the Committee's general comments No. 3 and No. 14 on the nature of States parties' obligations and on the right to the highest attainable standard of health

Furthermore, within the obligation to realise, a bit more emphasis should be given to the obligation to inform, which has both a personal and collective dimension. States should report on the steps, plans and projects that affect the water supply and sanitation. They should report any incident affecting this basic human right and about any overwhelming circumstances that limit, even justifiably, the supply of water to the population, as well as the

origin or transmission of water-born diseases. States are obliged to get everyone involved in everything that happens regarding this basic human right.

## 6. REMEDIES AND ACCOUNTABILITY

Accountability compels a State to explain what it is doing and why, and how it is moving towards the realization of the right to water for all, as expeditiously and effectively as possible. International human rights law does not prescribe an exact formula for domestic mechanisms of redress and accountability. At a minimum, all accountability mechanisms must be accessible, impartial, transparent and effective.

Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels. The Committee notes that the right has been constitutionally entrenched by a number of States and has been subject to litigation before national courts. All victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right.<sup>531</sup>

Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies<sup>532</sup>. Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water".<sup>533</sup>

## 7. LIMITS<sup>534</sup>

While the right to water does not prohibit disconnections from water services, it puts limits and conditions on these actions. Overall, disconnections must be performed in a manner warranted by law and must be compatible with the Covenant. Those affected must be provided with effective procedural guarantees, including:

- An opportunity for genuine consultation;
- Timely and full disclosure of information on the proposed measures;
- Reasonable notice of proposed actions;
- Legal recourse and remedies;
- Legal assistance for obtaining legal remedies.

General Comment No. 15 furthermore underlines that an individual shall under no circumstances be deprived of the minimum essential level of water. Accordingly, the quantity of safe drinking water a person can access may be reduced, but full disconnection may be permissible only if there is access to an alternative source that can provide a minimum

531. See General Comment N°. 9 (1998), para. 4. The Principle 10 of the Rio Declaration on Environment and Development, states with respect to environmental issues that "effective access to judicial and administrative proceedings, including remedy and redress, shall be provided".

532. See also General Comments N°. 4 (1991) and N°. 7 (1997).

533. General Comments N°. 15, paragraphs 55 and 56.

534. This section is a literal reproduction from Factsheet 35. The Right to Water, 2006, pp. 28-29, 40-42.

quantity of safe drinking water needed to prevent disease. In this respect, there is a strong presumption that disconnections of institutions serving vulnerable groups such as schools, hospitals and refugee or IDP camps are prohibited.

If the disconnection relates to non-payment, general comment No. 15 states that a person's capacity to pay must be taken into account before the actual disconnection takes place. Read in conjunction with the affordability criteria (see chap. I), this requirement implies that, in certain instances, when individuals are unable to pay for water, the authorities might have to provide it for free. In this respect, a number of national laws restrict disconnections of water services, in particular those that occur as a result of the user's inability, rather than unwillingness, to pay.

The right to water carries a clear obligation for States to prioritize personal and domestic uses—covering drinking, personal sanitation, washing clothes, food preparation, and personal and household hygiene—in their water management and allocation. In doing so, the authorities should ensure that those who do not have access, especially vulnerable and marginalized groups, have priority over those who already have access. This obligation remains in situations of water scarcity and water stress, during which the State should, at a minimum, ensure everyone's equal access to sufficient and safe water to prevent disease. In this respect, it was specified at the International Conference on Freshwater (Bonn, 2001) that “water should be equitably and sustainably allocated, firstly to basic human needs and then to the functioning of ecosystems and different economic uses including food security”. Several national legislations already prioritize essential personal and domestic uses over other water uses, including in times of water stress and water scarcity.

In its general comment No. 15, the Committee noted that, during armed conflicts, emergencies and natural disasters, the obligations of States encompass the right to water and the provisions of international humanitarian law relating to water. This includes protecting objects indispensable for the survival of the civilian population, including drinking-water installations and supplies, and ensuring that civilians, internees, prisoners and returnees have access to adequate water. It should also be recalled that the Covenant contains no derogation clause, which means that States are not allowed to suspend their obligations in a public emergency.

In emergencies—such as natural disasters, conflicts or post-conflict situations—a basic provision of 7.5 to 15 litres minimum per person per day has been suggested, as there may not be enough water to cover all personal and domestic uses.

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60**

**Subject**

**2.4.15. Labour rights**

**Lecturer:**

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## SUMMARY OF THE TOPIC

The right to work -in its dual dimension as the right to work and as rights at the workplace, or the right to work in fair and satisfactory conditions- is a human right acknowledged in a number of international instruments that lay out different general norms and principles that pursue its effective implementation.

In their collective dimension, work-related rights are all the rights on workers and their right to form trade unions and join them freely in the right to collective bargaining and the right to strike.

Work-related rights form part of what are known as economic, social and cultural rights, and are indispensable for the exercise of other rights.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

Specifically for this lesson, participating teachers will learn to efficiently respond to the following objectives.

### GENERAL:

- **Teamwork:** to become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.

- **Adaptation to the environment:** to face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** to positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** to understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** to analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** to be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

## SPECIFIC:

### Module 2:

- Suitably identify, interpret and apply the international, regional and national norms on human rights applicable to the different assumptions posed in their respective disciplines and professional spheres.
- Define and accurately distinguish who the possessors of rights are and the holders of obligations in relation to each human right in a particular situation.
- Identify the specific obligations of respect, protection and realisation of each human right and the minimum normative content needed for its realisation and for questioning its fulfilment in a particular situation.
- Identify, analyse, argument and evaluate the critical deviations and gaps in the capability and responsibility of the holders of rights and obligations that hinder the action or transformation of a particular situation in which human rights are being violated.
- Contrast and evaluate situations, practices, legislation, local and national policies in accordance with the legal instruments on human rights ratified in your country, and suggest and plan out some efficient alternatives.
- Identify and apply the international and regional protection mechanisms for human rights.
- Seek out, select and analyse information from a variety of sources (legal, social, financial, etc.). Plan and document this task appropriately.

### Module 3:

- Understand the processes of intervening in the social reality linked with the field of knowledge of the degree by carrying out a service learning project.
- Design and orient a service learning project linked to the defence or promotion of human rights as regards the field of knowledge
- Assess, evaluate and reflect on the processes and results of the action carried out in contact with reality and the learning acquired by the students on service learning projects.

- Evaluate the needs and possible options by means of participatory methods to guide an intervention and management strategy aimed at ensuring that the activities undertaken fit the desired outcomes (results-based participatory management models).
- Identify, interpret and act to solve risk situations.

## REQUIRED READINGS AND RESOURCES

### International legal texts:

- UN General Assembly. (1948). Universal declaration of human rights (217 [III] A). Paris.
- International Covenant on Economic, Social and Cultural Rights, adopted by the General Assembly in Resolution 2200 (xxi) on 16 December 1966.
- International Convention on the Elimination of All Forms of Racial Discrimination adopted by General Assembly resolution 2106 (XX) of 21 December 1965.
- Convention on the Elimination of All Forms of Discrimination against Women, adopted by General Assembly resolution 34/180 of 18 December 1979
- Convention on the Rights of the Child, adopted by General Assembly resolution 44/25 of 25 November 1989.

### International labour standards

#### UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (CESCR):

- General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1 ICRC), 14 December 1990, UN Doc. E/1991/23.
- General Comment No. 18: The Right to Work (Art. 6 ICRC), 6 February 2006, UN Doc. E/C.12/GC/18.
- General Comment No. 23 (2016) on the right to just and favourable conditions of work (art. 7 ICRC), 26 Apr 2016, UN Doc. E/C.12/GC/23.

## OPTIONAL READINGS AND RESOURCES

### ILO - Legal information

Database on job protection legislation, on national legislation on work, social security and related human rights and on occupational health and safety, updated by the Department of international labour norms of the ILO.

### ILO - NORMLEX

NORMLEX is a new information system that brings together information on International Labour Standards (such as ratification information, reporting requirements, comments of the ILO's supervisory bodies, etc.) as well as national labour and social security laws.

### ILO - Labordoc: Library catalogues of OIT

ILO - Research guides: Our research guides point you to the most relevant and reliable sources on a given topic.

ABRAMOVICH, Víctor and COURTIS, Christian, Los derechos sociales como derechos exigibles, Madrid, ed. Trotta, 2004.

ARANGO, Rodolfo, "Protección nacional e internacional de los derechos humanos sociales", en Ciudadanía y Derechos Humanos Sociales, 2001.



SIEGEL, Richard L., Towards A General Comment On The Right to Work: Core Elements, Day of General Discussion on article 6 of the Covenant (the right to work), 24 November 2003 (UN Doc. E/C.12/2003/8).

VON POTOBOSKY, Geraldo W. and BARTOLOMEI DE LA CRUZ, Héctor, La Organización Internacional del Trabajo, el sistema normativo internacional, instrumentos sobre derechos humanos fundamentales, Buenos Aires, ed. Astrea, 1990.

MANTOUVALOU, Virginia, The right to work: legal and philosophical perspectives, Hart Publishing, Oxford, 2015.

ILO, "Gender equality at the heart of decent work" campaign in the Arab States: selected publications. Available in: [http://www.ilo.org/gender/Events/Campaign2008-2009/WCMS\\_104918/lang-es/index.htm](http://www.ilo.org/gender/Events/Campaign2008-2009/WCMS_104918/lang-es/index.htm)

ILO-Oficina Subregional América Central, [Promover los Derechos Laborales desde los medios de comunicación](#), San Jose de Costa Rica, 2009:

ILO, Knowing the Fundamental Rights at Work, Geneva, 2009:

- [Book](#)
- [Guide for Trainers](#)

ILO, [Strengthening action to end forced labour International](#), Labour Conference 103rd Session 2014, Geneva.

International Labour Organization and Inter-Parliamentary Union, [Eliminating the worst forms of child labour: A practical guide to ILO Convention No. 182](#), Handbook for parliamentarians No. 3, 2002.

The United Nations Development Programme (PNUD), [Human Development Report 2015: Work for Human Development](#), New York, 2015.

## LEARNING OUTCOMES

At the end of the topic, the student will be able to:

- Understanding the nature and scope of the right
- Identifying the holders of the right to decent work. Identifies particularly those who belong to risk groups (women, children, migrants, elderly workers, the disabled)
- Identifying the situations at risk of infringing on the right to decent work
- Integrating a module on work-related rights into their coursework

## METHODOLOGY

The teaching tools and methods proposed for carrying out the activities are as follows:

Methodology:	Teaching tools
Expository method	Reading texts and/or viewing audiovisual material
Case studies	Blog / Forum
Group discussions	Blog / Forum

## DESCRIPTION OF TEACHING ACTIVITIES

### 1. Reading the Educational Guide of the topic

By reading the Guide, students are given a first look at the study of work-related rights, with precise information on the required and optional readings and on activities to develop to achieve the learning outcomes associated with the module.

### 2. Study of the recommended readings, audio-visuals, etc.

By consulting the various different information resources listed in the Guide, the student can delve deeper into the different aspects regarding the right to decent work, thereby helping at identifying the most vulnerable people and the main problems faced for exercising the right.

### 3. Active search for information on the right to decent work

The student shall identify the main and complementary bibliographic resources for study of work-related rights in the Maghreb area. The student shall draw up a bibliographic repertory that will include a reference card for each publication identified, stating at least the following data: author, title, publisher, place and date of publication, brief comment on the main aspects for further into this study.

### 4. Watching a film

Participants will choose one of the following films and will design a practicum for their students in accordance with the discipline or degree of their teaching (laws, social work, journalism, pedagogy, etc.). The practicum will feature issues regarding the exercise or infringement of work-related rights that can be found in the film, as well as using other complementary materials indicated by the lecturer and the general readings included in the Educational Guide. The practicum must help the student relate the problems detected to the national and international framework and the explanations received in class.

- Modern Times. USA, 1936. 89'. Directed by: Charles Chaplin

Chaplin is a worker who loses his mind, driven mad by the frantic pace of the assembly line. He spends time recovering in hospital, and when he gets out he is arrested for participating in a demonstration he found himself in by chance. Once out of prison, he goes back to his struggle for survival, a struggle he shares with a young orphan he meets in the street.

- Ressources Humaines. France, United Kingdom. 1999. 100'. Directed by Laurent Cantet. work fact sheet (proposals by EduAlter, 'The Workaday World as seen in film').

Frank is a university graduate who returns to his home town to do an internship at the factory where his father has been working all his life. Frank is assigned to the human resources department, where he thinks he can help negotiate the worker's workday hours, but in fact he is being used for a restructuring with lay-offs, one of which is his father.

#### Pedagogical Objectives

- Identify the generational differences on how jobs are perceived and the roles each must take on.
- Reflect on the new ways of organising work, their implementation and their effects on the workers.
- Salt of the Earth USA. 1954 95'. Directed by Herbert J. Biberman

Based on a true story. By blending fiction and documentary, the film tells the story of a strike that paralysed the zinc mine in Silver City (New Mexico) in June 1951. Miners demanded more safety measures and better health conditions in the housing that the company used. The company's refusal to negotiate made the strike become indefinite. At the company's request, the miners were prohibited from picketing and shutting off access to the mine, but their wives then manned the picket lines themselves. The film had several problems during and after the filming, since the director, the producer, the screenwriter and the actor Will

Geer were at that time “blacklisted” by Senator McArthur’s House Un-American Activities Committee.

- The Back of the World. Peru, Turkey, USA. 2000. 89’. Directed by Javier Corcuera

The film consists of three reports, each dealing with a different situation of human degradation and social and political injustice.

#### Pedagogical Objectives

- Learn about the experience of child labourers.
- Reflect on the debate on how to handle child labour, between eradication and regulation.
- Le Couperet. France. 2005. 122’. Directed by Constantin Costa-Gavras

A top executive loses his job. At first, he’s not overly concerned: he has an excellent background and trusts he will soon find a similar job. Three years later, still unemployed, his only thoughts are for survival. And therefore, he decides to take action: to kill off the people who are vying for the same job positions.

#### Pedagogical Objectives

- Identify the attitudes and feelings of people who live with unemployment.
- Reflect on the personal and family consequences of the process of corporate restructuring and relocation to cheaper countries.
- Show the link between standard of living and salary as seen from a situation of unemployment.
- Stachka (‘The Strike’). The Soviet Union. 1925. 82’. Directed by Sergei M. Eisenstein. Silent movie. The workers at an important company in Tsarist Russia are unhappy with their working conditions and decide to go on strike. The strike comes to a violent, tragic end.
- Charles Dickens’s novel ‘Hard Times’ will accompany the viewing of excerpts from the British miniseries based on the novel and directed by Peter Barre.
- Germinal, by Claude Berrí, 1993. Complementary materials made available to students will include excerpts from the book by E. Zolá, Germinal, on which the film version is based.

### 5. Syllabus

Students will develop a module/topic to incorporate into the syllabus of their speciality and thus work with their students on some aspects on work-based rights, incorporating whatever competencies are deemed worthwhile and the APS methodology

## TIMELINE OF ACTIVITIES

Activity Name	Estimated work time	Evaluation criteria
Activity 1	1 hour	Self-evaluation
Activity 2	5 hours	Portfolio: consultation log
Activity 3	5 hours	Portfolio: bibliography cards
Activity 4	20 hours	Portfolio: report

## SUBJECT 2.4.:

# 2.4.15. LABOUR RIGHTS

## 1. INTRODUCTION

The right to work and its related rights have been present in international codes and standards since the early 20th century. The *Constitution of the International Labour Organisation* (1919) established the principle of equal pay of equal work and the principle of trade union freedom for workers and employers. It also regulated the daily and weekly work hours. Added as an annex to the Constitution years later, the *Declaration of Philadelphia* (1944) set the purposes and principles of the International Labour Organisation (ILO): 'labour is not a commodity', 'Freedom of expression and of association are essential to sustained progress', 'Poverty anywhere constitutes a danger to prosperity everywhere' and 'All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity'.

The set of work-related rights- the right to work, free choice of work, equal and satisfactory labour conditions, protection from unemployment, equal pay for equal work, the right to rest, the right to form unions and to unionise- were stated later in the *Universal Declaration of Human Rights* (1948) and have been the object of specific attention in different agreements adopted by the ILO or ILC. Currently, ratification of the "fundamental agreements" is at nearly 86%. After ratification, the States accept obligations regarding some rights immediately<sup>535</sup>.

Work-related rights form part of Economic, Social and Cultural Rights. One of them, the *International Covenant on Economic Social and Cultural Rights (ICESCR)* includes in Part II [arts. 6-9] (i) the right to a job that is freely chosen or accepted, (ii) the right to fair and satisfactory working conditions, (iii) the right of everyone to form trade unions and join the trade union of a person's choice and (iv) the right to social security.

This topic takes on the individual dimension of work-related rights, paying special attention to the nature and holders of those rights and the normative content of the right to work and the rights at work. Matters concerning freedom of union association and the right to social security are covered in another Teaching Unit.

## 2. NATURE OF WORK-RELATED RIGHTS

Work-related rights form part of what are known as economic, social and cultural rights, and are indispensable for the exercise of other rights.

The right to work -in its dual dimension as the right to work and as rights at the workplace, or the right to work in fair and satisfactory conditions- is a human right recognized in the International Covenant on Economic, Social and Cultural Rights and other international and

535. Of all the Conventions adopted since the ILo was created, eight are considered to be fundamental: the Convention on Freedom of Association and Protection of the Right to Organise (1948); Convention on the Right to Organise and Collective Bargaining (1949); Convention of forced labour (1930); Convention on the abolition of forced labour (1957); Convention on minimum age (1973); Convention on the worst forms of child labour (1999); Convention on equal remuneration (1951) and the Convention on discrimination (employment and occupation) (1958).

regional human rights treaties, as well as related international legal instruments, including conventions and recommendations of the International Labour Organization (ILO)<sup>536537</sup>.

Basically, these instruments guarantee:

- The **right to work**, which is essentially taken as the right to access work and to stay employed (whether self-employed or working for someone else) as a right of every citizen, without any kind of discrimination. By this right, anyone able to work may not be excluded from the economic sphere, such that anyone who is able and willing to work can do so. A job freely chosen or accepted based on the job seeker's abilities.
- **Rights at the workplace**: the work must be carried out in fair, equitable and satisfactory conditions. A right that lets its holder earn a living with dignity.

The ICESCR refers to the right to work as everyone's right to carry out a licit activity that lets them make a living and ensures decent living conditions for their family and to undertake this activity in conditions that are respectful of his physical and mental integrity. As the Committee on Economic, Social and Cultural Rights (CESCR) points out, "Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community" [Gen. comment no. 18]. In this way, work-related rights form an inherent and inseparable part of human dignity.

The ILO has been using the term "**decent work**" for years-thereby identifying one of its priorities- to highlight that work is a source of personal dignity, family stability, peace in the community and democracy. Decent work is one that respects the fundamental rights of the workers. Decent work also fosters economic growth by increasing the opportunities for productive work and the development of the companies.

In short time, the concept of "decent work" has achieved international consensus among governments, employers, workers and the whole of civil society, understanding that

536. See Universal Declaration of Human Rights, arts. 23 and 24; International Convention on the Elimination of All Forms of Racial Discrimination, art. 5; Convention on the Elimination of All Forms of Discrimination against Women, art. 11; Convention on the Rights of the Child, art. 32; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 25; Convention on the Rights of Persons with Disabilities, art. 27; European Social Charter (Revised), Part I, paras. 2, 3, 4, 7 and 8; and Part II, arts. 2, 3 and 4; Charter of Fundamental Rights of the European Union, arts. 14, 23, 31 and 32; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 7; and African Charter on Human and Peoples' Rights, art. 15. The wording of the provisions in the various treaties differs. The European instruments are broader in the protections offered, while the African Charter includes the narrower requirement of "equal pay for equal work".

537. Although many ILO conventions relate directly and indirectly to just and favourable conditions of work, for the present general comment, the Committee has identified the following as relevant: Hours of Work (Industry) Convention, 1919 (No. 1); Weekly Rest (Industry) Convention, 1921 (No. 14); Minimum Wage-Fixing Machinery Convention, 1928 (No. 26); Hours of Work (Commerce and Offices) Convention, 1930 (No. 30); Forty-Hour Week Convention, 1935 (No. 47); Protection of Wages Convention, 1949 (No. [fuzzy]14); Minimum Wage-Fixing Machinery Convention, 1928 (No.95); Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99); Equal Remuneration Convention, 1951 (No. 100); Weekly Rest (Commerce and Offices) Convention, 1957 (No. 106); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Wage Fixing Convention, 1970 (No. 131); Holidays with Pay Convention (Revised), 1970 (No. 132); Minimum Age Convention, 1973 (No. 138); Hours of Work and Rest Periods (Road Transport) Convention, 1979 (No. 153); Occupational Safety and Health Convention, 1981 (No. 155); Protocol of 2002 to the Occupational Safety and Health Convention, 1981; Workers with Family Responsibilities Convention, 1981 (No. 156); Night Work Convention, 1990 (No. 171); Part-Time Work Convention, 1994 (No. 175); Maternity Protection Convention, 2000 (No. 183); Convention concerning the Promotional Framework for Occupational Safety and Health, 2006 (No. 187); and Domestic Workers Convention, 2011 (No. 189).

productive employment and decent work are key elements to achieving fair globalisation, reducing poverty and obtaining equitable and even sustainable development. Therefore, one of the new *Sustainable Development Goals* (SDGs) includes encouraging sustained and even sustainable economic growth, full and productive employment and decent work for all.

Moreover, “the right of everyone to the enjoyment of just and favourable conditions of work is an important component of other labour rights enshrined in the Covenant and the corollary of the right to work as freely chosen and accepted. Similarly, trade union rights, freedom of association and the right to strike are crucial means of introducing, maintaining and defending just and favourable conditions of work. In turn, social security compensates for the lack of work related income and complements labour rights. The enjoyment of the right to just and favourable conditions of work is a prerequisite for, and result of, the enjoyment of other Covenant rights, for example, the right to the highest attainable standard of physical and mental health, by avoiding occupational accidents and disease, and an adequate standard of living through decent remuneration” [Gen. comment. no. 23]<sup>538 539</sup>.

### 3. HOLDERS OF THE RIGHT

Work-related rights feature an individual dimension in terms of rights that belong to each person, and a collective dimension regarding the workers as a whole.

It is a right of everyone, without distinction of any kind. Holders of the fundamental right to work are both those who are employed as well as, and primarily, those who are not. Furthermore, workers are holders of rights at the workplace, whether they are self-employed or not. “The reference to “everyone” highlights the fact that the right applies to all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities, workers in the informal sector, migrant workers, workers from ethnic and other minorities, domestic workers, self-employed workers, agricultural workers, refugee workers and unpaid workers. The reference to “everyone” reinforces the general prohibition on discrimination in article 2 (2) and the equality provision in article 3 of the Covenant, and is supplemented by the various references to equality and freedom from distinctions of any kind in sub-articles 7 (a) (i) and (c) » [Gen. comment num. 23].

The individual dimension of the right to work is covered in articles 6 and 7 of ICESCR, which respectively state the right to freely chosen and accepted work and the right to equitable and satisfactory work conditions.

Article 6:

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7: The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

538. Committee on Economic, Social and Cultural Rights general comment No. 18 (2005) on the right to work, paragraph 2, indicates the interconnection between the right to work in a general sense in article 6 of the Covenant, the recognition of the individual dimension of the right to the enjoyment of just and favourable conditions of work in article 7 and the collective dimension in article 8.

539. See Committee on Economic, Social and Cultural Rights general comment No. 19 (2007) on the right to social security, para. 2.



- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays

Especially vulnerable groups include women, children, the disabled and migrant workers. Included along with them, in the current labour market context, are also young people and older workers, both of whom face additional difficulties in accessing employment.

### 3.1. WORKING WOMEN

The ICESCR commits the State Parties to “ensure that men and women have equal enjoyment of all economic, social and cultural rights” (art. 3). Similarly, the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) requires the State parties to take appropriate measures to eliminate discrimination against women in employment so as to ensure, on the basis of equality between men and women, the same rights for all, and in particular: (i) the right to work, (ii) the right to enjoy conditions of equality at work, (iii) the right to a freely chosen livelihood and to employment and (iv) the right to promotion, stability at work and all the conditions and benefits of work in equality for women and men.

To prevent discrimination against women for reasons owing to marriage or maternity, and for the purpose of ensuring the effectiveness of their right to work, the States parties are required to adopt the pertinent measures: (i) *of prohibition*-with the corresponding sanction for non-compliance-of dismissal of a woman due to pregnancy or illness, or dismissal based on the woman’s marital status; (ii) *of protection* of pregnant or breast-feeding women by adopting measures that prevent harm to their health or the health of their children; and (iii) *of balancing* family life with the responsibilities of work and the parents’ participation in public life by means of providing the necessary social support services. The adoption of these measures is indispensable to achieve effective equality of opportunities and treatment between women and men in access to employment and in work and promotion.

The Committee “underlines the need for a comprehensive system of protection to combat gender discrimination and to ensure equal opportunities and treatment between men and women in relation to their right to work by ensuring equal pay for work of equal value.<sup>6</sup> In particular, pregnancies must not constitute an obstacle to employment and should not constitute justification for loss of employment. Lastly, emphasis should be placed on the link between the fact that women often have less access to education than men and certain traditional cultures which compromise the opportunities for the employment and advancement of women ». [Gen Comment no. 18].

The data, however, are less encouraging. The recent [Global Wage Report 2014/2015](#) from the ILo notes the gender wage gap, revealing a considerable difference -from 4% up to 36% at the top income levels - between women and men in a sample from 38 countries.

### 3.2. CHILD LABOUR

Child labour infringes on human rights. Child labour harms the normal development of children and may cause irreparable physical and moral damage. Closely tied to poverty, child labour contributes to perpetuating it by not allowing children to access education and training that would help them find a way out of their poverty.



The victims of the worst forms of child labour undergo severe risks to their physical and moral health, often being exposed to physical and emotional abuses and injuries.

The ICESCR contemplates protection of childhood in article 10, recalling that the laws should sanction the economic and social exploitation of children by their use in work that is harmful to their health or their morals or their normal development. States are also required to set age limits below which the paid employment of child labour should be prohibited and punishable by law

The ICESCR refers to a child's right to health and the need to protect children 'from all forms of work that may be harmful to their development or their physical or mental health' [Gen. comment no. 14], reaffirming the need to protect children from economic exploitation 'to enable them to pursue their full development and acquire technical and vocational education'.

The eradication of child labour -present in international norms for several decades- is closely tied with universalising primary education, declared as one of the Millennium Development Goals for 2015.

### 3.3. YOUNG WORKERS AND OLDER WORKERS

As the CESCR notes, "Access to a first job constitutes an opportunity for economic self-reliance and in many cases a means to escape poverty. Young persons, particularly young women, generally have great difficulties in finding initial employment" upon leaving the education and vocational training system. "National policies relating to adequate education and vocational training should be adopted and implemented to promote and support access to employment opportunities for young persons, in particular young women" [Gen. comment no. 18].

The CESCR points out "the need to take measures to prevent discrimination on grounds of age in employment and occupation" [Gen. comment no. 18], while recalling its Gen. comment no. 6 (1995) on the economic, social and cultural rights of older people.

### 3.4. WORKERS WITH DISABILITIES

"The 'right of everyone to the opportunity to gain his living by work which he freely chooses or accepts' is not realized where the only real opportunity open to disabled workers is to work in so-called 'sheltered' facilities under substandard conditions." The Committee recalls the principle of non-discrimination in access to employment by persons with disabilities enunciated in its general comment No. 5 (1994) on persons with disabilities, noting that « States parties must take measures enabling persons with disabilities "to secure and retain appropriate employment and to progress in their occupational field, thus facilitating their integration or reintegration into society" [Gen. comment no. 18].

### 3.5. MIGRANT WORKERS

Migrant workers make up a very relevant part of the work force worldwide. Among them, differences can easily be found between the group made up of highly skilled workers, who have little problem finding employment and obtaining the documentation needed to live and work in the host country. Along with them, the clear majority of the migrant population is made up of workers with few or no professional qualifications who are required to carry out jobs in accordance with their qualification and with a very low remuneration. Furthermore, these people have greater difficulty obtaining work and residency permits in their host countries.

The ICESCR and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families. In this regard the Committee underlines "the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise.

## 4. NORMATIVE CONTENT OF THE RIGHT TO DECENT WORK

The international framework on matters of work-related rights is formed by the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights (ICCPR), the ICESCR and the many covenants and recommendations of the ILO<sup>540</sup>.

### 4.1. DIMENSIONS OR ELEMENTS OF THE RIGHT

The DHDH recognises that everyone has the right to work. In particular, the right to freely choose or accept work, to protection against unemployment, to receiving equal pay for equal work, to carry out work in satisfactory and equitable working conditions and to obtain remuneration that can support a person's family decently. In addition, it ensures the right to rest, to limits to the working day and to enjoyment of free time (arts. 23 and 24). Similarly, the ICCPR expressly prohibits slavery, the slave trade, servitude and forced labour, the only exceptions to the latter being 'the performance of hard labour in pursuance of a sentence to such punishment by a competent court' and 'any service of a military character and, in countries where conscientious objection is recognized, any national service required by law of conscientious objectors' (art. 8). Finally, the ICESCR establishes the right to work and the State's obligations to safeguard this right (art. 6) as well as the right to just and favourable working conditions that guarantee (i) fair wages sufficient to provide a decent living for workers and their families, (ii) equal pay for equal work, (iii) safe and healthy work conditions, (iv) equal opportunity for work and promotion and (v) reasonable limits to the length of the work day, paid holidays and the enjoyment of vacation, rest and leisure time.

It is important to point out some of the fundamental elements of the right to decent work: the work must be freely accepted, available, accessible, acceptable and of good quality. CESCR notes the existence of the following interdependent and essential elements, implementation of which will depend on the conditions present in each State party: [Gen. comment no. 18].

**Freely accepted.** The work cannot be forced or obligatory for the worker. The State parties agree to eliminate, condemn and fight against all forms of forced labour, establishing whatever measures are needed to prevent anyone from being forced to perform a job.

**Availability.** States parties must have specialized services to assist and support individuals in order to enable them to identify and find available employment;

**Accessibility.** It means a right is accessible. In the case of work-related rights, accessibility comprises three dimensions:

The covenant prohibits *any discrimination in access to and maintenance of employment* on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status. States parties should "declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof". Even in times of severe resource constraints, disadvantaged and marginalized individuals and groups must be protected by the adoption of relatively low-cost targeted programmes.

**Physical accessibility** of the workplace, preventing any limitation that may affect people with disabilities.

**Information on access to employment.** Accessibility includes the right to seek, obtain and impart information on the means of gaining access to employment through the establishment of

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540. Since its creation, the ILO has adopted nearly two hundred conventions and a large number of recommendations regarding different issues in the area of work. Being international treaties, the Conventions require ratification by the States. Unlike Conventions, however, recommendations do not need ratification and are aimed at providing relevant guidelines on the matter at hand. In 1985, the ILO Governing Body revised the set of codes and standards adopted to date, noting which ones should be considered fully up to date, which ones need updating and which ones should be withdrawn.

data networks on the employment market at the local, regional, national and international levels.

**Acceptability and quality.** Not every job is acceptable. Decent work is work that respects fundamental rights. The right of the worker to just and favourable conditions of work, in particular to safe working conditions, the right to form trade unions and the right freely to choose and accept work.

#### 4.2..OBLIGATIONS FOR THE STATE

All the ILO Members, even if they have not ratified the Conventions in question, “have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions” [[Declaration of the ILO on the principles and fundamental rights in the workplace, 1998](#)].

As with the other economic, social and cultural rights, realisation is immediate in some cases and only gradual in others- i.e., it bears the obligation of adopting as soon as possible whatever measures are involved, linking its effectiveness to the existing conditions in the State that must safeguard the rights regarding work.

The ICESCR establishes that States parties have immediate obligations in relation to the right to work, such as the obligation to ‘guarantee’ that it will be exercised ‘without discrimination of any kind’ (art.2.1) and, take steps ‘to the maximum of its available resources’ with a view to achieving the full realization of the rights regarding work (art. 2.2). Those steps, according to the Committee, ‘must be deliberate and concrete’ Gen. comment no. 18].

The fact that **realization** of the right to work is **progressive** and takes place over a period of time should not be interpreted as a lessening of any of its content, since States parties have “a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realization” of the right to work [Gen. comment no. 18].

Advancing toward full realisation of the right involves not taking steps backwards regarding labour rights, and should measures of this kind be necessary, States Parties must demonstrate that they have considered all possible alternatives and that the steps taken are fully justified in the context of maximum use of their available resources.

With technical cooperation as needed to help ILO Member States adjust to the principles and fundamental rights on work approved in the fundamental conventions, the *Declaration on Fundamental Principles and Rights at Work* and its *Follow Up* (1988) commits Member States to respect and promote the principles and rights featured in the Conventions, whether or not they have ratified them. In other words, freedom of association and the effective recognition of the right to collective bargaining; the elimination of forced labour in all its forms; the effective abolition of child labour; and the elimination of discrimination in employment.

**Obligation to respect.** States Parties must abstain from interfering directly or indirectly in the enjoyment of the right. This way, the ILO Member States are required to comply with the international norms that prohibit forced labour, child labour and all forms of economic exploitation of children. They are also required to respect the right of women and young adults to a decent living, taking the steps needed to fight against discrimination and promote equal access to employment, which includes equal access to education, since it is a key factor to future opportunities for employment.

“The obligation to respect is particularly important when the State is the employer, including in State-owned or State-controlled enterprises. For example, States parties should not introduce salary scales that discriminate, directly or indirectly, against female workers, or maintain a promotion system in the public sector that favours, directly or indirectly, the overrepresented gender at higher levels. States parties should take measures to prevent and remedy occupational accidents and disease resulting from their acts or omissions. States parties should also respect collective agreements aimed at introducing and maintaining

just and favourable conditions of work and review legislation, including corporate laws and regulations, to ensure that it does not constrain that right.” [Gen. comment no. 23]<sup>541</sup>.

**Obligation to protect.** The ILO Member States are required to prohibit forced or obligatory labour by non-governmental agents. They are therefore required to legislate and develop policies that ensure equal access to employment and training. The States are also required to guarantee the effective legal safeguarding of work-relative rights. National trade unions and Human Rights Committees must undertake a key role in the defence of work-related rights.

Lastly, “the obligation to protect requires States parties to take measures to ensure that third parties, such as private sector employers and enterprises, do not interfere with the enjoyment of the right to just and favourable conditions of work and comply with their obligations. This includes taking steps to prevent, investigate, punish and redress abuse through effective laws and policies and adjudication. For example, States should ensure that laws, policies and regulations governing the right to just and favourable conditions of work, such as a national occupational safety and health policy, or legislation on minimum wage and minimum standards for working conditions, are adequate and effectively enforced. States parties should impose sanctions and appropriate penalties on third parties, including adequate reparation, criminal penalties, pecuniary measures such as damages, and administrative measures, in the event of violation of any of the elements of the right. They should also refrain from procuring goods and services from individuals and enterprises that abuse the right. State parties should ensure that the mandates of labour inspectorates and other investigation and protection mechanisms cover conditions of work in the private sector and provide guidance to employers and enterprises. Measures to protect should also cover the informal sector. Certain workers, such as domestic workers, may require specific measures” [Gen. comment no. 23]<sup>542</sup>

**The obligation to fulfil** “requires States parties to adopt the measures necessary to ensure the full realization of the right to just and favourable conditions of work. This includes introducing measures to facilitate, promote and provide that right, including through collective bargaining and social dialogue.

In order to facilitate the right to just and favourable conditions of work, States parties should adopt positive measures to assist workers by according sufficient recognition of the right through laws, policies and regulations, for example, on non-discrimination, a non-derogable minimum wage, occupational safety and health, compulsory insurance coverage, minimum standards for rest, leisure, limitations on working hours, paid annual and other leave and public holidays. States parties should also introduce quotas or other temporary special measures to enable women and other members of groups that have experienced discrimination to reach high-level posts and provide incentives for the private sector to do so” [Gen. comment no. 23].

In addition, the ILO State Members are required to: (i) recognise work rights in their national court system and adopt national policies on them, (ii) establish and develop active employment policies aimed at fomenting full employment, productive and freely-chosen, to ‘stimulate growth and economic development, raise standards of living, meet the need for manpower and solve the problem of unemployment and underemployment’, (iii) take effective steps to increase the resources assigned to lowering the unemployment rate that mostly affects women, young adults and the disadvantaged, (iv) set mechanisms to compensate for the loss of employment and adopt the measures needed to establish Employment Services, public and private, on the local and national level, (iv) put plans into practice for access to technical or professional vocational training for employment, as well as adopting measures to help people enjoy their right to work and (v) apply informative and vocational programmes to teach about work-related rights<sup>543</sup>.

541. See Guiding Principles on Business and Human Rights, principle 3 (b).

542. Ibid., principle 3.

543. Convention 122 of the ILO.

With the three levels or types of obligation -respect, protect, apply- for the set of human rights, in the specific domain of work-related rights, the CESCR points out each State Party's obligation to 'ensure at least the satisfaction of essential levels of each right stated in the Covenant' [Ob. gen. 3]. This fundamental minimum obligation refers to (i) to ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups; (ii) to avoid any measure that results in discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups or in weakening mechanisms for the protection of such individuals and groups; and (iii) to adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers and responding to them. The strategy and plan of action in work-related matters should be (i) based on a participatory and transparent process that includes employers' and workers' organizations (ii) and include indicators and benchmarks by which progress in relation to the right to work can be measured and periodically reviewed [Gen. comment no. 18].

The CESCR has similarly referred to the international obligations of the States, pointing out "the obligation of all States parties to take steps individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant." [Gen. comment no. 3], reasoning in the sense that "States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to work." [Gen. comment no. 18].

The international obligations of the States in the area of work-related rights require them to make an effort "to promote the right to work in other countries as well as in bilateral and multilateral negotiations. In negotiations with international financial institutions, States parties should ensure protection of the right to work of their population. States parties that are members of international financial institutions, in particular the International Monetary Fund, the World Bank and regional development banks, should pay greater attention to the protection of the right to work in influencing the lending policies, credit agreements, structural adjustment programmes and international measures of these institutions. The strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right to work and impact negatively on the right to work of women, young persons and the disadvantaged and marginalized individuals and groups." [Gen. comment no. 18].

"States parties must demonstrate that they have taken all steps necessary towards the realization of the right within their maximum available resources, that the right is enjoyed without discrimination and that women enjoy conditions of work not inferior to men, as well as equal pay for equal work and for work of equal value. A failure to take such steps amounts to a violation of the Covenant. In assessing whether States parties have complied with their obligation to take such steps, the Committee examines whether steps taken are reasonable and proportionate and whether they comply with human rights standards and democratic principles" [Gen. comment no. 23].

"While only States are parties to the Covenant, business enterprises, trade unions and all members of society have responsibilities to realize the right to just and favourable conditions of work. This is particularly important in the case of occupational safety and health, given that the employer's responsibility for the safety and health of workers is a basic principle of labour law, intrinsically related to the employment contract, but it also applies to other elements of the right to just and favourable conditions of work" [Gen. comment no. 23].

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 12****Subject****2.4.16.** Trade union right**Lecturer:**

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## SUMMARY OF THE TOPIC

Trade Union Law is the branch of Labor Law that regulates the constitution and activity of trade unions and business organizations, as well as the exercise of the right to strike. However, Trade Union Law is not an autonomous branch, due to its rules concerning trade union organization belong to Labor Law and, more specifically, to Collective Labor Law.

In the past, the establishment of a trade union or any other form of union activity was not allowed by law, but today, in most countries, trade union activity is not only an acquired right but a freedom attributed to any person who practices a profession legally. Thus, the title of this course deals with different concepts, norms and intentions related to the Trade Union Law exercise, from its beginnings to the present day.

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Traub-Merz, R., et J. Eckl, J., [Mouvement syndical international: Fusions et contradictions](#), « La Coopération Syndicale Internationale ». Document d'information d'information N°01, 2007.

## LEARNING OUTCOMES

On successful completion of this module, the participant should be able to:

- Understand the value and importance of trade unionism in different contexts.
- Examine the changes and historical evolution of trade unionism, highlighting the current challenges and reflecting on possible solutions.
- List the forms of trade unionism applicable to all employees and employers.
- Conduct an in-depth analysis of trade unionism in the social, economic and cultural context.
- Develop critical debate.

## SCHEDULING OF LEARNING ACTIVITIES

### 1. Reading:

- Topic content prepared by the teacher
- Documents listed in the section "References and other obligatory educational resources"
- Documents listed in the section "References and other complementary resources"



## 2. Group discussion:

- Arrive at a common definition of trade unionism
- Identify the conditions for trade unionism
- Discuss the content

## 3. Notes for the forum:

- Give brief remarks in the forum (maximum 100 words) with personal thoughts on the conclusions of the group discussion.

## DESCRIPTION OF TEACHING ACTIVITIES

- 1) Read topic contents
- 2) View websites
- 3) Participate in the Forum, with at least two contributions per person
  - First:** give a personal opinion, summarising the reading assignments and videos.
  - Second:** comment on the contributions of the other participants.

Description of the learning activities	Estimated time
F. Engels paints a vivid portrait of the birth of the trade union movement in his work " <a href="#">The Condition of the Working Class in England</a> ". After consulting the above link, we would like you to summarise the true facts that led to the birth of the trade union movement in the United Kingdom.	3 hours
Algeria has ratified ILO Conventions 87 and 98, which means that it is bound to respect the provisions laid down in these standards. But the reality of trade union rights in Algeria is somewhat negative, since several complaints have been filed by independent unions against the Algerian government through the <a href="#">Committee on Freedom of Association of the ILO</a> . You are therefore required to thoroughly read international labour Convention <a href="#">C87</a> and <a href="#">Act 90/14</a> on the different ways trade union rights are exercised. List a minimum of three provisions established by this Act that are contradictory to the international standards laid down by ILO C87.	3 hours
Historically, the right to strike in Algeria was not recognised for public employees until the Algerian Constitution of 1989. Until then, strike action was a legitimate right granted to any person employed by the private sector. However, the aforementioned Act 90/02 of 1990 laid down certain restrictions or even prohibitions that some consider to be violations of the right to strike. I would like you to give your opinion in a few lines on the constitutionality of the provisions relating to legal limitations or prohibitions contained in <a href="#">Act 90/02</a> , amended and supplemented by Act 91/27 of 21 December 1991 on the right to strike in Algeria.	2 hours

# SUBJECT 2.4.:

## 2.4.16: LABOUR RIGHTS

### 1. INTRODUCTION

Trade union rights are a fundamental constitutional right for all workers. It is their right to organise, to pursue trade union action during the delegation hours of a trade union mandate during their working hours or to benefit from trade union information and training to defend their professional interests, be they material or moral.

In the past, the establishment of a union or any other form of union activity was prohibited by law, but today, in most countries, trade union activity is an acquired right; more than that, it is a freedom attributed to any person lawfully exercising a profession.

This course therefore addresses the various concepts, standards and issues related to trade unionism, from its inception until the present day.

### 2. HISTORY

Historically, the birth of the proletariat, like that of the bourgeoisie and the capitalist mode of production, dates back to a specific time: the age of the new productive forces, the gradual replacement of manual labour with machines; the age of the incipient industrial revolution that first began in the United Kingdom at the end of the eighteenth century, to then spread to the other countries of Western Europe and the United States of America.

One cannot, therefore, speak of trade unionism (the Labour Movement) before the industrial revolution. This does not however mean that workers had not previously organised themselves within specific institutions, but the cooperatives of the old regime had a different rationale from that of the unionism that was born of the industrial machine and the separation of labour and capital.

The industrial revolution which first emerged in *the United Kingdom* and then spread to the other countries of Western Europe and the United States of America from the eighteenth century gave rise to social consequences that significantly disrupted the organisation of society. It replaced the feudal mode of production with the capitalist mode of production. This revolution, which resulted above all in the appearance of machines and factories, was not just a technological revolution; it directly influenced the class structure of society, creating new relationships between people, giving rise to and nurturing two antagonistic classes – the industrial bourgeoisie and the proletariat. This profound qualitative transformation of society led to the emergence and development of capitalist relations of production; on one hand, the owners of the means and tools of production and, on the other hand, the proletariat, who lived on nothing more than the labour of their own hands. The struggle of the proletariat against the bourgeoisie began precisely with the emergence of the proletariat as a class.

The industrial revolution therefore propelled two classes with conflicting interests onto the industrial scene:

- The bourgeoisie, a class that, at the time, fought for the advent of capitalism and whose major concern was to amass more wealth. This class is the owner of capital (means of production);
- The proletariat (worker) class that had nothing but their labour-power, which they had to sell in order to live or survive.

Thus we can say that there are three features that trace the history of the trade union movement in major Western industrial nations: a series of workers' revolts, the struggle to gain legal recognition, and the efforts to create new modes of organisation.

Modern trade unionism was born, as was socialism, with the advent of capitalism. In the early nineteenth century, British workers protested violently against the introduction of machinery and modern equipment in their workshops. The first workers' protests were widespread and violent. The new machines were seen as creating unemployment.

The mechanisation of industrial production led to the unchecked and inhuman exploitation of the proletariat. The backbreaking work, the absence of any technical safety standards, hygienic conditions or any law on labour, low wages, substandard housing conditions for workers, hunger, poverty and the arbitrary behaviour of the capitalist employers – such were the harsh conditions in which the proletariat lived and worked.

In order to ensure the greatest possible profits and to produce as cheaply as possible, capitalists exploited children and women above all. In the textile industry, thousands of children worked for a pittance, and often there were five- and six-year-olds who were beaten to keep them awake.

The law passed on April 6, 1802 by the House of Commons of the United Kingdom, established that a working day should not exceed twelve hours for children and outlawed having more than two children sleeping in the same bed. However, it was never enforced.

At the same time, almost every country that was awakening to industry faced disturbances similar to those caused by the “Luddites”, named after *Ludd*, who participated in the smashing of machinery and the riots that took place in 1811 in the Midlands. But worse than that, the unquestioned exploitation and miserable working conditions that defined the first phase of capitalism, as revealed in Britain by the reports of factory inspectors and in France by labour investigations such as those conducted by Dr. *Villermé*, led to uprisings that were violently repressed.

These are the words of a rule published by the German manufacturer *Krupp* in 1838, which, at the time, was thought to be one of the most socially advanced: *“Every worker must be unconditionally faithful and obedient, behave with decorum in and out of the factory and demonstrate by his zeal that he desires to work for the profit of the factory.”*

These harsh working and living conditions for the proletariat and their unfettered and inhuman exploitation led them to reflect on their condition and to gradually find ways for their struggle to be heard. Experience helped them to understand two crucial matters:

o firstly, that it is capitalist exploitation and not the machines that are the source of their suffering;

o secondly, that their spontaneous, isolated struggles are ineffective and change nothing. Taking this conclusion on board, the working class set up various labour organisations during a long and arduous process that led to the trade union as we know it today, with its considerable achievements and wide-ranging experience.

The capitalist system is therefore behind the development of productive forces without compare in the history of mankind, dragging the social classes that it engendered into increasingly harsh struggles. These struggles allowed the proletariat to acquire certain social entitlements, the most important of which are:

- The birth of the International Workingmen's Association (IWA), spearhead of the fight for workers' freedom of association and the right to strike, denied to French workers by the Le Chapelier Law;
- Legislation for labour protection of women and children;
- The establishment and development of social legislation on health and accident insurance schemes, a pension fund;

- The improvement of working conditions through a minimum wage and a gradual reduction of the duration of the working day (from 16 to 14 hours, then 11, 10 and, as it stands today, 8 hours).

These achievements were not offered to the working class by the bourgeoisie. They are the result of the struggles of the proletariat, struggles against which the approach of the bourgeoisie was to use repression (the stick) and/or corruption (the carrot). It must also be added that in this struggle between the two classes, each of them resorted to all forms of organisation and all other social classes and strata that could be of service to them.

In general, trade unions set up by the workers waged their struggles around three main objectives:

- Selling their labour-power in the most advantageous way possible;
- Firmly defending their material and moral interests;
- Uniting and showing solidarity with the other workers and other social strata, especially the urban petty bourgeoisie and the peasantry.

This resistance against the effects and not the causes of their misery quickly proved to have its limits. Guided by the utopian theory of socialism, these workers took collective action to demand the legalisation of trade unionism in order to defend their moral and material interests.

The organisation of the proletariat and their struggle, much like the early traits of the trade union movement, were determined by the specific historical circumstances of each country: the uneven development of capitalism, the extent of the proletariat's class consciousness and the political situation of the time.

The last quarter of the nineteenth century saw the birth and development of three types of unions in the labour movement, especially in Europe, which mostly took root and expanded in the UK, France and Germany and which consequently influenced all global trade union movements. These organisations each had their own characteristics, outlined briefly below.

#### A) TRADE UNIONISM:

The proletariat first came into being in the United Kingdom, one of the leading capitalist countries, and with it, the first worker organisations. Although the British government forbade these organisations and their first strikes with laws passed in 1799 and 1800, textile workers and miners created a number of illegal and semi-legal organisations.

Faced with considerable pressure from the workers who, in some cases, sparked riots, the British Parliament was forced to pass legislation authorising the working class to organise into trade unions. It was precisely the influence of the new British working class that gave birth, after 1830, to the "*Chartist movement*", which despite the victories that had been achieved, eventually suffered defeat.

After the repeal of the laws that prevented the creation of workers' organisations, *trade unions* appeared in the UK, the first labour organisations of their kind.

The worker and trade union movement in the UK developed under particular circumstances, since the economic power of the bourgeoisie had increased considerably due to the ruthless exploitation of the British proletariat and the unbridled plunder of many colonial countries. Having thus amassed huge profits, the bourgeoisie were the first to buy off the leaders of the working class. Together with the most highly-qualified workers, the *leaders* of the unions and workers' cooperatives, they formed the broad upper stratum of the working class that participated in the political bodies of the country, in Parliament, in the local bodies of power.

These were the circumstances under which a movement known as *trade unionism* developed in the United Kingdom. Its activity centred, as it does today, on class collaboration, the inviolability of the bourgeois order and private property, and protecting the interests of the most privileged worker groups. The trade unions were not fighting to abolish capitalism, and all that went with it, but to "improve" it.

The ideology of *Trade unionism* was based on the theory of spontaneity, which like the theory of opportunism, considers the development of the labour movement to be spontaneous. Proclaiming the principle, “no politics of any kind in the unions”, the British trade unions continued to confine their activity to the narrow context of economic demands; matters of a “political” nature were handled by the Labour Party, which, in origin, was nothing but a product of the bourgeoisified trade union movement, its mouthpiece in Parliament.

## B) ANARCHO-SYNDICALISM:

In France, the *Le Chapelier Law* of 1792 totally prohibited workers’ associations, but this did not stop the French proletariat taking part in many battles and revolutions. From 1860 onwards, the “*chambres syndicales*”, or trade unions, first appeared in France, based on professions and set up as local organisations.

For its part, the 1870 Paris Commune was and remains a significant historical event, because for the first time the proletariat seized power from the bourgeoisie and made the first attempts to establish a dictatorship of the proletariat. The Paris Commune gave new impetus to, and had a positive influence on, the labour and trade union movement in France and beyond its borders. Despite the extreme measures taken by the reactionaries after the defeat of the Commune, the labour movement only continued to spread and grow stronger.

In 1884, when the trade unions were recognised by Parliament, after the *Le Chapelier Law* was repealed, the number of workers in these organisations came to about 100,000. Some of the *chambres syndicales* were run by the French Section of the First International. The *Bourses du Travail* (Labour Exchanges), which saw the light of day after the *chambres syndicales*, were at first organised by the municipalities, and they took care of employment issues for the workers, providing assistance to their members and organising cultural activities.

In 1895, after all the trade unions had been united at national level, the *General Confederation of Labour* (*Confédération Générale du Travail, CGT*) was founded in *Limoges*. This united, some years later, with the *National Federation of Labour Exchanges* (*Fédération Nationale des Bourses de France*). Its main purpose was to protect the economic interests of the working class and the masses not only in France but also in the rest of the world.

The economic and political circumstances of the end of the nineteenth century and the beginning of the twentieth century and up to the outbreak of the First World War was conducive to the emergence and spread of anarcho-syndicalist views in the French labour movement. This trend, which especially after 1906 was called *revolutionary syndicalism*, was the result of the ruin of the middle stratum of the petty bourgeoisie which, swelling the ranks of the proletariat, brought with it petty-bourgeois ideology. This became the social basis on which anarcho-syndicalism grew. This trend found fertile ground because, among other reasons, the workers were disillusioned by the opportunistic and reformist activity of trade union leaders and the French Socialist Party. Because of the extent to which this movement spread in France, it became known as “*the home of anarcho-syndicalism*”.

Anarcho-syndicalist ideas predominated in the early days of the CGT in France, and its Congress of 1906 it adopted the “*Charter of Amiens*” – the programme and ideological platform of anarcho-syndicalism. It proclaimed that “*syndicalism advocates the general strike as a means of action and considers that the trade union has now become a centre of resistance, will in future be a centre of production and distribution, the basis of social reorganisation*”.

The anarcho-syndicalists viewed the general strike as the highest and most radical form of the struggle of the proletariat. Their ultimate goal was to overthrow capitalism without revolution and to take power through a general strike, which they considered “*the ideal form of revolution*” and “*the expression of violence that avoids bloodshed*”. The anarcho-syndicalists were opposed to any form of state power, regardless of its nature; they regarded unions as the only form of organisation of the proletariat and resistance against the bourgeoisie, and wanted the workshop to replace the government.

Proclaiming the total “independence” of the unions from the political parties of the working class, the anarcho-syndicalists rejected the need for the political struggle of the working class and the leadership role of its party, armed insurgency and the dictatorship of the proletariat over the bourgeoisie. Anarcho-syndicalism, as a petty-bourgeois, semi-anarchist

trend, introduced the ideology, politics and tactics of anarchism into the labour and trade union movement. Thus it adopted forms of action such as sabotage and destruction of machines, raw materials, production, etc.

Strikes and sabotage, whatever their nature, were considered “*revolutionary gymnastics*”. *Lenin* called anarcho-syndicalism the “*twin brother*” of *opportunism*, the “*original reformism*” of the left.

The event that tested the strength of the views espoused by the CGT was undoubtedly the First World War (1914-1918); as the very first cannon shots were fired, Social Democracy in Germany, France, the UK, Russia (the Mensheviks) and other countries rallied behind the camp of bourgeois nationalism.

This was much in the same spirit as the CGT basely betrayed the ideals of anti-militarism and proletarian internationalism. The Federation of Metals and members of the newspaper *la Vie Ouvrière* opposed rallying the workers’ confederation to the cry of bourgeois nationalism.

In December 1920, responding to the clarion call of the 3rd International, the majority of the SFIO (French Section of the Workers’ International) founded the French Communist Party. Fearing that the trade union apparatus would slip from their grasp, the reformists went on the offensive and excluded communists and anarchists in December 1921. These latter groups founded a new Workers’ Confederation (CGT-U) which united with the newly-formed Red International of Labour Unions (RILU). At the end of the Second World War, the CGT had at least 4 million members. The leadership of the Workers’ Confederation passed into the hands of the Communists. On 19 December 1947, five reformist confederal secretaries left the CGT and founded the yellow union, Fo (General Confederation of Labour – Workers’ Force), in April 1948.

CGT activists continued to champion its founding values. They rightly said that without these values CGT would not have been able to lead the working class to its great victories of the pre-war and post-war periods, and in 1968. The rightful stance of the CGT on all major issues relating to the life of peoples and societies, its commitment to the anti-colonial and anti-fascist cause clearly constitute a rich heritage that should not remain confined to dusty library books. The new generation of workers must study to understand this history so that it may draw on its theoretical and practical teaching for the major social battles to come.

### C) TRADE UNION PLURALISM:

The worker and trade union movement in Germany is distinguished principally by union fragmentation. Towards the beginning of the nineteenth century, especially after the uniting of the German states into one single state, the economic development of Germany advanced at a faster rate; thus the working class, too, formed and organised more quickly. But it was only after 1860 that the first of the working class organisations were formed in Germany, since political reactionaries had prohibited them before that time.

The trade unions immediately multiplied; “*They sprang up*”, in the words of August Bebel, “*like mushrooms after summer rain*”. Because of the diversity of the political currents, the trade union movement in Germany remained fragmented. We can single out four trade union currents which, in the chronological order of their formation, may be divided into:

1. *Hirsch-Dunker trade unions* (after the names of their founders) which were under the influence of the liberal bourgeoisie, as opportunist and reformist organisations of the British trade-union type, and which were later called the General Union of Mutual Aid.
2. *Lassallean trade unions*, which were directed by the Lassallean political party. They renounced the economic struggle entirely, opposing the revolution which they replaced with the struggle for universal suffrage and activity in parliament; they also advocated the peaceful transition to a socialist society. Marx, in his “Critique of the Gotha Programme” denounced the reactionary character of the Lassalleans.
3. *Eisenacht trade unions*, which are otherwise known as “Worker Education Associations”.



4. *Christian trade unions*, which were founded on religious principles and advocated class harmony. They were founded by the Catholic clergy. The union of the two political parties of Eisenacht and Lassalle led to the unification of these two trade union movements.

The unified German trade union movement began to follow the path of opportunism and reformism. At the first National Trade Union Congress in 1892 a single organisation was created, which was under the influence of German social democracy, but got increasingly bogged down in the quagmire of opportunism and reformism.

During this period, the German trade unions attached more importance to the administrative aspects than to the struggle of the working class. For this reason it was said, ironically, that the German unions were suffering from “stone disease”: with many resources at their disposal, they bought and built magnificent buildings.

The three main trends in the trade union movement were particularly important in that they had an influence on the evolution of the global trade union movement as a whole. The trade union movement in western countries is distinguished by the fact that it came into being and developed before certain political parties of the working class were established. Many of these parties even emerged from within the unions, which at first acted particularly in the economic sphere, since the working class was more concerned with this aspect of the struggle, while political parties engaged first and foremost in the parliamentary struggle, the political struggle.

### 3. CONCEPTS

The French word for trade union (*syndicat*) is very closely related to the word for trade unionism (*syndicalisme*). The etymology of the word is derived from the Greek *syn* (with) and *dike* (trial or justice).

The Arabic translation of this word is *El-nakabia*, which means trade union activity or social or political benefit from trade union activities.

Trade unionism is therefore the activity carried out in the context of a labour organisation and membership of that union. Trade unionism is also the social doctrine according to which employees, traders, farmers and generally all workers must join together in trade unions in order to defend their common interests (wages, working conditions, working hours, security of employment, etc.).

As regards trade union rights, these have been defined as: *“The legally recognised ability of a professional association to form a trade union (after satisfying the regulations in force), which gives it legal personality, enabling it to assert its rights and defend its interests.”* Thus, any employee in a company may exercise the right to create or join a union. Employees are free to join a union, regardless of gender, age, nationality, religion or belief, disability, or membership, real or assumed, of an ethnic group or race.

A person who has ceased to exercise their profession may also join or continue to be a member of the trade union of their choice.

A *trade union* is an association of people whose objective is the protection of their common professional interests. Trade unions or professional associations bring together people from the same profession, from similar or related trades, and their sole purpose is to examine and protect their rights and the material and moral, collective and individual interests of the persons covered by their statutes. They have the capacity to defend those interests in court.

There are different types of union (in the broad sense and encompassing association and syndication):

- *Professional or interprofessional union*: trade unions are often organised by industry and/or region and federated at county, regional and national level. There are:
- *workers' unions*;



- *employers' organisations*;
- *unions for the liberal professions* including lawyers' unions, pharmacists' unions, etc;
- *Student unions and high school student unions*.
- *Commonhold associations* (co-owners of a property), and housing subdivision associations, governed by specific regulations.
- *Municipal association*, an association for the pooling of common interests within a municipality (e.g. local tourism office).
- *Intermunicipal associations* that pool communal resources (water management, waste disposal, public transport, etc).
- *Local tourism office*: In France and Switzerland, the *syndicat d'initiative* is a centre for tourism development (the former name of local tourist offices). In other countries it may have a different purpose (e.g. protection of local interests).
- *Bank syndicate*, a banking group that places capital on the financial market.

In short, unions and associations of all types are present in all countries, with varying degrees of constitutional freedom.

## 4. FOUNDATIONS

Trade union rights – the right to freedom of association – are an integral part of fundamental human rights and the cornerstone of provisions in many international instruments designed to ensure the protection of workers. Indeed, the [Universal Declaration of Human Rights](#) (1948) specifically states in paragraph 4 of Article 23, that: *"Everyone has the right to form and to join trade unions for the protection of his interests"*.

This was confirmed by the [International Covenant on Civil and Political Rights](#) (1966). Article 22 of this agreement states that:

*"1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.*

*2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.*

*3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention."*

Similarly, trade union rights were enshrined in Article 8 of the [International Covenant on Economic, Social and Cultural Rights](#) (1966), which states that:

*"1. The States Parties to the present Covenant undertake to ensure:*

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. *This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.*

3. *Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."*

The principle of freedom of association is also at the heart of the ILO's values, and is enshrined in the [Constitution of the Organisation](#) (1919), and the [Declaration of Philadelphia](#) (1944).

The ILO Constitution states in its preamble, in clear terms, that: *"Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;..."*

The [Declaration of Philadelphia](#) (1944) states, in turn, that: *"The Conference reaffirms the fundamental principles on which the Organization is based and, in particular, that:*

- (a) labour is not a commodity;
- (b) freedom of expression and of association are essential to sustained progress;
- (c) poverty anywhere constitutes a danger to prosperity everywhere;
- (d) the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare".

Under these two fundamental texts, the ILO was created to improve working conditions and to promote freedom of association in different countries. It follows that the matters dealt with by the Organisation in this connection no longer fall within the exclusive sphere of States and the action taken by the Organisation for that purpose cannot be considered to be interference in internal affairs, since it falls within the terms of reference that the ILO has received from its Members with a view to achieving the aims assigned to it.

From the beginnings of the ILO, the ILO Constitution has affirmed the principle of freedom of association and over the years, the International Labour Conference has adopted conventions, recommendations and resolutions that are the source of the most important international labour law, the principles of which have been widely taken up in many national laws. These standards include the following conventions and resolutions:

- [C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 \(ratifications\)](#): Under this fundamental Convention, workers and employers have the right to establish organisations of their choice and to join them without prior authorisation. Workers' and employers' organisations are freely organised and

may not be dissolved or suspended by administrative authority. They also have the right to establish and join federations and confederations, and any organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

- [C098 - Right to Organise and Collective Bargaining Convention, 1949](#) - [ratifications]: Under this fundamental Convention, workers must enjoy adequate protection against acts of anti-union discrimination, including those calculated to make the employment of a worker subject to the condition that he shall not join a union or shall relinquish trade union membership, or to cause the dismissal of a worker by reason of union membership or because of participation in union activities. Workers' and employers' organisations must enjoy adequate protection against acts of interference by each other, in particular acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means, with the object of placing such organisations under the control of employers or employers' organisations. The Convention also enshrines the right to collective bargaining (see section on collective bargaining).
- [C135 - Workers' Representatives Convention, 1971](#) - [ratifications]: Workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, insofar as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements. Such facilities in the undertaking shall be afforded to workers' representatives as may be appropriate in order to enable them to carry out their functions promptly and efficiently.
- [C141 - Rural Workers' Organisations Convention, 1975](#) - [ratifications]: All categories of rural workers, whether they are wage earners or self-employed, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations, of their own choosing without previous authorisation. The principles of freedom of association shall be fully respected; rural workers' organisations shall be independent and voluntary in character and shall remain free from all interference, coercion or repression. National policy must facilitate the establishment and growth, on a voluntary basis, of strong and independent organisations of rural workers as an effective means of ensuring the participation of rural workers in economic and social development.
- [C151 - Labour Relations \(Public Service\) Convention, 1978](#) - [ratifications]: Under this Convention, public employees, as defined therein, shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment. Public employees' organisations shall enjoy complete independence from public authorities and adequate protection against any acts of interference by a public authority in their establishment, functioning or administration (see section on collective bargaining, below).

Beyond this standard-setting work of the ILO, which by itself testifies to the extent to which freedom of association is of paramount importance to the Organisation, emphasis should be placed on the fact that, following negotiations and agreements between the [ILO Governing Body](#) and the [Economic and Social Council of the United Nations](#), a special procedure for the protection of freedom of association was established in 1950. This procedure supplements the general procedures for the supervision and application of ILO standards and is entrusted to two bodies: the Fact-Finding and Conciliation Commission on Freedom of Association and the Committee on Freedom of Association set up by the Governing Body of the ILO.

The [Fact-Finding and Conciliation Commission on Freedom of Association](#), founded in 1950, is composed of independent persons and is mandated to examine any complaint concerning alleged infringements of trade union rights referred to it by the Governing Body of the ILO. Although essentially a fact-finding body, the Commission is empowered to examine, with

the government concerned, the possibilities for resolving difficulties by agreement. This Commission, which has examined six complaints to date, only requires the consent of the government concerned to intervene when that country has not ratified the Conventions on freedom of association. The procedure is determined on a case-by-case basis by the Commission itself and generally includes the hearing of witnesses and an on-site mission. As this is a procedure that respects traditional procedural, oral and written guarantees, it is relatively long and costly; for this reason it has been used only in a limited number of cases. Although this compendium does not specifically cover the Fact-Finding and Conciliation Commission, it is only right to emphasise the importance of its contribution in the field of human rights and trade union rights.

With regard to the [Committee on Freedom of Association](#), it is a tripartite body established in 1951 by the Governing Body. It is composed of nine members and nine deputies from the Government group and the workers' and employers' groups of the Governing Body, and is chaired by an independent person. The Committee on Freedom of Association meets three times a year and, taking into account the observations submitted by governments, is responsible for conducting an examination of the complaints submitted to it under the special procedure. It may have to recommend to the Governing Body, as appropriate, that a case requires no further examination, that it draw the attention of the government concerned to the irregularities found and invite it to take the appropriate measures to remedy them or, finally, that it try to obtain the agreement of the government concerned for the case to be brought before the Fact-Finding and Conciliation Commission.

This special procedure allows both governments and workers' and employers' organisations to submit complaints concerning violations of trade union rights against States (whether they are members of the ILo or members of the United Nations but not Members of the ILo), and can be applied even when the Conventions on freedom of association and collective bargaining have not been ratified.

It should be emphasised that the experience acquired through the examination of more than 2,500 cases during its over fifty years of existence has enabled the Committee on Freedom of Association to develop a body of principles governing freedom of association and collective bargaining, on the basis of the provisions of the ILo Constitution and of the relevant Conventions, Recommendations and resolutions. Because it has been issued by a renowned, specialised and impartial international body, which acts from a tripartite perspective based on real situations – i.e. highly varied, concrete and often extremely serious and complex allegations of violations of trade union rights around the world – this body of principles has acquired recognised authority both at international level and in the various countries where it is increasingly used for the development of national legislation, in the various bodies responsible for the implementation of standards relating to freedom of association, for the resolution of major collective disputes and in publications related to case-law.

In 2012, and within the [365th Report of the Committee on Freedom of Association](#), the ILo designated Argentina, Cambodia, Ethiopia, Fiji and Peru – from a list of 32 cases reviewed – as the most serious and urgent cases as regards freedom of association.

The Committee examined complaints concerning the rights of employers and trade unions in terms of association, collective bargaining and social dialogue. The ILo supervisory reviewed acts of violence in Argentina during which four workers were killed and two others were injured. These deaths and injuries occurred in 2011 during the evacuation of more than 500 workers who were demanding decent housing in the province of Jujuy. The Committee asked the government to communicate the outcome of ongoing judicial investigations.

The Committee also examined the murders of three union leaders, Chea Vichea, Ros Sovannareth and Hy Vuthy, that occurred between 2004 and 2007 in Cambodia. Once again, it strongly urged the government to conduct independent investigations into the murders of these union leaders, to punish the guilty parties and to end the climate of impunity that prevails in the country.

As for Ethiopia, the Committee regretted that, four years after it had applied for registration, the National Teachers' Association (NTA) had still not officially been registered. It urged the Government to ensure that the relevant authorities register the NTA to fully guarantee the rights of civil servants, including teachers in public schools, to form an association.

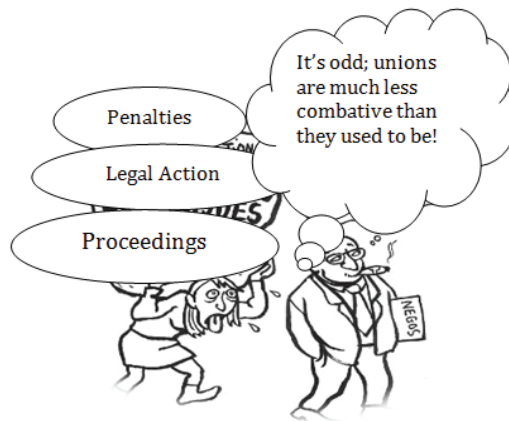
The Committee also urged the Government of Fiji to quickly discuss the return of an ILO Direct Contacts Mission to the country. In the previous September, the Fijian government had not allowed the ILO to continue its mission to verify complaints about the lack of freedom of association granted to local trade unions.

The Committee demanded that the government undertake independent investigations without delay into allegations of physical assault, harassment and intimidation committed against trade union leaders and members.

The Committee also considered the case of Peru, concerning allegations of the murder of a union leader in 2008 during clashes with police during a protest in the mining sector. As it was not possible to identify the perpetrators of the act, the Committee requested further investigations to clarify the facts. Finally, the ILO supervisory body reviewed the measures taken by the Government of Belarus to implement the 2004 recommendations of an ILO Commission of Inquiry. The Committee deeply regretted that the Government had once again failed to respond to the previous recommendations of the ILO and to the new allegations of violations of freedom of association. It urged the government to be more cooperative in the future. The ILO body examined 29 cases and noted with satisfaction that its recommendations had been implemented in cases concerning the reinstatement of trade unionists in Colombia and Peru and the registration of a union in Algeria.

## 5. PROTECTION OF TRADE UNION RIGHTS

Trade union rights are a freedom attributed to each person holding a job and to any organisation with the title of trade union. Thus, the employer shall not employ any means of leverage for or against a union. It shall not take discriminatory measures in respect of a trade union or favour one union over others.



Consequently:

- Any contrary action by the employer shall be considered abusive. It is a criminal offence and may result in damages. It is forbidden for the employer to take discriminatory measures on the basis of the union activities of an employee.
- No employee may be punished, dismissed or discriminated against, directly or indirectly, particularly in respect of recruitment, remuneration, training, reclassification, assignment, qualification, promotion, transfer or renewal of their contract due to their union activities.
- Any act of discrimination by the employer towards an employee because of their union activities is unwarranted. It shall give rise to damages and criminal sanctions.
- No one may discriminate against a worker in recruitment, in the conduct and distribution of work, advancement and promotion, the determination of

remuneration, and in vocational training and social benefits, on the grounds of their union activities.

- No one may exert pressure or threats on workers directed against the union and its activities.
- No trade union delegate may be subjected to dismissal, transfer or disciplinary action of any kind whatsoever on the part of their employer, on the grounds of their union activities. Misconduct that strictly falls under the remit of the trade union shall be the sole responsibility of the trade union.



## 6. TRADE UNIONS AND THE RIGHT TO STRIKE<sup>544</sup>

A critical means for exerting pressure and fighting to defend workers' economic and social interests, a strike is defined by the economic and social dictionary as: *"Suspension of work through which workers either seek to exert direct pressure on the employer or to make users of the company or service support the strike such that governments are constrained to satisfy all or part of the demands of the workers."*<sup>545</sup>

### 6.1. THE BASIC PRINCIPLE OF THE RIGHT TO STRIKE

From its very earliest days, during its second meeting, in 1952, the Committee on Freedom of Association declared strike action to be a right and laid down the basic principle underlying this right, from which all others to some extent derive, and which recognizes the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests<sup>546</sup>. Over the years, in line with this principle, the Committee on Freedom of Association has recognized that strike action is a right and not simply a social act, and has also:

1. made it clear it is a right which workers and their organizations (trade unions, federations and confederations) are entitled to enjoy<sup>547</sup>;
2. reduced the number of categories of workers who may be deprived of this right, as well as the legal restrictions on its exercise, which should not be excessive;

544. This section was transcribed literally from Gernigon, Bernard, Otero, Alberto and Guido, Horacio, [ILO Principles concerning the right to strike](#), ILO, Geneva, 2000.

545. G. Lavau, Dictionnaire économique et social, Les éditions ouvrières, Paris, 1978.

546. ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, 1996, paras. 473- 475.

547. Nevertheless, the supervisory bodies have accepted that legislation may make the exercise of this right subject to the agreement of a certain percentage of the workers, regardless of their union membership.



3. linked the exercise of the right to strike to the objective of promoting and defending the economic and social interests of workers (which criterion excludes strikes of a purely political nature from the scope of international protection provided by the ILO, although the Committee makes no direct statement or indication regarding sympathy strikes other than that they cannot be banned outright; this matter will be examined subsequently);
4. stated that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination.

## 6.2. DEFINITION OF THE RIGHT TO STRIKE AND VARIOUS TYPES OF STRIKE ACTION

The principles of the ILO's supervisory bodies contain no definition of strike action which would permit definitive conclusions to be drawn regarding the legitimacy of the different ways in which the right to strike may be exercised. However, some types of strike action (including occupation of the workplace, go-slow or work-to rule strikes), which are not merely typical work stoppages, have been accepted by the Committee on Freedom of Association, provided that they are conducted in a peaceful manner<sup>548</sup>. The Committee of Experts has stated that:

*When the right to strike is guaranteed by national legislation, a question that frequently arises is whether the action undertaken by workers constitutes a strike under the law. Any work stoppage, however brief and limited, may generally be considered as a strike. This is more difficult to determine when there is no work stoppage as such but a slowdown in work (go-slow strike) or when work rules are applied to the letter (work-to-rule); these forms of strike action are often just as paralysing as a total stoppage. Noting that national law and practice vary widely in this respect, the Committee is of the opinion that restrictions as to the forms of strike action can only be justified if the action ceases to be peaceful. The Committee considers ... that restrictions on strike pickets and workplace occupations should be limited to cases where the action ceases to be peaceful<sup>549</sup>.*

### A. 2. OBJECTIVES OF STRIKES

The nature of the demands pursued through strike action may be categorized as:

- being occupational (seeking to guarantee or improve workers' working or living conditions),
- trade union (seeking to guarantee or develop the rights of trade union organizations and their leaders), or
- political.

The two former categories do not give rise to any particular problems as from the outset the Committee on Freedom of Association has made clear decisions stating that they are legitimate. However, within the three categories of demand specified, a distinction should be made as to whether or not they directly and immediately affect the workers who call the strike. This introduces the issue of the political strike and the sympathy strike. It should at once be noted that the Committee on Freedom of Association and the Committee of Experts have rejected the notion that the right to strike should be confined to industrial disputes that are likely to be resolved through the signing of a collective agreement.

548. Ibid., para. 496.

549. ILO, Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, 1994, paras. 173 and 174.



### a) Political strikes

On the basis of the definition of “workers’ organization” contained in Article 10 of Convention No. 87, the Committee on Freedom of Association considers that “strikes of a purely political nature ... do not fall within the scope of the principles of freedom of association”<sup>550</sup>. However, although the Committee has expressly stated that “it is only in so far as trade union organizations do not allow their occupational demands to assume a purely political aspect that they can legitimately claim that there should be no interference in their activities”, it has also specified that it is difficult to draw a clear distinction between what is political and what is, properly speaking, trade union in character, and that these two notions overlap<sup>551</sup>.

Hence, in a subsequent decision, the Committee concluded that the occupational and economic interests which workers defend through the exercise of the right to strike do not only concern better working conditions or collective claims of an occupational nature, but also the seeking of solutions to economic and social policy questions<sup>552</sup>. Along the same lines, the Committee has stated that workers and their organizations should be able to express their dissatisfaction regarding economic and social matters affecting workers’ interests in circumstances that extend beyond the industrial disputes that are likely to be resolved through the signing of a collective agreement<sup>553</sup>. Nevertheless, worker action should consist merely in the expression of a protest and not be intended as a breach of the peace<sup>554</sup>. In this connection, the Committee on Freedom of Association has stated that “a declaration of the illegality of a national strike protesting against the social and labour consequences of the government’s economic policy and the banning of the strike constitute a serious violation of freedom of association”<sup>555</sup>. That said, it should be added that the principles laid down cover both strikes at the local level, and general strikes, which by their nature have a markedly political connotation. As regards the geographical scope of the strike:

*The Committee [on Freedom of Association] has stated on many occasions that strikes at the national level are legitimate in so far as they have economic and social objectives and not purely political ones; the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term, i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population endanger the life, personal safety or health of the whole or part of the population*<sup>556</sup>.

As regards the general strike, in its examination of one particular case, the Committee considered that “[a] 24-hour general strike seeking an increase in the minimum wage, respect of collective agreements in force and a change in economic policy (to decrease prices and unemployment) is legitimate and within the normal field of activity of trade union organizations” (ibid., para. 494). Similarly, in connection with another case, the Committee concluded that “[a] general protest strike demanding that an end be put to the hundreds of murders of trade union leaders and unionists during the past few years is a legitimate trade union activity and its prohibition therefore constitutes a serious violation of freedom of association” (ibid., para. 495).

The Committee on Freedom of Association’s attitude in cases where the demands pursued through strike action include some of an occupational or trade union nature and others of a political nature has been to recognize the legitimacy of the strike when the occupational

550. ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, 1996, para. 481.

551. Ibid., para. 457.

552. Ibid., para. 479.

553. Ibid., para. 484.

554. ILO, “Reports of the Governing Body Committee on Freedom of Association”, in Official Bulletin (Geneva), Vol. LXII, Series B, No.1, 190th Report, Case No. 913, 1979, para. 450.

555. ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, 1996, para. 493.

556. Ibid., para. 492.

or trade union demands expressed did not seem merely a pretext disguising purely political objectives unconnected with the promotion and defence of workers' interests.

The Committee of Experts also has stated that strikes that are purely political in character do not fall within the scope of freedom of association. However, the difficulty arises from the fact that it is often impossible to distinguish in practice between the political and occupational aspects of a strike, since a policy adopted by a government frequently has immediate repercussions for workers or employers; this is the case, for example, of a general wage and price freeze.

*In the view of the Committee, organizations responsible for defending workers' socio-economic and occupational interests should, in principle, be able to use strike action to support their position in the search for solutions posed by major social and economic policy trends which have a direct impact on their members and on workers in general, in particular as regards employment, social protection and the standard of living*<sup>557</sup>.

### b) Sympathy strikes

Where sympathy strikes are concerned, the crux of the issue is to decide whether workers may declare a strike for occupational, trade union or social and economic motives which do not affect them in a direct and immediate manner.

In its General Survey of 1983, the Committee of Experts defined sym-pathy strikes ("where workers come out in support of another strike") and determined that a general prohibition of sympathy strikes could lead to abuse and that workers should be able to take such action provided that the initial strike they are supporting is itself lawful<sup>558</sup>. This principle was then taken up in 1987 by the Committee on Freedom of Association when it examined a Decree which did not ban sympathy strikes but merely regulated them by limiting the possibilities of recourse to this type of action. In the Committee's opinion, although several provisions contained in the Decree might be justified by the need to respect various procedures (notification of the strike to the labour authorities) or to guarantee security within the undertaking (the prevention of agitators and strike-breakers from entering the workplace) others, however, such as geographical or sectoral restrictions placed on sym-pathy strikes — which therefore exclude general strikes of this nature — or restrictions on their duration and frequency, constitute a serious obstacle to the calling of such strikes<sup>559</sup>.

Similarly, the Committee of Experts has subsequently stated that:

*Sympathy strikes, which are recognized as lawful in some countries, are becoming increasingly frequent because of the move towards the concentration of enterprises, the globalization of the economy and the delocalization of work centres. While pointing out that a number of distinctions need to be drawn here (such as an exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of strike, etc.), the Committee considers that a general prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful*<sup>560</sup>.

557. ILO, Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, 1994, para. 165.

558. ILO, Freedom of association and collective bargaining: General survey by the Committee of Experts on the application of the Conventions on freedom of association, the right to organise and collective bargaining and the Convention and Recommendation concerning rural workers' organisations. Report of the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 4B), International Labour Conference, 69th Session, 1983. Geneva, para. 217.

559. ILO, "Reports of the Committee on Freedom of Association", in Official Bulletin (Geneva), Vol. LXX, Series B, No. 1, 248th Report, Case No. 1381, 1987, paras. 417 and 418

560. ILO, Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, para. 168.

### 6.3. WORKERS WHO ENJOY THE RIGHT TO STRIKE AND THOSE WHO ARE EXCLUDED

It should be noted, first and foremost, that Article 9 of Convention No. 87 states that “the extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations”<sup>561</sup>. As a result, the Committee on Freedom of Association has refused to find an objection to legislations which deny the right to strike to such groups of workers. Since the Committee on Freedom of Association first laid down its earliest principles on the subject of strikes, and given that strike action is one of the fundamental means for rendering effective the right of workers’ organizations “to organize their ... activities” [Article 3 of Convention No. 87], the Committee has chosen to recognize a general right to strike, with the sole possible exceptions being those which may be imposed for public servants and workers in essential services in the strict sense of the term. Obviously, the Committee on Freedom of Association also accepts the prohibition of strikes in the event of an acute national emergency<sup>562</sup>. The Committee of Experts has in turn adopted this approach.

### 6.4. ESSENTIAL SERVICES IN THE STRICT SENSE OF THE TERM

Over time, the supervisory bodies of the ILO have brought greater precision to the concept of essential services in the strict sense of the term (for which strike action may be prohibited). In 1983, the Committee of Experts defined such services as those “the interruption of which would endanger the life, personal safety or health of the whole or part of the population”<sup>563</sup>. This definition was adopted by the Committee on Freedom of Association shortly afterwards.

Clearly, what is meant by essential services in the strict sense of the term “depends to a large extent on the particular circumstances prevailing in a country”; likewise, there can be no doubt that “a non-essential service may become essential if a strike lasts beyond a certain time or extends beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population”<sup>564</sup>. The Committee on Freedom of Association has none the less given its opinion in a general manner on the essential or non-essential nature of a series of specific services.

Thus, the Committee has considered to be essential services in the strict sense, where the right to strike may be subject to major restrictions or even prohibitions, to be: the hospital sector; electricity services; water supply services; the telephone service; air traffic control<sup>565</sup>. In contrast, the Committee has considered that, in general the following do not constitute essential services in the strict sense of the term, and therefore the prohibition to strike does not pertain<sup>566</sup>:

- radio and television; the petroleum sector; ports (loading and unloading); banking; computer services for the collection of excise duties and taxes; department stores; pleasure parks; the metal sector; the mining sector; transport generally; refrigeration enterprises; hotel services; construction; automobile manufacturing; aircraft repairs; agricultural activities; the supply and distribution of foodstuffs;

561. ILO, International Labour Conventions and Recommendations, 1919-1951. Vol. I. Geneva, 1996, p. 528.

562. ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, 1996, para. 527.

563. ILO, Freedom of association and collective bargaining: General survey by the Committee of Experts on the application of the Conventions on freedom of association, the right to organise and collective bargaining and the Convention and Recommendation concerning rural workers’ organisations. Report of the Committee of Experts on the Application of Conventions and Recommendations. Report III (Part 4B), International Labour Conference, 69th Session, 1983, Geneva, para. 214.

564. ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, 1996, para. 541.

565. Ibid., para. 544.

566. Ibid., para 545

These few examples do not represent an exhaustive list of essential services. The Committee has not mentioned more services because its opinion is dependent on the nature of the specific situations and on the context which it has to examine and because complaints are rarely submitted regarding the prohibition of strikes in essential services.

Obviously, the Committee on Freedom of Association's list of non-essential services is not exhaustive. Attention should in all events be drawn to the fact that, in examining a complaint which did not involve an essential service, the Committee maintained that the possible long-term serious consequences for the national economy of a strike did not justify its prohibition<sup>567</sup>.

Furthermore, pursuant to its examination of particular national legislations, the Committee on Freedom of Association has recommended that amendments should be introduced in order to prohibit only strikes in the essential services in the strict sense of the term, particularly when the authorities have held discretionary powers to extend the list of essential services<sup>568</sup>.

When the Committee of Experts uses the expression "essential services" it refers only to essential services in the strict sense of the term (i.e. those the interruption of which would endanger the life, personal safety or health of the whole or part of the population), in which restrictions or even a prohibition may be justified, accompanied, however, by compensatory guarantees. Nevertheless, a "minimum service" "would be appropriate in situations in which a substantial restriction or total prohibition of strike action would not appear to be justified and where, without calling into question the right to strike of the large majority of workers, one might consider ensuring that users' basic needs are met and that facilities operate safely or without interruption"<sup>569</sup>. Specifically, the Committee considers this type of minimum service might be established in services of public utility<sup>570</sup>. Indeed, "nothing prevents authorities, if they consider that such a solution is more appropriate to national conditions, from establishing only a minimum service in sectors considered as 'essential' by the supervisory bodies according to the criteria set forth above, which justify wider restrictions to or even a prohibition of strikes"<sup>571</sup>. Situations in which the supervisory authorities consider a minimum service may be imposed are described below.

## 6.5. CONDITIONS FOR EXERCISING THE RIGHT TO STRIKE

In most cases, the law lays down a series of conditions or requirements that must be met in order to render a strike lawful. The Committee on Freedom of Association has specified that such conditions "should be reasonable and in any event not such as to place a substantial limitation on the means of action open to trade union organizations"<sup>572</sup>. The large number of Committee decisions in this connection may be attributed to the fact that some 15 per cent of the cases submitted to it concern the exercise of the right to strike. The Committee on Freedom of Association has accepted the following prerequisites:

567. ILO, "Reports of the Committee on Freedom of Association", in Official Bulletin (Geneva), Vol. LXVII, Series B, No. 2, 234th Report, Case No. 1255, 1984, 234th Report, para. 190.

568. ILO, "Reports of the Committee on Freedom of Association", in Official Bulletin (Geneva), Vol. LXVII, Series B, No. 1, 233rd Report, Case No. 1255., 1984, 233rd Report, paras. 668 and 669.

569. Ibid., para. 162.

570. Ibid., para. 179.

571. Ibid., para. 162.

572. ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, 1996, para. 498.

1. the obligation to give prior notice<sup>573</sup>;
2. the obligation to have recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes as a prior condition to declaring a strike, provided that the proceedings are adequate, impartial and speedy and that the parties concerned can take part at every stage<sup>574</sup>;
3. the obligation to observe a certain quorum and to obtain the agreement of a specified majority<sup>575</sup>;
4. the obligation to take strike decisions by secret ballot<sup>576</sup>;
5. the adoption of measures to comply with safety requirements and for the prevention of accidents<sup>577</sup>;
6. the establishment of a minimum service in particular cases<sup>578</sup>; and
7. the guarantee of the freedom to work for non-strikers<sup>579</sup>.

As stated previously, the Committee on Freedom of Association accepts that provision may be made for recourse to conciliation, mediation and (voluntary) arbitration procedures in industrial disputes before a strike may be called, provided that they are adequate, impartial and speedy and that the parties involved can take part at every stage.

It should here be mentioned that the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92), advocates that if a dispute has been submitted to conciliation procedure or arbitration for final settlement with the consent of all parties concerned, the latter should be encouraged to abstain from strikes and lockouts while the conciliation procedure or arbitration is in progress and, in the latter case, to accept the arbitration award<sup>580</sup>.

#### 6.6. QUORUM AND MAJORITY FOR DECLARING STRIKES

The Committee of Experts has confirmed that: *In many countries legislation subordinates the exercise of the right to strike to prior approval by a certain percentage of workers. Although this requirement does not, in principle, raise problems of compatibility with the Convention, the ballot method, the quorum and the majority required should not be such that the exercise of the right to strike becomes very difficult, or even impossible in practice. The conditions established in the legislation of different countries vary considerably and their compatibility with the Convention may also depend on factual elements such as the scattering or geographical isolation of work centres or the structure of collective bargaining (by enterprise or industry), all of which require an examination on a case by case basis. If a member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level*<sup>581</sup>.

573. Ibid., paras. 502-504.

574. Ibid., paras. 500 and 501.

575. Ibid., paras. 506-513.

576. Ibid., paras. 503 and 510.

577. Ibid., paras. 554 and 555.

578. Ibid., paras. 556-558.

579. Ibid., para. 586.

580. ILO, International Labour Conventions and Recommendations, 1919-1951. Vol. I. Geneva, 1996, p. 660.

581. ILO, Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, para. 170.

## 6.7 FREEDOM TO WORK FOR NON-STRIKERS

The Committee on Freedom of Association recognizes the principle of the freedom to work of non-strikers<sup>582</sup>; the Committee of Experts appears to accept this principle when, in connection with strike picketing, it emphasizes that such action should be peaceful and should not lead to acts of violence against persons<sup>583</sup>.

## 6.8. PERSONS PROTECTED AND TYPES OF ACT OF ANTI-UNION DISCRIMINATION IN STRIKE CONTEXTS

The principles upheld by the Committee on Freedom of Association consider illegitimate any discriminatory act against union leaders for organizing legitimate strikes; such protection also covers trade union members and workers who participate in strikes. Specifically, the Committee supports the general principle that “no person shall be prejudiced in his employment by reason of his trade union membership or legitimate trade union activities whether past or present”<sup>584</sup>.

In practice, the Committee has maintained that:

- No one should be penalized for carrying out or attempting to carry out a legitimate strike<sup>585</sup>;
- The dismissal of workers because of a strike, which is a legitimate trade union activity, constitutes serious discrimination in employment and is contrary to Convention No. 98<sup>586</sup>;
- When trade unionists or union leaders are dismissed for having exercised the right to strike, the Committee can only conclude that they have been punished for their trade union activities and have been discriminated against<sup>587</sup>;
- Respect for the principles of freedom of association requires that workers should not be dismissed or refused re-employment on account of their having participated in a strike or other industrial action. It is irrelevant for these purposes whether the dismissal occurs during or after the strike. Logically, it should also be irrelevant that the dismissal takes place in advance of a strike, if the purpose of the dismissal is to impede or penalize the exercise of the right to strike<sup>588</sup>;
- The use of extremely serious measures, such as dismissal of workers for having participated in a strike and refusal to reemploy them, implies a serious risk of abuse and constitutes a violation of freedom of association<sup>589</sup>;
- No one should be deprived of their freedom or be subject to penal sanctions for the mere fact of organizing or participating in a peaceful strike<sup>590</sup>.

582. ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, 1996, para. 586; ILO, 1998c, 310th Report, paras. 496 and 497.

583. ILO, Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, para. 174.

584. ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, 1996, para. 690.

585. Ibid., para. 590.

586. Ibid., para. 591.

587. Ibid., para. 592.

588. Ibid., para. 593.

589. Ibid., para. 597.

590. Ibid., para. 602.

The Committee of Experts has also affirmed the protection of workers and union officials against acts of anti-union discrimination and has confirmed that most national legislation contains general or detailed provisions which protect workers against acts of discrimination, although the level of protection may vary. The Committee emphasizes that this protection “constitutes an essential aspect of freedom of association”<sup>591</sup> and, in its opinion, “is particularly desirable for trade union officers and representatives, because in order to be able to perform their trade union duties in full independence they must have the guarantee that they will not be prejudiced on account of their trade union office”<sup>592</sup>. This opinion coincides with that of the Committee on Freedom of Association<sup>593</sup>.

As stated previously, regarding the right to strike, the Committee of Experts has emphasized that the maintaining of the employment relationship is a normal legal consequence of recognition of the right to strike and that dismissals or discrimination against strikers should not ensue from the exercise of this right.

591. ILO, Report III (Part 4B), International Labour Conference, 81st Session, 1994. Geneva, para. 202.

592. Ibid., para. 207.

593. ILO, Freedom of association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO. Fourth (revised) edition. Geneva, 1996, para. 724.



## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 4**

**Subject**

**2.4.17. Right to health**

**Lecturer:**

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## SUMMARY OF THE TOPIC

The purpose of this topic is to provide learners with knowledge and critical understanding of the key aspects of the human right to health as well as with the basic tools necessary to activate the right to health in their own context. In particular, this topic will:

1. look at the nature and the minimum normative content of the right to health in international human rights law;
2. analyse the relevant state's obligations under international human rights law; and
3. consider the current challenges related to the protection of the right to health in the Maghreb region.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course, participating teachers shall be able to recognise the educational potential of the general and specific skills described below in order to achieve significant learning in human rights. Moreover, these skills shall be included within teaching plans through a unifying approach and directed towards the effective implementation of the knowledge acquired.

The following general and specific skills are included **in this topic**:

### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.

- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify and apply international and regional human rights protection mechanisms.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### International standards

- International Covenant on Economic, Social and Cultural Rights, art. 12
- The 1965 International Convention on the Elimination of All Forms of Racial Discrimination: art. 5 (e) (iv)
- The 1966 International Covenant on Economic, Social and Cultural Rights: art. 12
- The 1979 Convention on the Elimination of All Forms of Discrimination against Women: arts. 11 (1) (f), 12 and 14 (2) (b)
- The 1989 Convention on the Rights of the Child: art. 24
- The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families: arts. 28, 43 (e) and 45 (c)
- The 2006 Convention on the Rights of Persons with Disabilities: art. 25.

### General comments and recommendations by treaty bodies

#### a) *Committee on the Elimination of Discrimination against Women:*

- General recommendation N° 15 (1990) on the avoidance of discrimination against women in national strategies for the prevention and control of AIDS
- General recommendation N° 19 (1992) on violence against women
- General recommendation N° 24 (1999) on women and health

#### b) *Committee on Economic, Social and Cultural Rights:*

- General comment N° 6 (1995) on the economic, social and cultural rights of older persons

- General comment N° 14 (2000) on the right to the highest attainable standard of health
- General comment N° 15 (2002) on the right to water
- General comment N° 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)

c) *Committee on the Rights of the Child:*

- General comment N° 3 (2003) on HIV/AIDS and the rights of the child
- General comment N° 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child

d) *Committee on the Elimination of Racial Discrimination:* General recommendation N° 30 (2004) on discrimination against non-citizens

### Selected websites

- [Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health](#)
- [Toolkit on the Right to Health](#)
- [Global Health and Human Rights Database](#)
- [Consultation on Elimination of discrimination against persons affected by leprosy and their family members](#)
- [Maternal and Child Health](#)
- [United Nations Population Fund \(UNFPA\)](#)
- [United Nations Programme on HIV/AIDS \(UNAIDS\)](#)
- [World Health Organization \(WHO\)](#)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

Human Rights Watch, Global State of Pain Treatment. Access to Palliative Care as a Human Right, 2011.

Office of the United Nations High Commissioner for Human Rights, [The Right to Health](#), Fact Sheet N° 31, Geneva, 2009.

République Tunisienne, Dialogue sociétal sur les politiques, les stratégies et le plans nationaux de santé, [Santé en Tunisie. Etat de lieux](#), 2014.

République Tunisienne, Dialogue sociétal sur les politiques, les stratégies et le plans nationaux de santé, [Livre Blanc](#)

TOBIN, J., *The Right to Health in International Law*, Oxford University Press, Oxford-New York, 2012.

United Nations Population Fund / Office of The High Commissioner for Human Rights, Expert Group Meeting "[Application of Human Rights to Reproductive and Sexual Health](#)".

WOLFF, J., *The Human Right to Health*, Amnesty International Global Ethics Series, W.W. Norton, 2012.

## LEARNING PROCESS RESULTS

Having successfully completed the topic, learners should be able to:

- A) Understand the core elements of the right to health, its international protection, and the key actors in the realization of the right to health;
- B) Analyze, interpret and evaluate situations where the protection of the right to health is at stake;
- C) Effectively apply the acquired knowledge and understanding to solve practical problems relating to the right to health in their own context.

## METHODOLOGY

We include, as a suggestion, the following:

Methodology	Educational tools
Exposition method	Reading of texts and/or watching of audiovisual material
Case studies	Blog /Forum
Problem-solving	Blog /Forum / Wiki Exercise sheet Tests and activities

## SCHEDULING OF LEARNING ACTIVITIES

A detailed description of the activities to be carried out by the student, at an individual level or in a group, specifying the expected results and, if applicable, the evaluation criteria.

### 1. Lecture:

- Read the exposition of the topic below on the right to health;
- Complete the autotest for self-evaluation.

### 2. Notes to the forum:

- Case study - Identify who are the holders of rights and obligations, what are their rights and obligations under human rights law and how can they activate them in the following scenario: HIV/AIDS is a very serious epidemic throughout the world. It is a big issue in South Africa where millions of poor people are suffering and dying unnecessarily because they cannot afford the expensive drugs they need. Their only alternative is to use cheaper copies of the drugs. The leading pharmaceutical companies are against this. They wish to protect their property rights and so they have joined forces to prevent any State from copying their products and selling them at cheaper prices. They have started legal action against the South African Government, which is distributing and selling cheaper copies of anti-HIV/AIDS drugs (Access to medicaments <http://www.coe.int/en/web/compass/synoptic-table-of-activities>).
- Post your answer to the forum.

### 3. Individual work :

- Carry out a HRBA analysis (maximum 1,000 words) of one of the challenges related to the right to health in your country by answering the following four questions (OHCHR; [A Human Rights-based Approach to Health](#)).
  1. **What is happening, where and who is more affected?** (assessment) For every health challenge, identify the inter-related human rights standards and the groups suffering from a greater denial of rights\*.
  2. **Why are these problems occurring?** (causal analysis) Identify the underlying and root causes of exclusion, discrimination and inequality.
  3. **Who has the obligation to do something about it?** (role analysis) Identify individual and institutional duty-bearers and their corresponding obligations.
  4. **What capacities are needed for those affected, and those with a duty, to take action?** (capacity analysis) Identify the skills, abilities, resources, responsibilities, authority and motivation needed by those affected to claim their rights and those obliged to fulfil the rights.

\* Commonly marginalized groups include: children and adolescents; women (across groups); persons with disabilities; indigenous peoples, ethnic, religious or linguistic minorities; internally displaced people and refugees; migrants, particularly undocumented; and persons living with HIV or AIDS. General Comment N°. 20 of the Committee on Economic, Social and Cultural Rights offers ample details about non-discrimination in relation to the right to health. General Comment N°. 20 is available on [OHCHR's web site](#).

- Post your answer to the forum.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1. Lecture	1,30 hours	Auto-test
Activity 2. Notes to the forum	1,00 hour	Forum
Activity 3. Individual work	1,30 hours	Forum
	4 hours	

## EVALUATION SELF-TEST

- 1: What does the right to health entail?
  - a) The right to be healthy;
  - b) The right to an equal system of health protection;
  - c) The right to be free from interference;
  - d) b and c.

- 2: What does it mean that all health facilities, goods and services must be culturally appropriate?
- a) Respectful of the culture of individuals, minorities, peoples and communities;
  - b) Sensitive to gender requirements;
  - c) Sensitive to life-cycle requirements;
  - d) All of the above.
- 3: The most authoritative interpretation of the right to health is outlined in:
- a) General comment N° 14 (2000);
  - b) Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
  - c) General comment N° 20;
  - d) None of the above.
- 4: Ensuring access to medicines is part of the State's obligation
- a) To respect the right to health;
  - b) To protect the right to health;
  - c) To fulfill the right to health;
  - d) All of the above
- 5: "The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without discrimination of race, religion, political belief, economic or social condition" as states the
- a) International Covenant on Economic, Social, and Cultural Rights (ICESCR);
  - b) Convention on the Elimination of all Forms of Discrimination against Women (CEDAW);
  - c) Constitution of the World Health Assembly;
  - d) None of the above.

## EVALUATION SELF-TEST

Question	Question Key
Question 1	D
Question 2	D
Question 3	B
Question 4	B
Question 5	C

## SUBJECT 2.4.:

# 2.4.17. RIGHT TO HEALTH

## 1. INTRODUCTION

*"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."* International Covenant on Economic, Social and Cultural Rights (Article 12.1)

*"The enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition."*

Constitution of the World Health Assembly

The right to health is a fundamental part of our human rights and of our understanding of a life in dignity. The right to the enjoyment of the highest attainable standard of physical and mental health, to give it its full name, is not new. Internationally, it was first articulated in the 1946 Constitution of the World Health Organization (WHO), whose preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The preamble further states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human

being without distinction of race, religion, political belief, economic or social condition." The 1948 Universal Declaration of Human Rights also mentioned health as part of the right to an adequate standard of living (art. 25)

The right to the highest attainable standard of health is a human right recognized in international human rights law<sup>594</sup>. The International Covenant on Economic, Social and Cultural Rights, widely considered as the central instrument of protection for the right to health, recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." It is important to note that the Covenant gives both mental health, which has often been neglected, and physical health equal consideration; while Article 12.2 provides, by way of illustration, the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right.

Subsequent international and regional human rights instruments address the right to health in many ways. Some are of general application while others address the human rights of specific groups, such as women or children. In addition, the treaty bodies that monitor the

594. Vid. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Constitution of the World Health Organisation, Declaration of Commitment on HIV/AIDS, article 8 of the Declaration on the right to development, article 24 of the Convention on the Rights of the Child (CRC), principle 4 of the Declaration of the Rights of the Child, article 3 of the ILO Convention N° 182: Worst Forms of Child Labour Convention, 1999, Article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 3 of the Declaration on the Elimination of Violence against Women, Beijing Platform for Action – Women and health Article 21, 23 and 24 of the United Nations Declaration on the Rights of Indigenous Peoples, Article 28, 43 and 45 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), article 25 of the Convention on the Rights of Persons with Disabilities (CRPD), The United Nations Principles of Older Persons, Geneva Convention (I, II, III, IV) and Protocol Additional, General recommendation N° 24: Women and Health, General Comment N° 3 HUV/AIDS and the rights of the child, General Comment N° 4 Adolescent health and development, General recommendation N° 30: Discrimination Against Non-Citizens. The mandate of the Special Rapporteur on the right to of everyone to the enjoyment of the highest attainable standard of physical and mental health was originally established by the Commission on Human Rights in April 2002.



International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child have adopted general comments or general recommendations on the right to health and health-related issues. These provide an authoritative and detailed interpretation of the provisions found in the treaties.

The right to health is also recognized in several regional instruments, such as the African Charter on Human and Peoples' Rights (1981), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador (1988), and the European Social Charter (1961, revised in 1996). The American Convention on Human Rights (1969) and the European Convention for the Promotion of Human Rights and Fundamental Freedoms (1950) contain provisions related to health, such as the right to life, the prohibition on torture and other cruel, inhuman and degrading treatment, and the right to family and private life.

Finally, the right to health or the right to health care is recognized in at least 115 constitutions. At least six other constitutions set out duties in relation to health, such as the duty on the State to develop health services or to allocate a specific budget to them.

## 2. KEY ASPECTS OF THE RIGHT TO HEALTH

The right to health includes a wide range of factors that can help us lead a healthy life. The Committee on Economic, Social and Cultural Rights, the body responsible for monitoring the International Covenant on Economic, Social and Cultural Rights, calls these the “*underlying determinants of health*”. They include: safe drinking water and adequate sanitation, safe food, adequate nutrition and housing, healthy working and environmental conditions, health-related education and information, gender equality.

The right to health refers to the right to the enjoyment of a variety of goods, facilities, services and conditions necessary for its realization. This is why it is more accurate to describe it as the right to the highest attainable standard of physical and mental health, rather than an unconditional right to be healthy.

The right to health entails freedoms and rights. These freedoms include the right to be free from non-consensual medical treatment, such as medical experiments and research or forced sterilization, and to be free from torture and other cruel, inhuman or degrading treatment or punishment. These entitlements include: the right to a system of health protection providing equality of opportunity for everyone to enjoy the highest attainable level of health; the right to prevention, treatment and control of diseases; access to essential medicines; maternal, child and reproductive health; equal and timely access to basic health services; the provision of health-related education and information; participation of the population in health-related decision making at the national and community levels.

## 3. CORE CONTENT OF THE RIGHT TO HEALTH

General Comment N° 14 (2000) clarifies the Committee's understanding of the provisions of Article 12 of the International Covenant on Economic, Social and Cultural Rights. Likewise, in General Comment N° 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care. These include;

- (a) To ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- (b) To ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- (c) To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;

- (d) To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- (e) To ensure equitable distribution of all health facilities, goods and services;
- (f) To adopt and implement a national public health strategy and plan of action

What's more, it is important to emphasize certain core elements of the right to health. Health must be available, accessible, acceptable, appropriate and of good quality:

**Availability** - Functioning public health and health-care facilities, goods and services, as well as programmes, have to be available in sufficient quantity within the State party. They will include the underlying determinants of health such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs.

**Accessibility** - Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

- **Non-discrimination:** health facilities, goods and services must be accessible to all, especially the most vulnerable or marginalized sections of the population, in law and in fact. States have an obligation to prohibit and eliminate discrimination on all grounds and ensure equality to all in relation to access to health care and the underlying determinants of health. The International Convention on the Elimination of All Forms of Racial Discrimination (art. 5) also stresses that States must prohibit and eliminate racial discrimination and guarantee the right of everyone to public health and medical care

Non-discrimination and equality further imply that States must recognize and provide for the differences and specific needs of groups that generally face particular health challenges, such as higher mortality rates or vulnerability to specific diseases. The obligation to ensure nondiscrimination requires specific health standards to be applied to particular population groups, such as women, children or persons with disabilities (see chap. II). Positive measures of protection are particularly necessary when certain groups of persons have continuously been discriminated against in the practice of States parties or by private actors. Along the same lines, the Committee on Economic, Social and Cultural Rights has made it clear that there is no justification for the lack of protection of vulnerable members of society from health-related discrimination, be it in law or in fact. So even if times are hard, vulnerable members of society must be protected, for instance through the adoption of relatively low-cost targeted programs.<sup>595</sup>

- **Physical accessibility:** health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups. Accessibility also implies that medical services and underlying determinants of health are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.
- **Economic accessibility (affordability):** health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying determinants of health, must be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households.

595. General comment N° 14, para. 18.

- **Information accessibility:** accessibility includes the right to seek, receive and impart information and ideas concerning health issues in an accessible format (for all, including persons with disabilities), but does not impair the right to have personal health data treated confidentially.

**Acceptability** - All health facilities, goods and services must be respectful of medical ethics and culturally appropriate, i.e. respectful of the culture of individuals, minorities, peoples and communities, sensitive to gender and life-cycle requirements

**Quality** - As well as being culturally acceptable, health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, *inter alia*, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water, and adequate sanitation.

## 4. OBLIGATIONS ON STATES

Through their ratification of human rights treaties, States parties are required to give effect to these rights within their jurisdictions. More specifically, article 2 (1) of the International Covenant on Economic, Social and Cultural Rights underlines that States have the obligation to progressively achieve the full realization of the rights under the Covenant. This is an implicit recognition that States have resource constraints and that it necessarily takes time to implement the treaty provisions. Consequently, some components of the rights protected under the Covenant, including the right to health, are deemed subject to progressive realization.

Not all aspects of the rights under the Covenant can or may be realized immediately, but at a minimum States must show that they are making every possible effort, within available resources, to better protect and promote all rights under the Covenant. Available resources refer to those existing within a State as well as those available from the international community through international cooperation and assistance, as outlined in article 2.

While the concept of progressive realization applies to all rights under the Covenant, some obligations are of immediate effect, in particular the undertaking to guarantee that all rights are exercised on the basis of nondiscrimination and the obligation to take steps towards the realization of the rights, including the right to health, which should be concrete, deliberate and targeted. In this regard, retrogressive measures are not permissible, unless a State can demonstrate that it has made every effort to use all resources at its disposal to meet its obligations.

States also must ensure a minimum level of access to the essential material components of the right to health, such as the provision of essential drugs and maternal and child health services.

A country's difficult financial situation does not absolve it from having to take action to realize the right to health. It is often argued that States that cannot afford it are not obliged to take steps to realize this right or may delay their obligations indefinitely. When considering the level of implementation of this right in a particular State, the availability of resources at that time and the development context are taken into account. Nonetheless, no State can justify a failure to respect its obligations because of a lack of resources. States must guarantee the right to health to the maximum of their available resources, even if these are tight. While steps may depend on the specific context, all States must move towards meeting their obligations to respect, protect and fulfil.

The Committee on Economic, Social and Cultural Rights has also stressed that States have a core minimum obligation to ensure the satisfaction of minimum essential levels of each of the rights under the Covenant. While these essential levels are, to some extent, resource-dependent, they should be given priority by the State in its efforts to realize the rights under the Covenant. With respect to the right to health, the Committee has underlined that States must ensure:

- The right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- Access to the minimum essential food which is nutritionally adequate and safe;
- Access to shelter, housing and sanitation and an adequate supply of safe drinking water;
- The provision of essential drugs;
- Equitable distribution of all health facilities, goods and services.

The right to health imposes three types of obligations on States parties: the obligations to *respect*, *protect* and *fulfil*.

- a) **The obligation to respect** requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health by refraining from;
- denying or limiting equal access for all persons to preventive, curative and palliative health services
  - prohibiting or impeding traditional preventative care, healing practices and medicines
  - marketing unsafe drugs and from applying coercive medical treatments
  - limiting access to contraceptives and other means of maintaining sexual and reproductive health
    - censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters
  - unlawfully polluting air, water, soil and from limiting access to health services as a punitive measure (e.g., during armed conflicts of violation of international humanitarian law).
- b) **The obligation to protect** requires States to take measures that prevent third parties from interfering with article 12 guarantees. These include:
- to adopt legislation or to take measures ensuring equal access to health care and health-related services provided by third parties
  - to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services
  - to control the marketing of medical equipment and medicines by third parties; and to ensure that medical practitioners and other health professionals meet appropriate standards of education, skill and ethical codes of conduct.
  - to ensure that harmful social or traditional practices do not interfere with access to pre- and post-natal care and family-planning (to prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation; and to take measures to protect all vulnerable or marginalized groups of society, in particular women, children, adolescents and older persons, in the light of gender-based expressions of violence.)
  - ensure that third parties do not limit people's access to health-related information and services, including environmental health; and ensure that health professionals provide care to persons with disabilities with their free and informed consent.

A State's obligation to protect human rights includes ensuring that non-party States do not infringe upon human rights. With respect to health, States should, for instance, adopt

legislation or other measures ensuring equal access to health care provided by third parties. In addition, there is an increasing debate about the extent to which other actors in society— individuals, intergovernmental and non-governmental organizations (NGOs), health professionals, and business—have responsibilities with regard to the promotion and protection of human rights.

- c) **The obligation to fulfil** requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health. These include:
- to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health.
  - to ensure provision of health care, including immunization programmes and equal access for all to the underlying determinants of health.
  - to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and the promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas.
  - The provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances.
  - to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data.
  - to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services.
  - ensure the provision of health care, including immunization programs against infectious diseases and services designed to minimize and prevent further disabilities.
  - ensure equal access for all to the underlying determinants of health, such as safe and nutritious food, sanitation and clean water.

**International obligations** - In its General Comment N° 3, the Committee drew attention to the obligation of all States parties to take steps, individually and through international assistance and cooperation, especially economic and technical, towards the full realization of the rights recognized in the Covenant, such as the right to health. In the spirit of article 56 of the Charter of the United Nations, the specific provisions of the Covenant (articles 12, 2.1, 22 and 23) and the Alma-Ata Declaration on primary health care, States parties should recognize the essential role of international cooperation and comply with their commitment to take joint and separate action to achieve the full realization of the right to health. It is not a substitute for domestic obligations, but it comes into play especially if a State is unable to give effect to economic, social and cultural rights on its own, and requires assistance from other States to do so. International cooperation is particularly incumbent upon those States that are in a position to assist others in this regard. States should thus have an active programme of international assistance and cooperation and provide economic and technical assistance to enable other States to meet their obligations in relation to the right to health.<sup>596</sup>

596. Committee on Economic, Social and Cultural Rights, general comment N° 3 (1990) on the nature of States parties' obligations and general comment N° 14, paras. 38–42.

## 5. MONITORING THE RIGHT TO HEALTH AND HOLDING STATES ACCOUNTABLE

Mechanisms of accountability are crucial for ensuring that the State obligations arising from the right to health are respected. How then are States parties' legal obligations monitored, and by whom? How can a State be held to account if it has violated the right to health? Monitoring and holding States accountable take place at national, regional and international levels, and involve a variety of actors, such as the State itself, NGOs, national human rights institutions or international treaty bodies.

Accountability compels a State to explain what it is doing and why and how it is moving, as expeditiously and effectively as possible, towards the realization of the right to health for all.<sup>597</sup> International human rights law does not prescribe an exact formula for domestic mechanisms of accountability and redress, so the right to health can be realized and monitored through various mechanisms. At a minimum, all accountability mechanisms must be accessible, transparent and effective.

States have the primary obligation to respect, protect and promote the human rights of the people living in their territory. So, seeking the implementation of the right to health at the domestic level is particularly important. Where domestic mechanisms exist and function, they are often quicker and easier to access than regional or international mechanisms.

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597. A/HRC/4/28, paras. 46 and 87.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60****Subject****2.4.18.** The Right to Education**Lecturer:**

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## SUMMARY OF THE TOPIC

The right to education is a basic right regardless of where it is listed in a country's Constitution. Education is the condition for a human to develop as a person as well as to exercise the rest of the rights recognised in the State's Constitution. The individual of the right is anyone with educational needs, even if the entitled individuals are persons in the age of receiving basic education within the State's education system. Parents are responsible for requesting an education for their children in accordance with their convictions, and the State is responsible for ensuring the education service through public institutions or through institutions created by social initiative. In any case, it is a basic right that in certain situations may be highly conditioned by the economic abilities of the country.

The right to education as a right to access a State service is indissolubly bound to the freedom of teaching as stated in these dimensions: a) the right to create educational institutions different from those managed by the State; b) academic freedom, which allows teachers to oppose any mandate from the public powers aimed at imposing a particular orientation on teaching beyond the constitutional requirements; c) the parents' right to choose a religious education for their children in accordance with their convictions; d) the right to choose a global model of education for their children.

The main aim of education is the full development of personality. However, as persons become social beings, the social purpose of education gains importance in a way that it leads to a fair and peaceful society in which everyone respects the human rights of whomever they interrelate with.

The States are obliged to guide their policies so that all the most underprivileged social classes and categories are not deprived of this right.

The international texts on human rights establish: A) everyone's right to education and the prohibition of all types of discrimination (UDHR art. 26.1; ICESCR art. 13.1; CLDE art.2). B) The aims of education [UDHR art. 26.2; ICESCR art. 13.1; CLDE art.2]. C) Free and compulsory elementary and basic education UDHR art. 26.1; ICESCR art. 13.2 a); CLDE art.4 a)] D) The generalisation of secondary education in its various forms (ICESCR art. 13.2 b); CLDE art.4 a)]. E) Equal access to higher education (UDHR art. 26.1; ICESCR, art.13.2 c); CLDE art.4 a)] F) The parent's preferential right to choose the type of education for their children (UDHR, art. 26.3; Convention for the Protection of Human Rights and Fundamental



Freedoms [CPHRFF] (Additional protocol art.2; CLDE, art. 2 c) and 5.1. b); International Covenant on Civil and Political Rights (ICCPR), art. 18.4; ICESCR art. 13.3]. G) The freedom to create and manage educational institutions [International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 13.4 H) The right of adults to basic and vocational education [CLDE, art. 4 c)]. I) The rights of national minorities [CLDE art. 5.1 c)]. J) The right for children to receive a religious and moral education in accordance with their own convictions [ICCPR, art. 18.4]

The main normative section is composed of the Declarations listed in section a) of the Bibliography.

In this topic, the students shall have a deeper understanding of the realisation of the right by identifying the main challenges faced by the Maghreb.

## GENERAL AND SPECIFIC SKILLS

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course, participating teachers shall be able to recognise the educational potential of the general and specific skills described below in order to achieve significant learning in human rights. Moreover, these skills shall be included within teaching plans through a unifying approach and directed towards the effective implementation of the knowledge acquired.

The following general and specific skills are included **in this topic**:

### GENERAL:

- **Teamwork:** Become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Adaptation to the environment:** Face critical situations in the psychosocial environment, thus maintaining a state of well-being as well as a physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** Positively relate to other people through empathetic listening and through a clear and assertive expression of what a person thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** Understand and accept social and cultural diversity as an enriching and collective component in order to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical thinking:** Analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts to be true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** Be positively inclined towards the moral good of oneself or others (i.e., everything that is or means good, the experience of meaning, personal fulfilment, sense of justice) and persevere in this said moral good.

### SPECIFIC:

- Properly identify, interpret and implement international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional fields.
- Precisely define and distinguish who the holders of the rights are and who the holders of the obligations are in relation to each human right in a specific situation.

- Identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment; question their fulfilment in a specific situation.
- Identify, analyse, argument and evaluate the critical deviations as well as the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- Contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; propose and plan efficient alternatives.
- Identify and implement international and regional human rights protection mechanisms.
- Search, choose and analyse information from a variety of sources (legal, social, economic, etc.). Properly plan and document this task.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### a) International legal texts:

- “Principaux instruments sur le droit à l’éducation”, pp. 12 ss, en Alfred FERNANDEZ/Zacharie ZACHARIEV with the collaboration of Paul Gaullier, Renata Martija and Harivola Rabemansantsoa, *Bibliographie choisie sur le droit à l’éducation* (2011 version)
- Everyone’s right to education and the prohibition of all types of discrimination (art. 26.1 Universal Declaration of Human Rights; art. 13.1 International Covenant on Economic Social and Cultural Rights; art. 2)
- The aims of education art. 26.2 Universal Declaration of Human Rights; art. 13.1 International Covenant on Economic, Social and Cultural Rights; art. 5.1.a) European Convention on Human Rights and Fundamental Freedoms].
- Free and compulsory elementary and basic education ([art. 26.1 Universal Declaration of Human Rights; art. 13.2 a) International Covenant on Economic, Social and Cultural Rights; art. 4 a) European Convention on Human Rights and Fundamental Freedoms].
- Generalisation of secondary education in its different forms (art. 13.2 b) International Covenant on Economic Social and Cultural Rights; art.) 4 a) European Convention on Human Rights and Fundamental Freedoms].
- Equal access to higher education (art. 26.1 Universal Declaration of Human Rights; art. 13.2 c) International Covenant on Economic, Social and Cultural Rights; art. 4. a) European Convention on Human Rights and Fundamental Freedoms].
- The preferential right of parents to choose the type of education for their children (art. 26.3
- Universal Declaration of Human Rights; European Convention on Human Rights and Fundamental Freedoms (supplementary protocol art. 2; art. 2 c) and 5.1. b); art. 18.4 International Covenant on Civil and Political Rights; art. International Covenant on Economic Social and Cultural Rights].
- The freedom to create and manage educational institutions [art. 13.4 International Covenant on Economic Social and Cultural Rights].

- The right of adults to basic and vocational education [art. 4 c) European Convention on Human Rights and Fundamental Freedoms].
- The rights of national minorities [art. 5.1 c) European Convention on Human Rights and Fundamental Freedoms].
- The right for children to receive a religious and moral education in accordance with their own convictions [art. 18.4 International Covenant on Civil and Political Rights].

[Indigenous and Tribal Peoples Convention, 1989 \(No. 169\), art. 26-31](#)

[Convention against Discrimination in Education, 1960: arts. 2 \(2\) and 3](#)

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[Convention on the Rights of the Child, \(CDN\): arts. 28 and 29.](#)

[Convention on the Elimination of All Forms of Discrimination against Women \(CEDAW\): art. 10](#)

[Vienna Declaration and Programme of Action, \(1993\): Part I, par. 33 and Part. II, par. 80.](#)

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Committee on Economic, Social and Cultural Rights:

- [General Comment No. 11 \(on article 14 plans of action for primary education\)](#)
- [General Comment No. 13 \(on article 13 the right to education\).](#)

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- Mission in Algeria, Jan 27 to Feb 3, 2015
- Mission in Tunisia, April 30 to May 9, 2012
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## LEARNING PROCESS RESULTS

Upon completion of this topic, the student shall be able to:

- Understand the nature and scope of the right
- Identify the holders of the right, and particularly, the risk groups and situations of violation
- Determine the challenges to the right to education in the Maghreb in general and in its particular context.
- Integrate the right to participate in the teaching programme, proposing a learning service project regarding an identified situation of violation of that right.

Get to know the guarantee mechanisms of the right to participate

## METHODOLOGY

Methodology:	Teaching tools
Expository method	Text reading and/or audio-visual material
Case studies	Blog / Forum
Problem-solving	Blog / Forum / Wiki Worksheet Tests and activities
Preparing projects	Blog / Forum / Wiki
Cooperative learning	Forum/Wiki
Learning contract	Blog / Forum / Wiki
Simulation or role play	
Group discussions	Blog / Forum
Field trips	
Work groups	
Discussions-conferences	
Practical exercises	

## SYLLABUS OF LEARNING ACTIVITIES

### 1) Reading the learning guide of the topic

By reading the guide the participant will obtain a general idea on the content of the topic and the activity to be carried out.

### 2) Reading the exposition of the topic

By reading the exposition of the topic the student will obtain a general idea (a kind of summary) of the main elements of the right to education. This reading will be complemented with the Information Sheet.

This first reading will enable participants to identify the area of interest in relation to their teaching activity in order to further study the right to education for the practical application of the course.

### 3) Search for documentation on the challenges involved in the right to education in the Maghreb and its context.

In conjunction with the previous activity, a search will be carried out for official documentation regarding the situation of the right to education in the Maghreb. On the one hand, this documentation shall show the constitutional protection of this right as well as the national legislation and public policies concerned and, on the other hand, the recommendations made for the country by the different bodies of the United Nations protecting this right: monitoring bodies of the international treaties on human rights, special procedures and a Universal Periodic Review. In this section, at least 5 documents must be consulted. These searches shall be used to draw up a document logging the work performed and clearly showing the country's degree of compliance with the international legal obligations derived from this right.



#### 4) Analysis of the context on the right to education in the chosen situation or group, with an indication of the main challenges for the Maghreb.

The previous search works shall be used to analyse the context on the right to education. This will be done by applying the three-tier model of analysis (causal analysis, role analysis and analysis of gaps in capacity) as well as the bibliography used in Module 2 of the course. A document shall be written outlining the methodology used in performing the analysis.

#### 5) Writing the report on the challenges of this right in the Maghreb and in the context of the intervention.

A status report of no fewer than 5000 words shall be written presenting a diagnosis based on the reference information consulted.

#### 6) Designing a teaching syllabus

The practical part of the course involves designing a teaching syllabus on the right to education.

## EXERCISES AND TASKS

These tasks are designed either for discussion groups or as personal individual or group tasks.

- ACTIVITY** (individual work): Check the statistical data from your country on education matters and use them to sketch a panorama of education in relation to these topics: a) illiteracy, b) drop-out rates, c) teacher/pupil ratio, d) percentage of students with financial aid. **PRODUCT:** Presentation of a 2-page paper featuring the conclusions obtained. The quality of the arguments leading to the conclusions presented will be valued.
- ACTIVITY** (group work): Visit a school with basic education and assess the extent of adequate means to achieve the educational goals. **PRODUCT:** presentation of a 2-page paper giving grounds for your answer. The paper should be written after having agreed upon the conclusions. The presentation and quality of the argumentation will be valued.
- ACTIVITY** (group work): Visit a school for minority education and establish the differences with ordinary schools. **PRODUCT.** Presentation of a 2-page paper featuring the conclusions obtained, written after a discussion with the other students. The presentation and quality of the argumentation will be valued.
- DOCUMENT** (general group discussion): All students in the course will analyse together the rules of a school, where appropriate. After reading the document, the students will talk about its content and they should reach some conclusions on whether the rules in terms of school discipline are respectful of human rights. The capacity for oral expression, for listening and respecting other, and the quality of the arguments will be valued.
- DOCUMENT** (individual work): Read and reflect on the curricula for compulsory education and check if they promote values indicated in international documents as being the object of teaching. **PRODUCT:** present a 3-page paper featuring your opinion on it.
- CASE STUDY:** (General group discussion): For a situation to fill a university teaching vacancy, analyse if the faculty selection process respects the principles of merit and ability. The quality of the legal arguments on legality, advertising, the right to recourse, etc. will be valued.
- ACTIVITY** (Directed discussion with all the students) Discuss about whether the freedoms of expression, assembly and association are respected in the university

context. The quality of the arguments and the objectivity of the narration of the assumptions on which the claims are based will be valued.

8. **ACTIVITY** (individual work and group discussion): Students must write a 2-page paper on how human rights are experienced at the university setting. As a group, students will comment via a directed debate on the reason for featuring those activities. The capacity for observation will be valued, as well as the pertinence of the arguments in regard to human rights, etc.
9. **Do you believe that any of these rights are part of the basic content to the right to education?**
  - a) Appeal against the grade given on an examination
  - b) Find out in advance how the exams will be developed
  - c) Obtain individual advice from the instructor
  - d) Obtain complementary benefits in case of disadvantaged social or family situations.
  - e) Timeline of activities of the topic:

Identification of the activity	Estimated work time	Assessment criteria
Reading the Educational Guide of the topic	15 minutes	Self-evaluation
Reading the Exposition of the topic	45 minutes	Self-evaluation
Search for documentation on the challenges of the right to education in the Maghreb and its context.	2 hours	Portfolio: annotated bibliography
Analysis of the context on the right to education in the chosen situation or group	5 hours	Portfolio: methodology used
Write-up of context reports	10 hours	Portfolio: Status Report
Design the teaching syllabus by incorporating the methodology of service learning to approach the topic from one's own branch of knowledge (Communication, Laws, Education, Social Work).	40 minutes	Final practicum work
	60 hours	

## EVALUATION SELF-TEST

1. Which individuals are involved in the education relationship?
  - a) students
  - b) parents and teachers
  - c) the educational administration
  - d) all the above

2. What is the main responsibility of the public powers on education matters?
  - a) to ensure a placement in the education system for those who have the right to education according to the legislation in force.
  - b) to provide education institutions with material means.
  - c) to ensure a system for monitoring the education processes so that they fit in with the constitution.
  - d) to ensure access to the teaching function by merit and ability
  
3. What is the main aim of education?
  - a) to prepare students for professional life
  - b) to prepare students to live in social harmony.
  - c) to improve the economic power of the State
  - d) the full development of the student's personality
  
4. What education rights do minorities have?
  - a) not to be discriminated against
  - b) not to be discriminated against and to receive, provided that they are not placed in an inferior position, learning contents in accordance with their characteristics
  - c) on the basis of the principle of equality, a common education must be guaranteed without concessions to the particular traits of the minorities.
  - d) in the Social and democratic State of Law there are no minorities
  
5. The different education according to sex is in line with the International Documents
  - a) No
  - b) Yes
  - c) Yes, provided that there is an equivalence in accessing education and the material and personal conditions of the learning activity are equal.
  - d) The States may prohibit differentiated education even in schools created by parents.

## EVALUATION SELF-TEST

Question	Question Key
Question 1	d
Question 2	a
Question 3	d
Question 4	b
Question 5	c

## SUBJECT 2.4.:

# 2.4.18. THE RIGHT TO EDUCATION

## 1. NATURE, AIMS AND OBJECTIVES OF THE RIGHT TO EDUCATION

### 1.1. NATURE

The **right to education** is a fundamental right provided by the State. The concept of fundamental is given by its main purpose: full development of the personality. Despite being a fundamental right, since it is also a provision right, it is subject to the limitations of the economic aspects of every State; although it is commonly known that the maintenance of the education system should always be given the highest priority in comparison with any other public service in case of a lack of resources.

**Educational freedom** is inextricably joined to the right to education and ensures a field of freedom to persons and social groups in relation to the State which must be respected and promoted in any way. Educational freedom is characterized as the following:

- a) in the right of the society to create teaching institutions different from those provided by the state.
- b) (i) in the right of the parents to choose the model of education that they want for their children; (ii) of children to receive religious and moral education in accordance with their convictions; (iii) parents are the first educators and Constitutions enable them to demand the guarantee of their educational freedoms to the public administrations. Educational freedom is indivisible from the right of education.
- c) in the academic freedom to empower teachers to oppose to the mandates of the public authorities that try to lead education to a certain sense out of what the Constitution requires.
- d) in the right of students to oppose to any type of education that lessens human dignity when violating the freedom of thought or, for example, when using improper education methods, such as corporal punishments, arbitrariness in qualifications, etc.

General Observation No. 13 states that: "Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a welleducated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence<sup>598</sup>".

### 1.2. AIMS AND OBJECTIVES OF EDUCATION

Objectives of education are indicated in points 4 and 5 of General Observation No. 13, which recognizes that the main purpose is the **"full development of the personality"**.

598. General Comment No.13, paragraph 1.

### Aims of education

States parties agree that all education, whether public or private, formal or non-formal, shall be directed towards the aims and objectives identified in article 13 (1). The Committee notes that these educational objectives reflect the fundamental purposes and principles of the United Nations as enshrined in Articles 1 and 2 of the Charter. For the most part, they are also found in article 26 (2) of the Universal Declaration of Human Rights, although article 13 (1) adds to the Declaration in three respects: education shall be directed to the human personality's "sense of dignity", it shall "enable all persons to participate effectively in a free society", and it shall promote understanding among all "ethnic" groups, as well as nations and racial and religious groups. Of those educational objectives which are common to article 26 (2) of the Universal Declaration of Human Rights and article 13 (1) of the Covenant, perhaps the most fundamental is that "education shall be directed to the full development of the human personality". (General Comment No.13 paragraph 4)".

However, "The Committee notes that since the General Assembly adopted the Covenant in 1966, other international instruments have further elaborated the objectives to which education should be directed. Accordingly, the Committee takes the view that States parties are required to ensure that education conforms to the aims and objectives identified in article 13 (1), as interpreted in the light of the World Declaration on Education for All (Jomtien, Thailand, 1990) (art. 1), the Convention on the Rights of the Child (art. 29 (1)), the Vienna Declaration and Programme of Action (Part I, para. 33 and Part II, para. 80), and the Plan of Action for the United Nations Decade for Human Rights Education (para. 2). While all these texts closely correspond to article 13 (1) of the Covenant, they also include elements which are not expressly provided for in article 13 (1), such as specific references to gender equality and respect for the environment. These new elements are implicit in, and reflect a contemporary interpretation of article 13 (1). The Committee obtains support for this point of view from the widespread endorsement that the previously mentioned texts have received from all regions of the world".<sup>599</sup>

In relation to the education of children, the CRC establishes more specific objectives or aims: "1. States Parties agree that the education of the child shall be directed to: (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; (c) The development of respect for the child's parents,

his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own; (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; (e) The development of respect for the natural environment (CRC, art. 29)"

## 2. CONTENT OF THE RIGHT TO THE EDUCATION

The main content of the right to education is inferred from the essential obligations in charge of the State on education matters. General Comment No. 13 of the Committee confirmed that States Parties have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels" of every right indicated in the Covenant, including "the most basic forms of education". In the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a nondiscriminatory basis; to ensure that education conforms to the objectives set out in article 13 (1); to provide primary education for all in accordance with article 13 (2) (a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference

599. General Comment No.13, paragraph 5.

from the State or third parties, subject to conformity with “minimum educational standards” (art. 13 (3) and (4)).<sup>600</sup>

There are therefore obligations of **immediate compliance** (letters a), b) and c) and e)) **and some others progressive compliance** (letter d)) since the accomplishment of the right is subject to limits of the resources.

All the rights have, to a lesser or major extent, the *immediate-type* obligation, and the obligation of non-discrimination. “The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination. The Committee interprets articles 2 (2) and 3 in the light of the UNESCO Convention against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169), and wishes to draw particular attention to the following issues”.<sup>601</sup>

While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of the available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to education, such as the “guarantee” that the right “will be exercised without discrimination of any kind” and the obligation “to take steps” towards the full realization of article 13. Such steps must be “deliberate, concrete and targeted” towards the full realization of the right to education.<sup>602</sup>

This leads public institutions to act in these public service aspects by adopting measures in some of the following areas:

- (a) **Availability** - functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party. What they require to function depends upon numerous factors, including the developmental context within which they operate; for example, all institutions and programmes are likely to require buildings or other protection from the elements, sanitation facilities for both sexes, safe drinking water, trained teachers receiving domestically competitive salaries, teaching materials, and so on; while some will also require facilities such as a library, computer facilities and information technology;
- (b) **Accessibility** - educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party. Accessibility has three overlapping dimensions:
  - (i) **Non-discrimination** - education must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds (see paras. 31-37 on non-discrimination);
  - (ii) **Physical accessibility** education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location (e.g. a neighbourhood school) or via modern technology (e.g. access to a “distance learning” programme);
  - (iii) **Economic accessibility** - education has to be affordable to all. This dimension of accessibility is subject to the differential wording of article 13 (2) in relation to primary, secondary and higher education: whereas primary education shall be available “free to all”, States parties are required to progressively introduce free secondary and higher education;

600. General Comment No. 13, paragraph 57.

601. General Comment No. 13, paragraph 31.

602. General Comment No. 13, paragraph 43

(c) **Acceptability** - the form and substance of education, including curricula and teaching methods, must be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and, in appropriate cases, parents; this is subject to the educational objectives required by article 13 (1) and such minimum educational standards as may be approved by the State (see art. 13 (3) and (4));

(d) **Adaptability** - education must be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings.<sup>603</sup>

“The right to education, like all human rights, imposes three types or levels of **obligations on States parties**: the obligations to respect, protect and fulfil (the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide).”<sup>604</sup>

i) **Respect**: “The obligation to respect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education”.<sup>605</sup>

“States parties are required to ensure that curricula, for all levels of the educational system, are directed to the objectives identified in article 13. They are also obliged to establish and maintain a transparent and effective system which monitors whether or not education is, in fact, directed to the educational objectives set out in article 13”.<sup>606</sup> For example “a State must respect the availability of education by not closing private schools; fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all; fulfil (provide) the adaptability of education by designing and providing resources for curricula which reflect the contemporary needs of students in a changing world”.<sup>607</sup>

“The obligations of States parties in relation to primary, secondary, higher and fundamental education are not identical. (...) States parties are obliged to prioritize the introduction of compulsory, free primary education. (...) The obligation to provide primary education for all is an immediate duty of all States parties.”<sup>608</sup>

“A State party has an immediate obligation “to take steps” towards the realization of secondary, higher and fundamental education for all those within its jurisdiction. At a minimum, the State party is required to adopt and implement a national educational strategy which includes the provision of secondary, higher and fundamental education in accordance with the Covenant. This strategy should include mechanisms, such as indicators and benchmarks on the right to education, by which progress can be closely monitored”.<sup>609</sup>

ii) **Protect**: The obligation to protect requires States parties to avoid measures that hinder or prevent the enjoyment of the right to education. “[...] For example, protect the accessibility of education by ensuring that third parties, including parents and employers, do not stop girls from going to school”.<sup>610</sup>

“States parties have an obligation to ensure that communities and families are not dependent on child labour. The Committee especially affirms the importance of education in eliminating child labour and the obligations set out in article 7 (2) of the Worst Forms of Child Labour Convention, 1999 (Convention No. 182). Additionally, given article 2 (2), States parties are

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603. General Comment No. 13, paragraph 6.

604. General Comment No. 13, paragraph 46.

605. General Comment No. 13, paragraph 47.

606. General Comment No. 13, paragraph 49.

607. General Comment No. 13, paragraph 50.

608. General Comment No. 13, paragraph 51.

609. General Comment No. 13, paragraph 52.

610. General Comment No. 13, paragraph 50.



obliged to remove gender and other stereotyping which impedes the educational access of girls, women and other disadvantaged groups”.<sup>611</sup>

“States parties are obliged to establish “minimum educational standards” to which all educational institutions established in accordance with article 13 (3) and (4) are required to conform. They must also maintain a transparent and effective system to monitor such standards. A State party has no obligation to fund institutions established in accordance with article 13 (3) and (4); however, if a State elects to make a financial contribution to private educational institutions, it must do so without discrimination on any of the prohibited grounds”<sup>612</sup>

iii) Fulfil: “[...] and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries”.<sup>613</sup>

“The obligation to fulfil (facilitate) requires States to take positive measures that enable and assist individuals and communities to enjoy the right to education. Finally, States parties have an obligation to fulfil (provide) the right to education. As a general rule, States parties are obliged to fulfil (provide) a specific right in the Covenant when an individual or group is unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. However, the extent of this obligation is always subject to the text of the Covenant”.<sup>614</sup>

**“Article 13 regards States as having principal responsibility for the direct provision of education in most circumstances;** States parties recognize, for example, that the “development of a system of schools at all levels shall be actively pursued” (art. 13 (2) (e)). Secondly, given the differential wording of article 13 (2) in relation to primary, secondary, higher and fundamental education, the parameters of a State party’s obligation to fulfil (provide) are not the same for all levels of education. Accordingly, in light of the text of the Covenant, States parties have an enhanced obligation to fulfil (provide) regarding the right to education, but the extent of this obligation is not uniform for all levels of education. The Committee observes that this interpretation of the obligation to fulfil (provide) in relation to article 13 coincides with the law and practice of numerous States parties.”<sup>615</sup>

“States parties are obliged to ensure that an educational fellowship system is in place to assist disadvantaged groups. The obligation to pursue actively the “development of a system of schools at all levels” reinforces the principal responsibility of States parties to ensure the direct provision of the right to education in most circumstances”<sup>616</sup>.

Observation No. 13 also contains **possible breaches in the obligations** of the Member states:

“When the normative content of article 13 (Part I) is applied to the general and specific obligations of States parties (Part II), a dynamic process is set in motion which facilitates identification of violations of the right to education. Violations of article 13 may occur through the direct action of States parties (acts of commission) or through their failure to take steps required by the Covenant (acts of omission).”<sup>617</sup>

“By way of illustration, violations of article 13 include: the introduction or failure to repeal legislation which discriminates against individuals or groups, on any of the prohibited grounds, in the field of education; the failure to take measures which address de facto

611. General Comment No. 13, paragraph 55.

612. General Comment No. 13, paragraph 54.

613. General Comment No. 13, paragraph 50.

614. General Comment No. 13, paragraph 47.

615. General Comment No. 13, paragraph 48.

616. General Comment No. 13, paragraph 53.

617. General Comment No. 13, paragraph 58.

educational discrimination; the use of curricula inconsistent with the educational objectives set out in article 13 (1); the failure to maintain a transparent and effective system to monitor conformity with article 13 (1); the failure to introduce, as a matter of priority, primary education which is compulsory and available free to all; the failure to take “deliberate, concrete and targeted” measures towards the progressive realization of secondary, higher and fundamental education in accordance with article 13 (2) (b)(d); the prohibition of private educational institutions; the failure to ensure private educational institutions conform to the “minimum educational standards” required by article 13 (3) and (4); the denial of academic freedom of staff and students; the closure of educational institutions in times of political tension in nonconformity with article 4”.<sup>618</sup>

A way of failing to comply with the obligations of the States consists, for example, of not being subject to the obligations imposed by the international documents regarding **school discipline**. “In the Committee’s view, corporal punishment is inconsistent with the fundamental guiding principle of international human rights law enshrined in the Preambles to the Universal Declaration of Human Rights and both Covenants: the dignity of the individual. Other aspects of school discipline may also be inconsistent with human dignity, such as public humiliation. Nor should any form of discipline breach other rights under the Covenant, such as the right to food. A State party is required to take measures to ensure that discipline which is inconsistent with the Covenant does not occur in any public or private educational institution within its jurisdiction. The Committee welcomes initiatives taken by some States parties which actively encourage schools to introduce “positive”, nonviolent approaches to school discipline”.<sup>619</sup>

### 3. EDUCATIONAL FREEDOM

In relation to educational freedom, public authorities have very clear obligations that reflect the above-mentioned on this matter. Paragraph 28 of Observation No. 13 refers to the obligation of States parties to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions

“Article 13 (3) has two elements, one of which is that States parties undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions. The Committee is of the view that this element of article 13 (3) permits public school instruction in subjects such as the general history of religions and ethics if it is given in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression. It notes that public education that includes instruction in a particular religion or belief is inconsistent with article 13 (3) unless provision is made for nondiscriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians”.<sup>620</sup>

“The second element is the **liberty of parents and guardians to choose other than public schools for their children**, provided the schools conform to “such minimum educational standards as may be laid down or approved by the State”<sup>621</sup>.

“This has to be read with the complementary provision, article 13, which affirms “the liberty of individuals and bodies to establish and direct educational institutions”, provided the institutions conform to the educational objectives set out in article 13 and certain minimum standards. These minimum standards may relate to issues such as admission, curricula and the recognition of certificates. In turn, these standards must be consistent with the educational objectives set out in article 13”.<sup>622</sup> (...) everyone, including nonnationals, has the liberty to establish and direct educational institutions. The liberty also extends to “bodies”, i.e.

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618. General Comment No. 13, paragraph 59

619. General Comment No. 13, paragraph 41.

620. General Comment No. 13, paragraph 28.

621. General Comment No. 13, paragraph 29

622. General Comment No. 13, paragraph 29.

legal persons or entities. It includes the right to establish and direct all types of educational institutions, including nurseries, universities and institutions for adult education. Given the principles of nondiscrimination, equal opportunity and effective participation in society for all, the State has an obligation to ensure that the liberty set out in article 13 does not lead to extreme disparities of educational opportunity for some groups in society”.<sup>623</sup>

The Declarations protect educational **freedoms and the autonomy of the establishments of education**: “(...) the right to education can only be enjoyed if accompanied by the academic freedom of staff and students. Accordingly, even though the issue is not explicitly mentioned in article 13, it is appropriate and necessary for the Committee to make some observations about academic freedom. The following remarks give particular attention to institutions of higher education because, in the Committee’s experience, staff and students in higher education are especially vulnerable to political and other pressures which undermine academic freedom. The Committee wishes to emphasize, however, that staff and students throughout the education sector are entitled to academic freedom and many of the following observations have general application”.<sup>624</sup>

“Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation or writing. Academic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligations, such as the duty to respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds”.<sup>625</sup>

“The enjoyment of academic freedom requires the **autonomy of institutions of higher education**. Autonomy is that degree of self-governance necessary for effective decisionmaking by institutions of higher education in relation to their academic work, standards, management and related activities. Selfgovernance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education, an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible”.<sup>626</sup>

## 4. INDIVIDUALS OF THE RIGHT TO EDUCATION

**Any person** in need of basic education is entitled to have this right. Nevertheless, **those who are in age of going to school in accordance with the laws of the State party are the privileged individuals of this right**. Out of the school ordinary system, adults in need of basic or vocational training are entitled to have this right. In the field of education States parties have the obligation to develop actions of positive discrimination in relation with disadvantaged persons or social groups.

### WOMEN

Article 10 of the Convention on the Elimination of All Forms of Discrimination against Women states: “States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women: (a) The same conditions for

623. General Comment No. 13, paragraph 30.

624. General Comment No. 13, paragraph 38.

625. General Comment No. 13, paragraph 39.

626. General Comment No. 13, paragraph 40.

career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training; (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of the same quality; (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods; (d) The same opportunities to benefit from scholarships and other study grants; (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women; (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely; (g) The same Opportunities to participate actively in sports and physical education; (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning”.

## MINORITIES

Article 5.1 of the Convention against Discrimination in Education (1960) states: “[...] It is essential to recognize the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language, provided however: (i) That this right is not exercised in a manner which prevents the members of these minorities from understanding the culture and language of the community as a whole and from participating in its activities, or which prejudices national sovereignty; (ii) That the standard of education is not lower than the general standard laid down or approved by the competent authorities; and (iii) That attendance at such schools is optional”.

## REFUGEES

The Convention related to the Status of Refugees in relation with education states: “Article 22. Public education “1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education. 2. The Contracting States shall accord to refugee’s treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships”.

## PERSONS WITH DISABILITIES

Articles 13 and 14 of the Committee on the rights of persons with disabilities states: “At present, the school programs of many countries admit that the best way of educating persons with disability consists of educating them inside the general system of education. For its part, the Uniform Procedure stipulate that “the States must recognize the beginning of the equality of opportunities of education in the levels primarily, secondarily and top for the children, the young persons and the adults with disability in integrated environments. To carry it out, the States must guard that the teachers are trained to educate children with disability in ordinary schools and arrange of the necessary equipment and the support in order that the persons with disability could reach the same level of education that other persons. For example, in case of the deaf children it should be recognized to the language of gestures as language to which the children should have access and which importance should be recognized due in his social general environment.”

## INMATES

The question of education in prisons is dealt with in Economic and Social Council Resolution 1990/20 of 24 May 1990. “In paragraph 3 of the resolution, the Council further recommends that Member States, in developing educational policies, should take into account the following

principles: a) Education in prisons should aim at developing the whole person, bearing in mind the prisoner's social, economic and cultural background; b) All prisoners should have access to education, including literacy programmes, basic education, vocational training, creative, religious and cultural activities, physical education and sports, social education, higher education and library facilities; c) Every effort should be made to encourage prisoners to participate actively in all aspects of education; d) All those involved in prison administration and management should facilitate and support education as much as possible; e) Education should be an essential element in the prison regime; f) Vocational education should aim at the greater development of the individual and be sensitive to trends in the labour market; g) Creative and cultural activities should be given a significant role since they have a special potential for enabling prisoners to develop and express themselves; h) Wherever possible, prisoners should be allowed to participate in education outside the prison; i) Where education has to take place within the prison, the outside community should be involved as fully as possible; j) the necessary funds, equipment and teaching staff should be made available to enable to receive appropriate education”<sup>627</sup>.

## 5. LIMITS

There are limits to education deriving from the purposes of education established in the treaties and constitutional texts: no intellectual content or mode of actuation in teaching processes that diminishes full development of the learner's personality, human dignity, or encourages values contrary to peaceful coexistence and respect for others is acceptable for governance. Indeed, that would not be a real education. Teachers have no right to inform their task by violating the organisational arrangement of education: aims, means, etc. In other words, the education activity is not simply mistaken for freedom of expression. The education activity must always respect the learner's human dignity.

No public policy on education that seriously hindered or impeded parents from taking part in their child's education or that limited the educational freedom would be compatible with the essence of this right.

In addition, the effective realisation of the right may find limits in the constraints of State resources for maintaining an education system that satisfies the minimum needs of the school-age population: “The Committee is aware that for millions of people throughout the world, the enjoyment of the right to education remains a distant goal. Moreover, in many cases, this goal is becoming increasingly remote. The Committee is also conscious of the formidable structural and other obstacles impeding the full implementation of article 13 in many States parties”.<sup>628</sup>

## 6. GUARANTEES OF THE RIGHT

In case States parties have signed agreements and declarations containing references to the right to education, they have the moral and legal obligation to engage in accordance with their requirements; and the entities provided for in treaties for their protection have the obligation to safeguard in order to repair the damage caused by their violation.

In case States parties have a normative constitution, the recognition of the right might force to the immediate implementation of the Constitution. Anyway, the law developing the right should respect its essence.

Due to the fundamental character of this right the legal system should provide remedies through administrative and legal resources to face States parties' failure to comply with their obligations.

627. See Human Rights and Prisons. [Manual on Human Rights Training for Prison Officials](#), United Nations, New York and Geneva, 2004. Professional Training Series No. 11. Human Rights. Office of the United Nations High Commissioner for Human Rights. See also [Standard Minimum Rules for the Treatment of Prisoners](#), adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by Resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

628. General Comment No. 13, paragraph 2.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 2****Subject****2.4.19.** Cultural Rights**Lecturer:**Rafael Valencia Candalija.  
Law Teacher. University of Extremadura

## SUMMARY OF THE TOPIC

It is becoming increasingly common to hear voices highlighting the importance of cultural rights, catalogued as “underdeveloped human rights”. Today there is a clear need for their protection, and effective recognition by the different States takes on a key role. However, despite the efforts of the United Nations, its effective enjoyment is still a utopia for certain, especially vulnerable collectives.

In this topic, they will study what the main international documents are that protect cultural rights and who their rights-holders are, in accordance with General Comment N° 21 of the Committee on Economic, Social and Cultural Rights on the right of everyone to take part in cultural life. The contents of cultural rights are also described, along with the obligations they create and the conditions needed to ensure their exercise.

Finally, reference is also made to the potential limitations on cultural rights in cases in which it is strictly necessary and proportionate to the legitimate goal that it is meant to achieve.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

## GENERAL:

- **Appreciate diversity and multiculturalism:** understand and accept social and cultural diversity as an enriching personal and collective component to develop



coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.

- **Critical reasoning:** analyse and evaluate the consistency of the approaches, in particular, the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** to be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- Suitably identify, interpret and apply the international, regional and national norms on cultural rights applicable to the different assumptions posed in their respective disciplines and professional areas.
- Identify the specific obligations of respect, protection and realisation of cultural rights and the minimum normative content needed for their realisation and for questioning their fulfilment in a particular situation.
- Identify, analyse, argument and evaluate the critical deviations and gaps in the capability and responsibility of the cultural rights-holders as well as the obligations that hinder the action or transformation of a particular situation in which those rights are being violated.
- Contrast and evaluate situations, practices, legislation, local and national policies in accordance with the legal instruments on cultural rights ratified in your country, and suggest and plan out some efficient alternatives.
- Identify and apply the international and regional protection mechanisms for cultural rights.
- Seek out, select and analyse information from a variety of sources (legal, social, financial, etc.). Plan and document this task appropriately.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### International texts on human rights regarding cultural rights:

- International Covenant on Economic Social and Cultural Rights, 16 December 1966 (especially Article 27)
- Universal Declaration of Cultural Diversity, Paris, 2 November 2001.
- Convención sobre la protección y la promoción de la diversidad de las expresiones culturales 2005, París, 20 de octubre de 2005.
- Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, Paris, 20 October 2005
  - General Comment N° 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (article 15, paragraph 1 (c), of the Covenant), 2006. UN Doc. E/C.12/GC/17.
  - General Comment N° 21 of the Committee on Economic, Social and Cultural Rights on the right of everybody to take part in cultural life (article 15, paragraph 1 a, of the International Covenant on Economic, Social and Cultural Rights), 2010. UN Doc E/C.12/GC/21/REV.1.



### International standards (A/HRC/14/36)

- Resolution 10/23 of the United Nations Human Rights Council regarding the Report from the Independent expert in the field of cultural right, 26 March 2009.
- Resolution 14/9 of the United Nations Human Rights Council for the promotion and protection of cultural rights and respect for cultural diversity, 23 June 2010.
- United Nations General Assembly Mandate of 20 March 2009 for the promotion and protection of cultural rights and respect for cultural diversity.
- The statement "Human rights are essential tools for an effective intercultural dialogue". Statement by a group of United Nations experts on the World Day for Cultural Diversity for Dialogue and Development, 21 May 2010.

### Fribourg Declaration on Human Rights, 7 May 2007.

Déclarer les droits culturels : Commentaire de la Déclaration de Fribourg, P. Meyer-Bisch – M. Bidault, volume 33, 2010.

### **Special Rapporteur in the field of cultural rights:**

- [Annual reports](#)
- [Country visits](#)
- Thematic issues:

[2017 - The impact of fundamentalism and extremism on the enjoyment of cultural rights](#)

[2016 - Intentional destruction of cultural heritage](#)

[2015 - Intellectual property regimes](#)

[2014 - The impact of advertising and marketing practices on the enjoyment of cultural rights](#)

[2013 - 2014: History and memory](#)

[2013 - The right to artistic freedom](#)

[2012 - Cultural rights of women](#)

[2012 - The right to benefit from scientific progress and its applications](#)

[2011 - Access to cultural heritage](#)

[2010 - Implementing cultural rights. Nature, issues at stake and challenges](#)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

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## LEARNING PROCESS RESULTS

Upon completion of this topic, the student shall be able to:

- Know what the main United Nations documents are on this matter.
- Identify the area of responsibility of the States with respect to potential situations of infringement of cultural rights, not only by a direct violation of these rights but also by their omissions in correcting inequalities and achieving equal results.
- Identify the main obstacles that currently exist to the protection of cultural rights.
- Argue against the restrictions of cultural rights.
- Analyse the situation of cultural rights in cases in which we find the subjects are especially vulnerable.

## METHODOLOGY

We include as suggestions the following:

Methodology:	Teaching tools
Expository method	Reading texts and/or viewing audio-visual material
Problem-solving	Carry out the activity described
Group discussions	Forum and writing the final document

## DESIGNING A SYLLABUS OF LEARNING ACTIVITIES

1. Study the content of the topic.
2. Read the wording of the Rights and their corresponding articles.
3. Choose potential situations in which it seems to you that discrimination occurs.
4. For each one, justify why the violation of cultural rights occurs.
5. What international norm is your argumentation based on?
6. Presentation to the group of the different situations chosen by the group members.  
Debate in regard to how often such violations take place, and the steps that can be taken to prevent and eliminate them.
7. Write a final document that features the main results of the learning activity, insisting on the ways formulated for prevention and elimination of potential violations and infringements of cultural rights.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Assessment criteria
Activity 1: Individual work	40 minutes	
Activity 2: Presentation	10 minutes of presentation per student	
Activity 3 Debate	20 minutes	
Activity 4 Writing a final document	15 minutes approx.	*Proposals for action will be given special consideration.

## SUBJECT 2.4.:

# 2.4.19. CULTURAL RIGHTS

## 1. NATURE AND NORMATIVE CONTENT OF CULTURAL RIGHTS<sup>629</sup>

As noted in the 2007 Fribourg Declaration on Cultural Rights, cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities in a diverse and multicultural world.

One of the most difficult aspects regarding cultural rights is its definition, on account of how complicated it is to delimit concepts such as culture. That is precisely what the Special Rapporteur on Cultural Rights referred to in her 2016 Report on Cultural Rights, noting that she believes her predecessor made the correct decision when she declined to define culture but took a holistic, inclusive approach to its meanings. Significantly, she stated that culture is created, contested and recreated within social praxis (see A/67/287, para. 2), in other words through human agency. The current Special Rapporteur further notes that: (a) all people and all peoples have culture, not merely certain categories or geographies of people; (b) cultures are human constructs constantly subject to reinterpretation; and (c) while it is customary to do so, referring to culture in the singular has problematic methodological and epistemological consequences. It must be understood that culture is always plural. "Culture" means cultures ».<sup>630</sup>

« Cultural rights protect the rights of each person, individually and in community with others, as well as groups of people, to develop and express their humanity, their world view and the meanings they give to their existence and their development through, inter alia, values, beliefs, convictions, languages, knowledge and the arts, institutions and ways of life. They may also be considered as protecting access to cultural heritage and resources that allow such identification and development processes to take place ».<sup>631</sup>

The legal basis for cultural rights can be found in numerous international human rights instruments. Explicit references include rights that expressly refer to culture. Implicit references include rights that, although not expressly referring to culture, may constitute an important legal grounding for the protection of cultural rights as defined above.<sup>632</sup> Therefore, important legal basis for cultural rights are to be found not only in the International Covenant on Economic, Social and Cultural Rights, in particular articles 13-15, but also in the International Covenant on Civil and Political Rights, in particular in provisions protecting the right to privacy, freedom of thought, conscience and religion, freedom of opinion and expression, freedom of association and peaceful assembly. Those rights are also key to ensuring the full realisation of cultural rights. Indeed, cultural rights transcend the juncture

629. In writing up the contents of the topic, it was considered vital to respect the contents of General Comment N° 21 from the Committee on Economic, Social and Cultural Rights on the right of everybody to take part in cultural life (Article 15, paragraph 1 a, from the International Covenant on Economic, Social and Cultural Rights- hereinafter GC21- as well as the Report from the Special Rapporteur of February 2016.

630. UN Doc. A/HRC/31/59, para 8.

631. Vid. General Comment N° 21 [2009] of the Committee on Economic, Social and Cultural Rights regarding the right of everyone to take part in cultural life, para. 13. Vid. also. UN Doc. A/HRC/14/36, para. 9, and A/67/287, para 7.

632. See UN Doc. A/HRC/14/36, in particular paras. 11-20.

of civil and political rights and economic and social rights and thus are important markers of interdependence and indivisibility.<sup>633</sup>

However, when we approach the question of the normative content of cultural rights, we should not forget that the starting point for establishing these rights lies in Article 27 of the United Nations Universal Declaration of Human Rights of 1948 (hereinafter UDHR), which is the precept that establishes:

- “1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
2. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

A few years later, both the ICCPR and the ICESCR expressly undertook the delimitation of the normative content of cultural rights. Thus, Article 27 of the ICCPR recognises the right of ethnic, religious or linguistic minorities in each State to have their own cultural life, to profess and practice their own religion and to use their own language. In addition, it is essential to note the interest given in the International Covenant on Economic Social and Cultural Rights, 16 December 1966 (hereinafter the ICESCR), one of its main objectives being to pursue the development of Article 27. Accordingly, article 15 states:

- “1. The States Parties to the present Covenant recognise the right of everyone:
  - (a) To take part in cultural life;
  - (b) To enjoy the benefits of scientific progress and its applications;
  - (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields”.

Thus, we see that article 15 contains the development of three groups of rights encompassed in the concepts of culture and science. First, the right to take part in cultural life; second, the right to enjoy the benefits of scientific progress and its applications; and third, the right everyone has to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. Furthermore, this article includes the commitment of the different States to respect freedom for scientific research and creative activity and to recognise the benefits derived from promoting the development of scientific and cultural activities.

There are, among others, three interrelated main components of the right to participate or take part in cultural life: *(a) participation in, (b) access to, and (c) contribution to cultural life*<sup>634</sup>

- a) *Participation in cultural life* covers “the right of everyone — alone, or in association with others or as a community — to act freely, to choose his or her own identity, to identify or not with one or several communities or to change that choice, to take part in the political life of society, to engage in one’s own cultural practices and

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633. UN Doc. A/HRC/31/59, para 21.

634. Vid. General comment N° 21 (2002), paras. 14 and 15.

to express oneself in the language of one's choice. Everyone also has the right to seek and develop cultural knowledge and expressions and to share them with others, as well as to act creatively and take part in creative activity".

- b) *Access to cultural life* must include any actions — alone, in association with others or as a community — "to know and understand his or her own culture and that of others through education and information, and to receive a quality education and training with due regard for cultural identity. Everyone has also the right to learn about forms of expression and dissemination through any technical medium of information or communication, to follow a way of life associated with the use of cultural goods and resources such as land, water<sup>635</sup>, biodiversity, language or specific institutions, and to benefit from the cultural heritage and the creation of other individuals and communities".
- c) The third component, *contribution to cultural life*, refers to the right of everyone to be involved in creating the spiritual, material, intellectual and emotional expressions of the community. This is supported by the right to take part in the development of the community to which a person belongs, and in the definition, elaboration and implementation of policies and decisions that have an impact on the exercise of a person's cultural rights.<sup>636</sup>

Notwithstanding the above, "the right of everyone to take part in cultural life is closely related to the other cultural rights contained in article 15: the right to enjoy the benefits of scientific progress and its applications (art. 15, para. 1 (b)); the right of everyone to benefit from the protection of moral and material interests resulting from any scientific, literary or artistic production of which they are the author (art. 15, para. 1 (c)); and the right to freedom indispensable for scientific research and creative activity (art. 15, para. 3). The right of everyone to take part in cultural life is also intrinsically linked to the right to education (arts. 13 and 14), through which individuals and communities pass on their values, religion, customs, language and other cultural references, and which helps to foster an atmosphere of mutual understanding and respect for cultural values. The right to take part in cultural life is also interdependent on other rights enshrined in the Covenant, including the right of all peoples to self-determination (art. 1) and the right to an adequate standard of living (art. 11)<sup>637</sup>".

## 2. RIGHTS-HOLDERS

In the liberal conception of human rights, the only holders of these rights are individuals. Even though some rights are exercised as members of a community, these rights do not belong to groups, they are not rights the group can claim and exercise against the individual. However, the liberal conception, which may have broad consensus in matters of civil and political rights, has become quite controversial in the case of cultural rights. In this regard, some consider cultural rights to be collective rights, while for others they are individual rights exercised with respect to a collective. The Committee clarifies the doctrinal discussion pointing out that the term "everyone" refers to both the individual subject and the collective subject. In other words, cultural rights may be exercised by a person (a) as an individual, (b) in association with others, or (c) within a community or group.<sup>638</sup>

Despite the recognitions and attempts basically carried out by the organs of the United Nations to bestow universality on cultural rights, there are still certain collectives today that have a set of socio-economic difficulties that seriously hinder their members from accessing culture. As can be deduced from General Comment N° 21, it mainly involves:

635. General comment N° 15 (2002) paras. 6 and 11.

636. Vid. Article 5 of the UNESCO's Universal Declaration on Cultural Diversity. Also see article 7 of the Fribourg Declaration on cultural rights.

637. General comment N° 21 (UN Doc. E/C.12/GC/21, para. 2).

638. Ibid., para. 9.

- 1) **Women:** Ensuring the equal right of men and women to the enjoyment of economic, social and cultural rights is a mandatory and immediate obligation of States parties<sup>639</sup>. Implementing article 3 of the Covenant, in relation to article 15, paragraph 1 (a), requires, inter alia, “the elimination of institutional and legal obstacles as well as those based on negative practices, including those attributed to customs and traditions, that prevent women from participating fully in cultural life, science education and scientific research”.<sup>640</sup>
- 2) **Children:** States parties are urged to take all the steps necessary “to stimulate and develop children’s full potential in the area of cultural life, with due regard for the rights and responsibilities of their parents or guardian”. Indeed, “States should recall that the fundamental aim of educational development is the transmission and enrichment of common cultural and moral values in which the individual and society find their identity and worth. Thus, education must be culturally appropriate, include human rights education, enable children to develop their personality and cultural identity and to learn and understand cultural values and practices of the communities to which they belong, as well as those of other communities and societies<sup>641</sup>. The Committee also recalls in this regard that educational programmes of States parties should respect the cultural specificities of national or ethnic, linguistic and religious minorities as well as indigenous peoples, and incorporate in those programmes their history, knowledge and technologies, as well as their social, economic and cultural values and aspirations. Such programmes should be included in school curricula for all, not only for minorities and indigenous peoples”.<sup>642</sup>
- 3) **Older persons:** The Committee is of the view that States parties to the Covenant are obligated to pay particular attention to the promotion and protection of the cultural rights of older persons, as they are the transmitters of information, knowledge, traditions and cultural values. Therefore, “the Committee attaches particular importance to the message contained in recommendations 44 and 48 of the Vienna International Plan of Action on Aging, calling for the development of programmes featuring older persons as teachers and transmitters of knowledge, culture and spiritual values, and encouraging Governments and international organizations to support programmes aimed at providing older persons with easier physical access to cultural institutions (such as museums, theatres, concert halls and cinemas).<sup>643</sup>
- 4) **Persons with disabilities:** the Comment states that paragraph 17 of the Standard Rules on the Equalization of Opportunities for Persons with Disabilities provides that “States should ensure that persons with disabilities have the opportunity to utilize their creative, artistic and intellectual potential, not only for their own benefit, but also for the enrichment of their community, be they in urban or rural areas, and that States should promote accessibility to and availability of places for cultural performances and services”.<sup>644</sup>
- 5) **Minorities:** In the Committee’s view, article 15, paragraph 1 (a) of the Covenant also includes the right of minorities and of persons belonging to minorities to take part in the cultural life of society, and also to conserve, promote and develop

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639. General comment N° 16 (2005) para. 16.

640. General comment N° 21 (UN Doc. E/C.12/GC/21, para. 25).

641. Ibid., para. 26.

642. Ibid., para. 27.

643. Ibid., para. 28. Vid. General comment N° 6 (1995) paras. 38 and 40.

644. Resolution 48/96 of the General Assembly, annex.



their own culture<sup>645</sup>. According to the Committee, this right in turn entails “the obligation of States parties to recognize, respect and protect minority cultures as an essential component of the identity of the States themselves. Consequently, minorities have the right to their cultural diversity, traditions, customs, religion, forms of education, languages, communication media (press, radio, television, Internet) and other manifestations of their cultural identity and membership”.<sup>646</sup>

- 6) **Migrants:** Regarding this collective, the Comment notes that “States parties should pay particular attention to the protection of the cultural identities of migrants, as well as their language, religion and folklore, and of their right to hold cultural, artistic and intercultural events. States parties should not prevent migrants from maintaining their cultural links with their countries of origin”.<sup>647</sup>
- 7) **Indigenous people:** As regards indigenous peoples, Comment N° 21 states that States parties should take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples<sup>648</sup>. It further adds that “indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity”.<sup>649</sup>
- 8) **Persons living in poverty:** As the Comment points out, “poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to enjoy effectively their own culture”.<sup>650</sup> It goes on, adding that “culture as a social product must be brought within the reach of all, on the basis of equality, non-discrimination and participation. Therefore, in implementing the legal obligations enshrined in article 15, paragraph 1 (a), of the Covenant, States parties must adopt, without delay, concrete measures to ensure adequate protection and the full exercise of the right of persons living in poverty and their communities to enjoy and take part in cultural life”.<sup>651</sup>

Finally, we cannot conclude this section on especially vulnerable groups without mentioning some groups that were added by the Special Rapporteur in her 2016 Report, mainly affecting the status of artists, scientists and intellectuals on one hand and on refugees on the other. The report notes “the situation of artists, scientists and intellectuals at risk, who face a wide range of violations of their human rights around the world. It is urgent to recognize and address these risks, as the ability of such persons to fulfil their artistic, scientific and intellectual roles, including in the field of education, is essential for their own human rights but also for the cultural rights of all. The Special Rapporteur also intends to continue addressing the right to artistic expression and creativity more broadly. Too many countries still practise

645. Vid. article 1.1 of the Declaration on the rights of persons belonging to national, ethnic, religious or linguistic minorities.

646. UN Doc. E/C.12/GC/21, para. 32.

647. Ibid., para. 34-35. Vid. article 31 of the International convention on the protection of the rights of all migrant workers and their families.

648. Vid. Declaration on the rights of indigenous peoples, 2007, art. 1. See also, the ILO Convention on indigenous and tribal peoples in independent countries (Convention N° 169), article 1, paragraph 2.

649. Vid. Convention N° 169 on indigenous and tribal peoples in independent countries (ILO, 1989) in regards to articles 20 and 33 of the United Nations Declaration on the rights of indigenous peoples.

650. UN Doc. E/C.12/GC/21, para. 38.

651. Ibid., para. 39.

censorship of the arts (see A/HRC/23/34). Financial crises and austerity measures have led to severe cuts in public spending, resulting in unemployment among artists and the closure of cultural institutions. Moreover, the Special Rapporteur expresses deep concern about the on-going inequalities faced by women in the arts.

In light of the epic 2015 refugee and migrant crisis that is on-going, the Special Rapporteur believes it important to underscore that protecting the cultural rights of refugees and migrants, including women, is a critical aspect of ensuring their well-being, integration and rehabilitation after trauma. The Special Rapporteur is keen to find ways to address those questions”.<sup>652</sup>

### 3. DEVELOPING THE CONTENT OF CULTURAL RIGHTS

In order to delimit these rights correctly, it is essential to analyse other legal instruments that have offered a deeper view of cultural rights, mainly focused on two aspects: *cultural heritage* and *cultural diversity*.

Despite the fact that these instruments are non-binding, they are *soft law*- intended to set the parameters that States' laws must respect in order to be considered respectful of human rights<sup>653</sup>. Indeed, they are documents that indirectly force States to incorporate decisions, recommendations and codes of conduct. They are both mechanisms of general scope as well as instruments that specifically address the two aspects referred to above.

The ones of general scope include the following:

1. The Universal Copyright Convention (UNESCO) Adopted in Geneva on 6 September 1952 and revised in Paris on 24 July 1971.
2. Declaration of Principles of International Cultural Co-operation (UNESCO, 1966)
3. Recommendation on Participation by the People at Large in Cultural Life and their Contribution to It (UNESCO, 1976).

The texts recommend States to guarantee different rights such as the rights regarding access to and participation in cultural life; free access to national and world cultures of all members of society; equality of cultures in their diversity, including the cultures of national minorities and foreign minorities; freedom of expression and communication; a suitable place for cultural education and artistic training in educational and vocational programmes; and finally, the enjoyment of artistic heritage.

As regards **cultural heritage**, there are several instruments that are worth highlighting. Among them are the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention (UNESCO, 1954); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO, 1970); The Convention concerning the Protection of World Cultural and Natural Heritage (UNESCO, 1972)<sup>654</sup>; Convention on the Protection of Underwater World Heritage (UNESCO, 2001); Convention for the Safeguarding of the Intangible Cultural Heritage (UNESCO, 2003).<sup>655</sup>

652. UN Doc. A/HRC/31/59, para 37.

653. In relation to this section, see G. Enrique Arjona Pachón, Guía virtual de las regulaciones internacionales, nacionales y distritales en materia de derechos culturales, Secretaría Distrital de Cultura, Recreación y Deporte. Dirección de Regulación y Control, Bogotá D.C., 2011, pp. 15 ss.

654. Article 4 of the Convention of 1972 determines that each State Party “recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory belongs primarily to that State”.

655. That same article 4 grants the States Parties the functions of identifying and defining the different elements of intangible cultural heritage present in their territory, and of taking the necessary measure to ensure its safekeeping.

Cultural heritage includes “not only tangible heritage composed of sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value, but also intangible heritage made up of traditions, customs and practices, aesthetic and spiritual beliefs, vernacular or other languages, artistic expressions and folklore. Both of these categories should be understood in broad and holistic terms. For example, tangible heritage includes not only buildings and ruins but also scientific collections, archives, manuscripts and libraries, which are critical to preserve all aspects of cultural life, such as education, as well as artistic and scientific knowledge and freedom”.<sup>656</sup>

Furthermore, in matters of *cultural diversity*, there are four main instruments aimed at developing the articles in the UDHR and the two international covenants on rights. One is the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO, 1989); the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Approved by the General Assembly of the United Nations on 18 December 1992); the Universal Declaration on Cultural Diversity (UNESCO, 2001); the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (UNESCO, 2005); and lastly, we must not forget the 2007 Declaration on the Rights of Indigenous Peoples.

To synthesise the degree of development of these texts, we can observe that article 2 of the 1989 Convention of the ILO states that protection of the rights of these peoples and respect for their integrity includes steps for “promoting the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions”. In addition, article 5 of the same Convention determines that, for effective application, “the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals”. To do so, essential mechanisms of communication are established such as consulting the representatives of indigenous populations in regard to any initiative that may affect their cultural traditions or even pose a threat to their survival.

Also noteworthy is the importance of the Declaration of 2001, on account of its positive assessment of cultural diversity, which it calls a positive factor in the development of world heritage. Indeed, Art. 4 affirms that “the defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity”.

The purpose of the 2005 Convention is the protection and promotion of the diversity of cultural expression, to foster interculturality and to underscore the importance of cultural activities, goods and services. In addition, the Convention contains a set of steps to sensitize public powers regarding the value of protecting cultural diversity and stimulating citizen participation, as well as the need for international cooperation in this matter.

Finally, the United Nations Declaration on the Rights of Indigenous Peoples of 2007 reaffirms the advances made in the ILO Convention 169 recognising the right to free determination of these peoples to determine their political condition and pursue their economic, social and cultural development<sup>657</sup>. Furthermore, this Declaration makes an exclusive revision of the mechanism for consulting these peoples so as to obtain the free, prior and informed consent of the members of these groups (see. art. 19).

## 4. NECESSARY CONDITIONS FOR GUARANTEEING CULTURAL RIGHTS

In accordance with General Comment N° 21, full realisation of the right to take part in cultural life requires the following elements:

- a) **Availability:** “availability is the presence of cultural goods and services that are open for everyone to enjoy and benefit from, including libraries, museums,

656. UN Doc. A/HRC/31/59, para 49.

657. Vid. articles 3 and 4 of the Declaration of 2007.

theatres, cinemas and sports stadiums; literature, including folklore, and the arts in all forms; the shared open spaces essential to cultural interaction, such as parks, squares, avenues and streets; nature's gifts, such as seas, lakes, rivers, mountains, forests and nature reserves, including the flora and fauna found there, which give nations their character and biodiversity; intangible cultural goods, such as languages, customs, traditions, beliefs, knowledge and history, as well as values, which make up identity and contribute to the cultural diversity of individuals and communities.<sup>658</sup>

- b) Secondly, *accessibility* consists of “effective and concrete opportunities for individuals and communities to enjoy culture fully, within physical and financial reach for all in both urban and rural areas, without discrimination<sup>659</sup>. It is essential, in this regard, that access for older persons and persons with disabilities, as well as for those who live in poverty, is provided and facilitated. Accessibility also includes the right of everyone to seek, receive and share information on all manifestations of culture in the language of the person's choice, and the access of communities to means of expressions and dissemination.<sup>660</sup>
- c) *Acceptability*: another element necessary for effective access to culture is acceptability, which entails that “the laws, policies, strategies, programmes and measures adopted by the State party for the enjoyment of cultural rights should be formulated and implemented in such a way as to be acceptable to the individuals and communities involved. In this regard, consultations should be held with the individuals and communities concerned in order to ensure that the measures to protect cultural diversity are acceptable to them”.<sup>661</sup>
- d) *Adaptability* refers to “the flexibility and relevance of strategies, policies, programmes and measures adopted by the State party in any area of cultural life, which must be respectful of the cultural diversity of individuals and communities”.<sup>662</sup>
- e) Finally, *appropriateness* refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples<sup>663</sup>. The Committee has in many instances referred to the notion of cultural appropriateness (or cultural acceptability or adequacy) in past general comments, in relation in particular to the rights to food, health, water, housing and education. This express statement is due to the fact that the way in which rights are implemented may also have an impact on cultural life and cultural diversity.<sup>664</sup>

## 5. LEGAL OBLIGATIONS BROUGHT ABOUT BY CULTURAL RIGHTS

For the States Parties, cultural rights entail three different types of obligations as described clearly in General Comment N° 21. They are legal obligations of a general kind, specific obligations, basic obligations, and lastly, a catalogue of international obligations.

658. UN Doc. A/HRC/31/59, para 16.a).

659. Vid. General comment N° 20 (2009).

660. UN Doc. A/HRC/31/59, para 16.b).

661. Ibid., para. 16.c).

662. Ibid., para. 16.d).

663. Fribourg Declaration on cultural rights of 2007, article 1, section e).

664. UN Doc. A/HRC/31/59, para 16.e).

## 5.1 GENERAL LEGAL OBLIGATIONS

Among the general obligations are the following of note:

- a) "The Covenant imposes on States parties the immediate obligation to guarantee that the right set out in article 15, paragraph 1 (a), is exercised without discrimination, to recognize cultural practices and to refrain from interfering in their enjoyment and development."<sup>665</sup>
- b) While the Covenant provides for the "progressive" realization of the rights set out in its provisions and recognizes the problems arising from limited resources, it imposes on States parties the specific and continuing obligation to take deliberate and concrete measures aimed at the full implementation of the right of everyone to take part in cultural life.
- c) As in the case of the other rights set out in the Covenant, regressive measures taken in relation to the right of everyone to take part in cultural life are not permitted. Consequently, if any such measure is taken deliberately, the State party has to prove that it was taken after careful consideration of all alternatives and that the measure in question is justified, bearing in mind the complete set of rights recognized in the Covenant.
- d) The full realization of the right of everyone to take part in cultural life also requires the adoption of steps necessary for the conservation, development and dissemination of science and culture, as well as steps to ensure respect for the freedom indispensable to scientific research and creative activity, in accordance with paragraphs 2 and 3, respectively, of article 15".<sup>666</sup>

## 5.2. SPECIFIC LEGAL OBLIGATIONS<sup>667</sup>

These include three types or levels of obligations on States parties: a) the obligation to respect; b) the obligation to protect; and c) the obligation to fulfil.

- a) **The obligation to respect** includes the adoption of specific measures aimed at achieving respect for the right of everyone, individually or in association with others or within a community or group:
  - To freely choose their own cultural identity, to belong or not to belong to a community, and have their choice respected.
  - To enjoy freedom of opinion, freedom of expression in the language or languages of their choice, and the right to seek, receive and impart information and ideas of all kinds and forms including art forms, regardless of frontiers of any kind.
  - To enjoy the freedom to create, individually, in association with others, or within a community or group, which implies that States parties must abolish censorship of cultural activities in the arts and other forms of expression, if any.
  - To have access to their own cultural and linguistic heritage and to that of others. In particular, States must respect free access by minorities to their own culture, heritage and other forms of expression, as well as the free exercise of their cultural identity and practices.
  - To take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life and on his or her rights under article 15, paragraph 1 (a).

665. See General Comment N° 20 (2009).

666. UN Doc. A/HRC/31/59, paras. 44-47.

667. Ibid. paras. 48-54.

- b) **The obligation to protect:** they are usually interconnected, so the obligation to protect is to be understood as requiring States to take measures to prevent third parties from interfering in the exercise of cultural rights. Noteworthy among these obligations are:
- Respect and protect cultural heritage in all its forms, in times of war and peace, and natural disasters
  - Respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups, in economic development and environmental policies and programmes.
  - Respect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression.
  - Promulgate and enforce legislation to prohibit discrimination based on cultural identity, as well as advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, taking into consideration articles 19 and 20 of the International Covenant on Civil and Political Rights and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.
- c) **The obligation to fulfil** can be subdivided into the obligations to facilitate, promote and provide.
- 1) States parties are under an **obligation to facilitate** the right of everyone to take part in cultural life by taking a wide range of positive measures, including financial measures, that would contribute to the realization of this right, such as:
- a) Adopting policies for the protection and promotion of cultural diversity, and facilitating access to a rich and diversified range of cultural expressions, including through, inter alia, measures aimed at establishing and supporting public institutions and the cultural infrastructure necessary for the implementation of such policies; and measures aimed at enhancing diversity through public broadcasting in regional and minority languages;
  - b) Adopting policies enabling persons belonging to diverse cultural communities to engage freely and without discrimination in their own cultural practices and those of others, and to choose freely their way of life;
  - c) Promoting the exercise of the right of association for cultural and linguistic minorities for the development of their cultural and linguistic rights;
  - d) Granting assistance, financial or other, to artists, public and private organizations, including science academies, cultural associations, trade unions and other individuals and institutions engaged in scientific and creative activities;
  - e) Encouraging scientists, artists and others to take part in international scientific and cultural research activities, such as symposiums, conferences, seminars and workshops;
  - f) Taking appropriate measures or programmes to support minorities or other communities, including migrant communities, in their efforts to preserve their culture;
  - g) Taking appropriate measures to remedy structural forms of discrimination so as to ensure that the underrepresentation of persons from certain communities in public life does not adversely affect their right to take part in cultural life;



- h) Taking appropriate measures to create conditions conducive to a constructive intercultural relationship between individuals and groups based on mutual respect, understanding and tolerance;
  - i) Taking appropriate measures to conduct public campaigns through the media, educational institutions and other available channels, with a view to eliminating any form of prejudice against individuals or communities, based on their cultural identity.
- 2) The **obligation to promote** requires States parties to take effective steps to ensure that there is appropriate education and public awareness concerning the right to take part in cultural life, particularly in rural and deprived urban areas, or in relation to the specific situation of, inter alia, minorities and indigenous peoples. This includes education and awareness-raising on the need to respect cultural heritage and cultural diversity.
- 3) Lastly, the **obligation to fulfil** requires that States parties must provide all that is necessary for fulfilment of the right to take part in cultural life when individuals or communities are unable, for reasons outside their control, to realize this right for themselves with the means at their disposal. This level of obligation includes, for example:
- a) The enactment of appropriate legislation and the establishment of effective mechanisms allowing persons, individually, in association with others, or within a community or group, to participate effectively in decision-making processes, to claim protection of their right to take part in cultural life, and to claim and receive compensation if their rights have been violated;
  - b) Programmes aimed at preserving and restoring cultural heritage;
  - c) The inclusion of cultural education at every level in school curricula, including history, literature, music and the history of other cultures, in consultation with all concerned;
  - d) Guaranteed access for all, without discrimination on grounds of financial or any other status, to museums, libraries, cinemas and theatres and to cultural activities, services and events.

#### 5.4. CORE LEGAL OBLIGATIONS<sup>668</sup>

In its general comment N° 3 (1990), the Committee stressed that States parties have a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights set out in the Covenant. In the Committee's opinion, these minimum levels entail a number of core obligations such as the ones listed below:

- 1) To take legislative and any other necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right of everyone to take part in cultural life;
- 2) To respect the right of everyone to identify or not identify themselves with one or more communities, and the right to change their choice;
- 3) To respect and protect the right of everyone to engage in their own cultural practices, while respecting human rights which entails, in particular, respecting freedom of thought, belief and religion; freedom of opinion and expression; a person's right to use the language of his or her choice; freedom of association and peaceful assembly; and freedom to choose and set up educational establishments;
- 4) To eliminate any barriers or obstacles that inhibit or restrict a person's access to the person's own culture or to other cultures, without discrimination and without consideration for frontiers of any kind;

668. Ibid., para. 55.



- 5) To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.

## 5.5 INTERNATIONAL LEGAL OBLIGATIONS<sup>669</sup>

In its general comment Nº 3 (1990), the Committee draws attention to the obligation of States parties to take steps, individually and through international assistance and cooperation, especially through economic and technical cooperation, with a view to achieving the full realization of the rights recognized in the Covenant. The ones listed below are good examples of it:

- States parties should, through international agreements where appropriate, ensure the realization of the right of everyone to take part in cultural life.
- In negotiations with international financial institutions and in concluding bilateral agreements, States parties should ensure that the enjoyment of the right enshrined in article 15, paragraph 1 a), of the Covenant is not impaired. For example, the strategies, programmes and policies adopted by States parties under structural adjustment programmes should not interfere with their core obligations in relation to the right of everyone, especially the most disadvantaged and marginalized individuals and groups, to take part in cultural life.

## 6. LIMITATIONS TO CULTURAL RIGHTS

As with other rights, cultural rights are not absolute rights; they are subject to limitations, especially those derived from the exercise of other rights protected by international human rights instruments. The above must be taken into account regardless of national peculiarities, various historical, cultural and religious backgrounds, etc. In other words, no one may invoke cultural diversity to infringe upon human rights guaranteed by international law.<sup>670</sup>

Lastly, it must be noted that in cases in which limitations must be imposed on cultural rights, such limitations must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary.<sup>671</sup>

As regards the limitations and their proportionality, the Special Rapporteur recalls that they must pursue a legitimate aim, be compatible with the nature of this right and be strictly necessary for the promotion of general welfare in a democratic society, in accordance with article 4 of the Covenant. Any limitations must therefore be proportionate, meaning that the least restrictive measures must be taken when several types of limitations may be imposed. The Committee also stressed the need to take into consideration existing international human rights standards on limitations that can or cannot be legitimately imposed on rights that are intrinsically linked to the right to take part in cultural life, such as the rights to privacy, to freedom of thought, conscience and religion, to freedom of opinion and expression, to peaceful assembly and to freedom of association”.<sup>672</sup>

In this context, it is perhaps useful to remember what cultural rights are not. They are not tantamount to cultural relativism. They are not an excuse for violations of other human rights. They do not justify discrimination or violence. They are not a licence to impose identities or practices on others or to exclude them from either in violation of international law. They are firmly embedded in the universal human rights framework. Hence, the implementation of human rights must take into consideration respect for cultural rights, even as cultural rights themselves must take into consideration respect for other universal human rights norms”.<sup>673</sup>

669. Ibid., para. 56-59.

670. Ibid., para. 17.

671. Ibid., para. 19.

672. UN Doc. A/HRC/31/59, para 26.

673. Ibid., para. 27.

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 50**

**Subject**

**2.4.20.** Companies and human rights

**Lecturer:**

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## SUMMARY OF THE TOPIC

In addition to meeting their basic objective, which is to create value, corporations should contribute to the general well-being of society. However, social and market pressures have progressively transformed the values and perspectives of corporations, in such a way that executives are increasingly convinced that in order to achieve corporate success and consolidate profits over the long-term their behaviour must be responsible. The aim is to contribute to sustainable development, guiding operations to, on the one hand, promote economic growth and competitiveness, but also on the other hand to guarantee environmental protection and to promote social responsibility.

Our society increasingly demands corporations to not violate human rights, when presenting their products and services.

A corporation that decides to adopt a human rights strategy makes observing human rights an integral component of its corporate operations, even in its relations with other corporations, partners, associates, affiliates, suppliers and government authorities. In addition to applying financial, legal, labour, environmental and other regulations, a corporation committed to human rights must consider aspects that bind it ethically and which are contained in international and regional human rights instruments, expressed in specific instruments of a voluntary nature.

In 1966 the “International Covenant on Civil and Political Rights” and the “International Covenant on Economic, Social and Cultural Rights” were signed, and have been in force since

1977. The legal grounds by which the signatory states undertook to respect, protect and implement human rights and freedoms were based on these covenants.

It was in 1999 at the Davos Economic Forum when the Global Compact was proposed, inviting corporate, civic and labour organisations to join the United Nations in the work of bringing to all human beings the benefits of economic and financial globalisation. The Global Compact invited organisations to commit to and respect its principles, which were based on three convictions: 1) There are enough assets for all human beings to live with dignity 2) We must choose good practices to promote common learning, therefore, we must not be swayed by arguments on ideological or cultural differences 3) Those organisations that embrace the principles will achieve better results, as they inspire better trust.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules comprised in the HRBA Training Program and in alignment with the governing principles of the plan of action for development of the World Program for human rights education approved by the United Nations (General Assembly, 2010, p.8; 2012 pp 26 and 27), at the end of the course the participating teachers must be able to recognise the pedagogical potential of the general and specific competencies described below, to achieve a significant awareness of human rights, as well as to include these competencies in their teaching plans from an integrative approach, aimed at effectively applying the knowledge acquired.

The following general and specific skills are included **in this topic**:

### GENERAL:

- **Teamwork:** To become integrated and actively collaborate in the achievement of common goals with other people, areas and organisations.
- **Adaptation to the environment:** Approach critical situations in the psycho-social area, maintaining a balanced physical and mental state that will enable the person to continue working effectively.
- **Interpersonal communication:** Positively interact with other people by empathetic listening and through the clear and assertive expression of their thoughts and/or feelings, by verbal and non-verbal communication.
- **Appreciate diversity and multiculturalism:** Understand and accept social and cultural diversity as an element of personal and collective enrichment to develop coexistence between people without incurring in discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** Analyse and evaluate the consistency of definitions, especially those statements or ideas that society accepts as true within the immediate context where a person lives.
- **Ethical sense and commitment:** Positively sway towards one's own or someone else's moral good (in other words, towards everything that is or means good, meaningful life, personal fulfilment, sense of justice) and persevere in this moral good.

### SPECIFIC:

1. Properly identify, interpret and apply international, regional and national regulations on human rights applicable to the various cases proposed in the different professional disciplines and fields.
2. Define and identify the rights-holders and duty-bearers regarding each human right in specific situations.

3. Identify the specific obligations of respect, protection and realisation of each human right and the minimum regulatory content required for their realisation and to question their fulfilment in specific situations.
4. Identify, analyse, discuss and evaluate the critical deficiencies and gaps in the capacity and responsibility of claim-holders and duty-holders that hinder the action or the transformation of a situation where human rights are infringed.
5. Compare and evaluate local and national situations, practises, legislation and policies pursuant to the legal instruments on human rights ratified by your country; propose and plan efficient alternatives.
6. Identify and apply the international and regional mechanisms for human rights protection.
7. Search for, select and analyse information from various sources (legal, social, economic, etc.). Properly plan and document this task.

## REQUIRED READINGS AND RESOURCES

Office of the United Nations High Commissioner for Human Rights, [Guiding Principles Business and Human Rights. Implementing the United Nations "Protect, Respect and Remedy" Framework](#), New York and Geneva, 2011 (HR/PUB/11/4)

## OPTIONAL READINGS AND RESOURCES

[Business and Human Rights Center:](#)

[Business and Human Rights Journal:](#)

[Business leader Forum Guide\(2011\), Human Rights Impact Assessment and Management:](#)

[Global Business Initiative on Human Rights:](#)

Office of the United Nations High Commissioner for Human Rights (OHCHR), [Human Rights Indicators. A Guide to Measurement and Implementation](#), New York and Geneva, 2012 (UN Doc. HR/PUB/12/5).

Office of the United Nations High Commissioner for Human Rights, Improving accountability and access to remedy for victims of corporate human rights abuse, Thirty-second session Human Rights Council, 10 May 2016 (UN Doc. A/HRC/32/19).

Office of the United Nations High Commissioner for Human Rights, Explanatory notes on guidance to improve accountability and access to remedy for victims of corporate human rights abuse - Addendum to report 2016 (UN DOC. A/HRC/32/19/Add.1).

Curto Grau, M., *La responsabilidad social interna de las empresas*, en "Cuaderno de la Cátedra La Caixa de Responsabilidad social de la Empresa y Gobierno corporativo", nº 16, septiembre 2012.

Hernández Zubizarreta, J., *Las empresas transnacionales frente a los derechos humanos: historia de una asimetría normativa. De la responsabilidad social corporativa a las redes contrahegemónicas transnacionales*, Hegoa, Bilbao, 2009.

Isea Silva, R., Las empresas y los derechos humanos, en "Cuaderno de la Cátedra La Caixa de Responsabilidad social de la Empresa y Gobierno corporativo", nº 12, septiembre 2011.

Maurel, Olivier, Et Al., *La responsabilité des entreprises en matière de droits de l'homme. II. État des lieux et perspectives d'action publique*, Commission nationale consultative des droits de l'homme, La Documentation française, Paris, 2008.

Maurel, Olivier, Et Al., *La responsabilité des entreprises en matière de droits de l'homme*. I. Nouveaux enjeux, nouveaux rôles, Commission nationale consultative des droits de l'homme, La Documentation française, Paris, 2009.

Ruggie J. And Nelson, T., [Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges](#). May 2015.

Rulli M., Bautista Justo, J., *Guía de derechos humanos para empresas. Proteger, Respetar y Remediar: Todos Ganamos*. 1ª ed., Buenos Aires: Programa Naciones Unidas para el Desarrollo - PNUD; Red Argentina Pacto Global, 2012.

Sherman, J.F. and Pitts, Ch., [Human rights corporate accountability guide: from law to norms to values](#), Mossavar-Rahamani Center for Business and Government at the Harvard Kennedy School, 2008.

## LEARNING OUTCOMES

Having successfully completed the topic, learners should be able to:

1. To know the context in which corporations' operations are developed and analyse to what extent respect for human rights may be affected.
2. To understand the impact of corporate management regarding human rights.
3. To integrate ethical and responsible conduct in corporate management from the human rights perspective.
5. To know what frameworks guide corporations in respecting human rights.

## METHODOLOGY

Methodology	Teaching tools
Explanatory method	Reading of texts and/or viewing of audio-visual material
Case study	Blog /Forum
Group discussions	Blog /Forum

## SYLLABUS

Detailed description of the activities to be performed by students, individually or in groups, specifying the results expected and, if applicable, the evaluation criteria.

### 1) Read the Educational Guide of the topic

By reading this guide, participants will have a general idea of the subject content and the activity to be carried out.

### 2) Read the presentation of the topic

By reading the presentation, students will have a general idea of the main elements guiding corporations on matters of Human Rights.

### 3) Analysis of the United Nations "Guiding Principles on Business and Human Rights"

There will be a general reading of the guide, which will be the basic orientation on matters of [Human Rights observance by corporations](#).

There will be a debate to exchange opinions on how corporations respect Human Rights.

#### 4) Research on corporations and Human Rights

As a complement to the above activity, students will research on the situation of corporations, both national and foreign, that operate in the Maghreb. This research will include documents that recommend principles for action on human rights observance. A report will then be submitted containing the main results of the research (maximum ten pages).

#### 5) Case analysis of a multinational corporation settled in the Maghreb and of a local company from the Maghreb.

Students will research on human rights observance, both by a multinational corporation operating in the Maghreb and by a local company from the Maghreb. A report will be produced, describing how these actions comply with the principles recommended by the United Nations.

#### 6) Drafting of a practical study case

A study case will be drafted that may be used in a lesson and will be the basis for studying and analysing a certain problem.

A case is a short history of a specific situation, pertaining to observance of Human Rights, faced by a corporation, its executives or employees. A case is a short history of a specific situation faced by a corporation, its executives or employees. It must be written objectively and derived from field research, either by compiling information or from real-life facts told by informants. Maximum 6 pages.

In addition to the case, the following must be submitted, maximum four pages:

- a) Subject in which the case study would be used.
- b) Learning outcomes that students are to achieve by working with the case.
- c) Questions that can be posed to the students once they have read the case.
- d) Competencies that the students will develop after studying and analysing the case.

## TIMELINE OF ACTIVITIES

Activity name	Estimated work time	Evaluation criteria
Reading the educational guide of the topic	15 minutes	
Reading the presentation	45 minutes	Self-evaluation
Analysis of the United Nations "Guiding Principles on Business and Human Rights"	4 hours	Group discussion
Research on corporations and Human Rights	10 hours	Portfolio: Document containing search results
Case Analysis of a multinational corporation settled in the Maghreb and of a local company from the Maghreb.	20 hours	Portfolio: descriptive document
Drafting of a practical study case	15 hours	Final project

## EVALUATION SELF-TEST

1. Corporate responsibility to observe human rights means that:
  - a) States should enforce that multinational corporations do not have a negative impact on human rights in their management, by means of sanctions.
  - b) Businesses should avoid causing a negative impact to others' rights and remedy such impact in case it occurs.
  - c) Businesses should act with due diligence in order to avoid violating others' rights in environmental matters.
  - d) When a corporation moves to Brazil, Chile, China, India, Malaysia, Ghana and South Africa, they should assess the impact on human rights.
2. The United Nations Guiding Principles entail:
  - a) An international law obligation for multinational corporations.
  - b) A resolution of ethical actions aimed at industrial sector corporations.
  - c) The adoption of environmental and work-related principles by any corporation.
  - d) A framework on paper that corporations and governments must assume in order to guarantee the observance of human rights.
3. Identifying and evaluating the negative impact that the corporation's activities and corporate relations have -and may have- on human rights is called:
  - a) Identifying and evaluating negative impacts.
  - b) Efficient monitoring of measures.
  - c) Repair mechanisms.
  - d) Due diligence.
4. Corporate responsibility to observe human rights comprises at the least:
  - a) The rights set forth in the International Charter on Human Rights and the principles pertaining to fundamental rights established in the Declaration of the International Labour Organisation on the fundamental principles and rights at work in multinational corporations.
  - b) The rights set forth in the International Charter on Human Rights and the principles pertaining to fundamental rights established in the Declaration of the International Labour Organisation on the fundamental principles and rights at work.
  - c) The rights set forth in the Unesco International Charter and the principles pertaining to fundamental rights established in the Declaration of the International Labour Organisation on the fundamental principles and rights at work.
  - d) All individuals' rights except those rights affecting children.
5. States perform multiple commercial operations with corporations and therefore they must:
  - a) Exercise proper supervision in order to comply with international human rights when signing agreements on corporate matters.
  - b) Hire consultancy services on national and international matters, before implementing an agreement to observe human rights.
  - c) Promote human rights observance by those corporations with which they have commercial operations.
  - d) Make suppliers comply with the policies, laws and regulations on human rights observance.



## EVALUATION SELF-TEST

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Question	Question key
Question 1	b
Question 2	d
Question 3	a
Question 4	b
Question 5	c

## SUBJECT 2.4.:

# 2.4.20. COMPANIES AND HUMAN RIGHTS

### 1. INTRODUCTION

The economic globalisation process has changed the world that we live in, not only due to the consequences of the process, but also, in a global economy, we are faced with increasingly complex challenges, among which is the protection of Human Rights in a model of sustainable development.

The World Map of Risks report, produced annually by Political Risk & Structured Credit Practise by Marsh and the analytics corporation Maplecroft, evaluates thirty-one aspects related to human rights in 197 countries. Some of the most significant conclusions point to the continuous deterioration of worker protection recorded in low-cost producing countries, as well as the repression of freedom of expression by law enforcement in countries with oppressive regimes.

On the other hand, a global survey taken by Ipsos MORI in 24 countries in 2013 revealed that approximately 74% of the respondents valued companies that show responsibility towards their environment, consumers, workers, etc. In addition, 84% of the subjects considered that corporations should promote more active policies to contribute towards the general well-being of society.

Given this, visibility of the negative impact of corporations in general, and multinational corporations in particular, as well as the appearance of critical sectors and the adoption of more responsible consumer models, have fostered the debate on responsibilities that corporations should assume on the present and future impact of their activities.

After decades of studying corporate conduct from an ethical perspective, the step forward is not only defining limits but also not surpassing them. Therefore, when identifying the scope of control, the human rights-based approach was one of the frameworks accepted as a comprehensive approach as it concerns universal rights, regardless of the societies where corporations set up and regardless of the place of residence. The advent of the Business and Human Rights (BHR<sup>674</sup>) studies lays out this aspect of corporate ethics not only as a voluntary act but rather progressing towards regulatory models that guarantee a minimum observance of universally accepted rights.

### 2. CONCEPTUAL FRAMEWORK: ETHICS, HUMAN RIGHTS AND SOCIAL RESPONSIBILITY

BHR is both a multidisciplinary academic field drawing from, inter alia, corporate ethics, law and the social sciences, and a social, economic and political justice movement involving governments and inter-governmental institutions, as well as indigenous peoples, non-governmental organizations, and other civil society actors, with the double aim to seek to hold corporations accountable and to implement joint legal measures and frameworks to protect human rights (Santoro, 2015). In other words, it is about joining efforts by different

674. Known as BHR (Business and Human Rights), it is the discipline that integrates human rights within the corporate field. We will use the terminology Business and Human Rights (BHR)

social agents to promote cultural changes in corporations, based on conducts that respect human rights in present and future terms.

Despite being over half a century old, human rights have been a topic with little impact on Management theory. Florian Wettstein (2012) says that *“until very recently, human rights have played a rather marginal role in and for the conceptualization of CSR”*, but this “discovery” of human rights by legal scholars has put a spin on their interpretation. There are several trends in this change (Santoro, 2015). First, the United Nations Guiding Principles on Business and Human Rights are at the moment driving much of the agenda, for better or worse, from the standpoint of corporate ethics there is a lack of moral foundation as well as failure to hold corporations accountable for their moral duty to act.

A second broad trend in BHR reflected is the increasing importance of law. While many NGOs continue to “name and shame” multinational corporations violating human rights, increasingly legal tactics are being added to the mix (Deva, 2012).

In third place, there is an emergence of standardized reporting obligations. Human rights are already an important component of voluntary CSR reporting, the most prominent of which is the Global Reporting Initiative. In 2011, a new chapter on human rights (incorporating the UNGPs) was added to the OECD’s Guidelines for Multinational Corporations.<sup>675</sup>

A fourth trend reflected is the continuing debate about fundamental principles, even as there is much practical movement and progress, the question is whether corporation have any human rights obligations when some countries, such as China, remain unpunished after constant human rights violations.

Taking the above into consideration, and from a more direct approach, BHR activists and academics defend that the human rights battle is not fought in the boardrooms of large international organisms, but rather in the field, and it is the local activists, indigenous people and local NGOs that are on the front lines of the struggle.

From a more theoretical standpoint, and before analysing other concepts, we question which elements condition individual ethical conduct within the business context. In the literature on corporate ethics we find a large number of works focusing on establishing frameworks for understanding what leads an individual to behave in an ethical or unethical manner. Ethics were added to the decision-making process in 1985, with the model proposed by Ferrell and Gresham. The authors present it as a multistage model (Ferrell et al., 1989) of ethical decision-making behaviour. The variables contemplated in the model can be classified as individual or organisational contingencies. The individual variables are personal characteristics and socialisation, such as education and experience. The organisation characteristics comprise external components such as clients or other corporations; and internal such as evaluations and audits.

So, as stated by Jones (1991), organisational factors may play an important role in ethical conduct in two matters: establishment of the moral intention and engagement in moral behaviour. Thus, social context is highly influential regarding the employee’s ethical intention and, especially, for those people who have a certain power and authority within the company. The theoretical reference to Hannah Arendt’s<sup>676</sup> banality of evil serves to argument how a person with legitimate authority is capable of issuing an order that individuals would be willing to carry out, in spite of it being contrary to the dictates of their conscience.

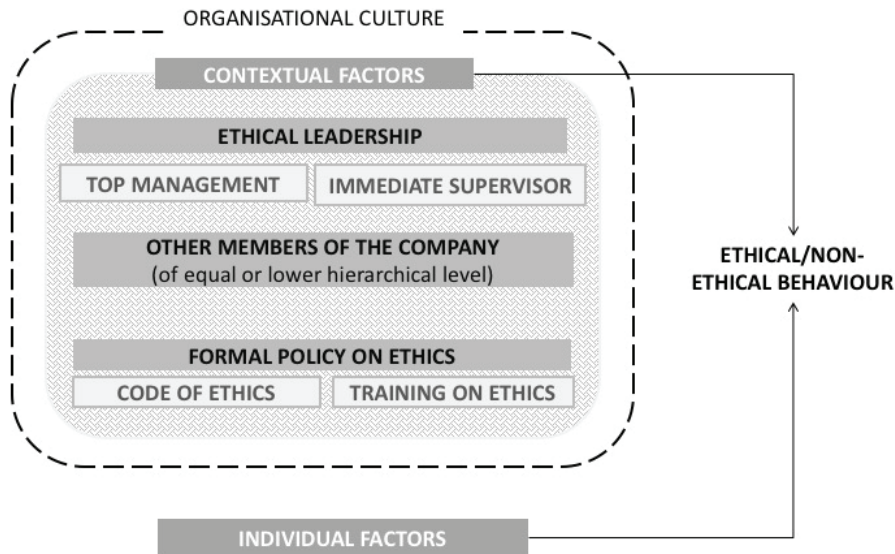
Related to the above, we must consider that CEOs, as individuals with legitimate authority, set the ethical tone for the behaviour of the members of the organisation. But they are not always aware of this influence, so that even inherently honest employees can be pushed to behave inappropriately from an ethical perspective if they perceive their work environment as unjust (Litzky, Eddleston, y Kidder, 2006).

675. Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other corporations. Ruggie, J. (2011). *Guiding Principles on Business and Human Rights: Protect, respect, and remedy: a framework for business and human rights*.

676. A full discussion of this theory can be found in Arendt, H., & Kohn, J. (2007). Responsabilidad y juicio (Nº. 1 Arendt). Paidós.

The first part of the model by Palomino and Amaya (2011) proposes the influence on ethical behaviour by those organisational factors that are highlighted mainly in the literature. On the one hand, the development of an ethical leadership, either by Top Management or by the immediate supervisors, positively contributes to the employees' behavioural morality. On the other hand, the behavioural morality perceived in the other members of the company, of equal or lower hierarchical level, and the implementation of instruments transmitting organisational values are the other factors that the literature understands as significantly influential on ethical behaviour. These factors, as a whole, make up what is called ethical organisational culture, which exercises a determining influence on the employee's ethical/non-ethical behaviour.

**Figure 1.** Model for ethical behaviour in corporations



Source: own production based on Palomino and Amaya (2011).

The old corporate management model based on maximising profits for shareholders with a short-term outlook has proven to be not only harmful to society in general, but also to the shareholders themselves, especially those with lesser negotiating leverage and long-term interests (De la Cuesta González; 2004). In addition to the financial capital and tangible assets, corporations have a social, human and intellectual capital that must be considered and, as opposed to the resources that are consumed by use, in this case the use of the social capital contributes to a higher development of said capacity and a long-term vision is required to obtain the highest return.

Increasingly more, employees, shareholders and clients value these intangible assets that are hard to market and which constitute the company's external reputation and internal culture (De la Cuesta González; 2004). Companies that adopt a social responsibility strategy, incorporating human rights, make respect for these rights a cross-sectional axis of all their operations.

Likewise, we all value the positive influence of ethics in any corporate management (Fontrodona and Ramiz, 2011). This is due mainly to the results observed in various areas, as can be seen in the table below:

**Table 1.** Results of responsible corporate conduct

Results	Definition	Studies
Improved results	Corporations must establish differentiation strategies to achieve competitive advantages and, along these lines, ethics provide added value as an intangible resource.	Orlitzky, Schmid and Rynes, 2003; Simpson and Kohers, 2002; McWilliams and Siegel, 2000; Griffin and Mahon, 1997; Aupperle, Carroll and Hatfield, 1985
Organisational climate	Entails higher motivation and loyalty to the company, attracting or retaining employees	Backhaus et al. 2002; Turban and Greening; 1997
Image and loyalty building	Increased tangible benefits, such as, for example, improved image and higher client loyalty.	Maignan et al, 1999; Brown and Dacin, 1997
Risk	Corporations that have a responsible social behaviour assume lower risk levels. The image of a corporation has a higher impact on market risk than on accounting risk.	Moore, 2001; Orlitzky and Benjamin, 2001; Waddock and Graves, 1997

Source: own production based on De la Cuesta González (2004)

Research has found sufficient evidence that good social and environmental results benefit the accounts, increasing the company's economic value, attracting or retaining employees, or increasing loyalty and improving corporate image (Table 1). A company that has good social results also has access to the volume of socially responsible investment funds, gains in efficiency given its better cost management, and is more competitive in tenders, in countries where there is legislation on the matter (Vilanova, Lozano y Arenas, 2009). Orlitzky, Schmidt and Rynes (2003) presented a quantitative study based on a meta-analysis of 52 studies on the relationship between corporate social/environmental performance and corporate financial performance, yielding a total sampling size of 33,878 observations and they concluded that there is a positive relation between both variables. It also confirms the existence of corporate virtue in the form that a better social behaviour entails better financial results and vice-versa, without being able to determine the temporal priority between both variables.

What does seem evident is that a non-ethical corporate management has shaken the foundations of major corporations such as Enron, Worldcom, Arthur Andersen or Parmalat. And this is precisely what has alarmed not only investors (whether socially responsible or not) but the legislators themselves, who have quickly begun to establish mandatory measures to guarantee the interests of investors and corporation owners and transparency on the markets to be able to make free and knowledgeable decisions (De la Cuesta González; 2004).

### 3. HUMAN RIGHTS AND THE COMPANY: INTERNATIONAL FRAMEWORK AND SPANISH PROPOSAL

The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948. Since then there have been several initiatives by international organisms and institutions, which have expanded and delved further into the nature and scope of application of these rights. The confluence of two broad historical shifts has shaped the contemporary BHR landscape (Santoro, 2015): the need for a global framework to monitor responsibilities and the expansion of the impacts and obligations of corporations.

We first have a lack of an institutional framework for attributing responsibility to member States for human rights violations against their own citizens. Given this impunity, as is the case of apartheid in South Africa, there was a mobilisation of indirect sanctions, by states and corporations, as punishment for the infringing governments. Secondly, mostly in legal scholarship, is the expansion of concerns beyond supply chain labour rights and the extractive industry to a broad array of issues ranging from the environment and access to affordable medicines to economic, cultural and social rights, known as Corporate Social Responsibility.

During this expansion and description process we can see the evolution through the chronology of the agreements and proposals developed in this field. After the Declaration of Human Rights, in 1966 the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were signed, both in force since 1977. The legal grounds by which the signatory states undertook to respect, protect and implement human rights and freedoms were based on these covenants.

In 1976 the Organisation for Economic Cooperation and Development (OECD) published the guidelines for responsible corporations in forty-two countries (revised text in 2011 and with a new chapter focused on human rights). These contain non-binding principles and norms for responsible corporate behaviour within the global context, making up the only code of conduct for responsible corporate behaviour that is extensive and multilaterally agreed. The section on human rights can be viewed in Table 2.

**Table 2.** Guidelines for multinational corporations on matters of human rights

States have the duty to protect human rights. Within the framework of internationally recognised human rights, the international human rights obligations of the countries in which they operate, as well as relevant domestic laws and regulations, enterprises should:

1. Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
2. Within the context of their own activities, avoid causing or contributing to adverse human rights impacts and address such impacts when they occur.
3. Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts.
4. Have a policy commitment to respect human rights.
5. Carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.
6. Provide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts.

Source: OECD (2013).

In 1977 the International Labour Organisation (ILO) presented the tripartite declaration of principles concerning multinational corporations and social policy. It provided direct guidance to corporations on social policy, training and inclusive, responsible and sustainable workplace practices (text amended in 2000 and 2006).

The world thus began to decidedly and jointly take steps towards an agreement that would become a reference. The Davos Economic Forum held in 1999 sped up the process, by proposing a Global Compact that invited business, civic and labour organisations to join the United Nations to encourage throughout the planet the benefits of economic and financial globalisation.

The Global Compact proposes commitment and respect for its principles, which are based on three convictions (Rulli y Justo, 2012):

- 1) There are enough assets to allow all human beings to live with dignity.
- 2) We must choose good practises to promote common learning and, therefore, not argue about ideological or cultural differences.
- 3) The organisations that embrace the principles will achieve better results, as they inspire better trust.

The principles set forth in the Global Compact (Table 3) were well received, but there were also critics due to their non-binding nature, which allowed corporations and organisations to become signatories without undertaking any commitment.

**Table 3.** Principles of the Global Compact

Human rights
<p><b>Principle 1.</b> Businesses should support and respect the protection of internationally proclaimed human rights, within their scope of influence.</p> <p><b>Principle 2.</b> Businesses should make sure that they are not complicit in human rights abuses.</p>
Labour
<p><b>Principle 3.</b> Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining.</p> <p><b>Principle 4.</b> Businesses should uphold the elimination of all forms of forced and compulsory labour.</p> <p><b>Principle 5.</b> Businesses should uphold the effective abolition of child labour.</p> <p><b>Principle 6.</b> Businesses should uphold the elimination of discrimination in respect of employment and occupation.</p>
Environment
<p><b>Principle 7.</b> Businesses should support a precautionary approach to environmental challenges.</p> <p><b>Principle 8.</b> Businesses should undertake initiatives to promote greater environmental responsibility.</p> <p><b>Principle 9.</b> Businesses should encourage the development and diffusion of environmentally friendly technologies.</p>
Anti-corruption
<p><b>Principle 10.</b> Businesses should work against corruption in all its forms, including extortion and bribery.</p>

The document *Guidelines on the Responsibilities of Transnational Corporations and Other Corporations with Regard to Human Rights* was approved in 2003, but it did not have wide acceptance either, as it was rejected by the business world. The aim of this document was to advance in those countries lacking or with few legal regulations on human rights. It also transferred responsibility to the transnational corporations that relocated to those countries and did have specific regulations.

After 2005 the discussion on human rights showed up in all agendas and discussion forums of the international organisations. A step forward was the creation of the position of secretary general for human rights and corporations, at the request of the UN Committee for Human Rights (currently the Human Rights Council). By creating this position, the Committee aimed to reach a universal consensus on the role that States and corporations should play regarding human rights (Ruggie, 2007).

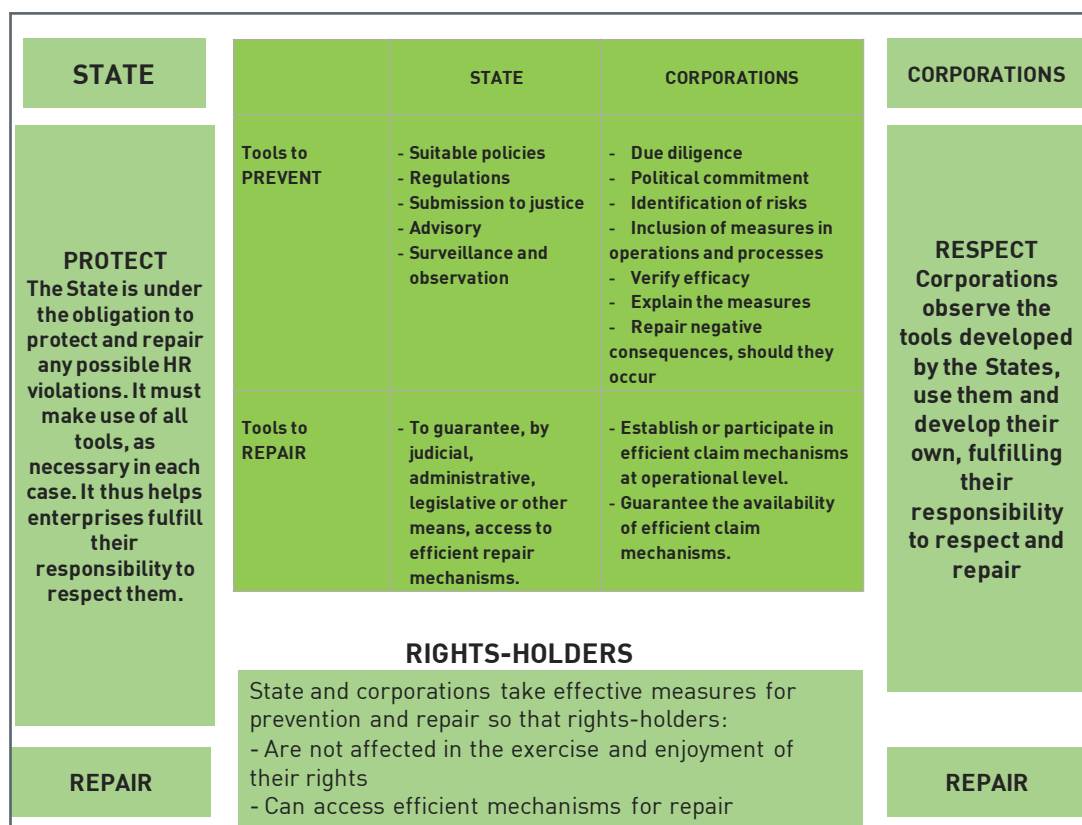
The post as secretary general was filled by John Ruggie until 2011, as his initial mandate was subsequently renewed until 2011. Ruggie focused on researching the information from stakeholders from around the world, and the result was consolidated within the framework of the United Nations. It established the responsibilities of States and corporations, which rested on three pillars:



- 1) States' duty to protect against human rights abuses by third parties.
- 2) Corporations should respect human rights by acting with due diligence to avoid infringing on the rights of others.
- 3) The need for greater access by victims to effective remedy, both judicial and non-judicial.

In 2011, Ruggie himself presented the document *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (see Figure 2). Here, he urged States to take an interest in:

**Figure 2.** Model for Enterprise-State-Human Rights relationship proposed by the United Nations



Source: own production based on Carneiro, Cordero, Cordero, Martín (2013).

- General policy and regulation mechanisms: States should set out clearly the expectation that all corporations conducting business in their territory respect human rights throughout their operations.
- The Business-State relationship: States should take steps to protect against human rights abuses by corporations that are owned or controlled by the State.
- Support corporations' respect for human rights in conflict-affected areas: States should help ensure that corporations are not involved in human rights abuse in the conflict-affected areas.
- Ensure policy coherence: States should ensure that the agreements they sign do not negatively impact human rights.

In recent years, other organisms have also made progress in producing regulatory documents and mechanisms. These three are highlighted, among others:

- In 2006 the International Finance Corporation (IFC) presented the Environmental and Social Performance Standards and Guidance Notes (text updated in 2011). Its purpose was to promote sustainable development by the private sector in developing countries, helping to reduce poverty and to improve the lives of communities.
- In 2010 the International Organization for Standardization (ISO) published the ISO 26000 standard as a guideline for social responsibility, including a full chapter on human rights and introducing the concept of due diligence.
- In June 2014, the Human Rights Council established an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other corporations. This generated a debate among the member States on the need to establish efficient regulations and control mechanisms to force multinational corporations to comply with International Law on human rights.
- In September 2015, the Sustainable Development Goals were approved, 17 goals that define a common future, designed with the participation of all the social agents. The main pillars were human rights, shared responsibilities, the right to development of all countries and balance between countries. The agent representing the business sector is the Global Compact.

Within the Spanish context, a large percentage of Spanish corporations have signed the United Nations Global Compact. This responsibility agreement has notable influence on corporate reputation, but it cannot exempt governments from their obligations. In Spain, the “Congreso de los Diputados” (Lower House) approved on 4 April 2013 an advisory resolution focused on CSR and human rights, encouraging the Government to advance on this matter through various actions.

To fulfil this, in June 2014 the draft of the National Plan on Enterprises and Human Rights by the Spanish Government was sent to the Council of Ministers. This Plan aims to provide a framework for action to develop business objectives, mitigating any risk of human rights violations. This initiative is directly linked to the Spanish CSR Strategy and to the work by the National Council for CSR.

The Government guarantees with this Plan the fulfilment of the commitments undertaken both with the United Nations and with the European Union, as well as binding public and private corporations to respect and promote human rights. It also assumes its obligation to support those corporations that have already included the Guiding Principles in their corporate strategy and to raise awareness for those that have still not done so. In other words, the new regulatory actions increase monitoring of the bad corporate practises performed abroad.

There have been several critiques on this matter. On the one hand, there are sectors inclined towards the State demanding, and not only supporting or raising awareness, that corporations respect human rights and, if necessary, impose sanctions. On the other hand, there are groups that defend human rights respect both nationally and internationally, so that a transnational corporation must respect the law in all continents where it operates, without distinction.

Respect for human rights requires the creation of international institutions that will favour this social justice. Meanwhile, States must exercise their coercive capabilities to meet these demands. If not, implementing an incentives system or good practises will produce scarce results, as it will not prevent breaches of the human rights frameworks.

## 4. IMPLEMENTING HUMAN RIGHTS IN CORPORATE MANAGEMENT

In 1999 UN Secretary-General Kofi Annan invited corporations to ratify the Global Compact, in order to promote respect for human rights, but also for work-related, environmental or judicial rights. This was not enough. More was still required. There were many legal vacuums that prevented proper defence of individuals' rights.

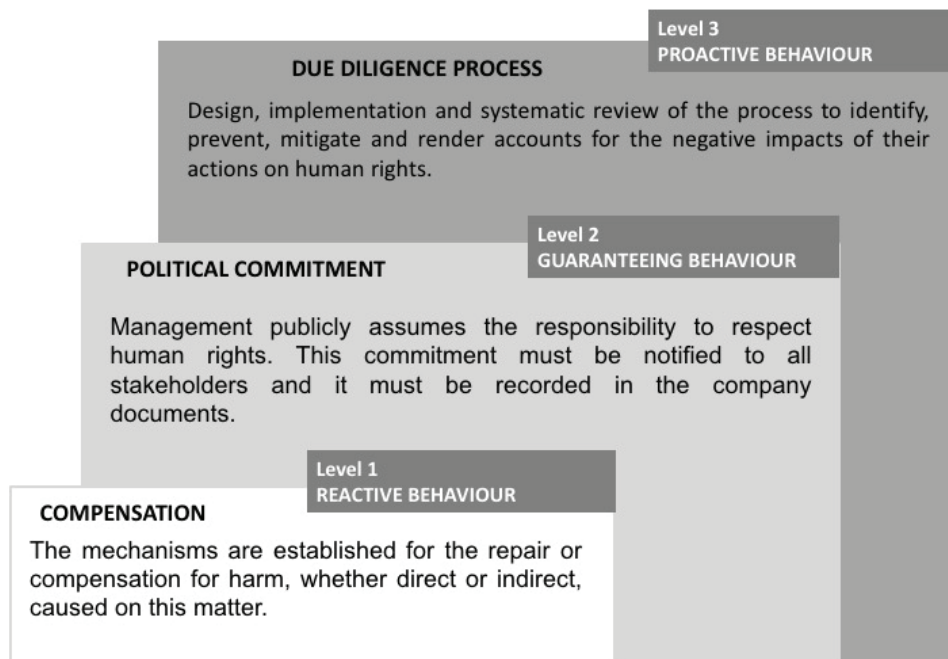
The International Corporate Accountability Roundtable (ICAR) and the European Coalition for Corporate Justice went even further and, in late 2014 submitted an evaluation of the national plans on corporations and human rights and concluded that only the United Kingdom, the Netherlands, Denmark and Finland had implemented them. Other countries had begun the process or declared their intent to begin.

There is conclusive data that confirms the increasing importance of the value of corporate responsible behaviour among consumers. For example, 33% of British investment funds now include the respect for human rights and environment value as a differentiating advantage for attracting investors; and 86% of North American consumers state that they are willing to change brands if they find another one with better human rights compliance.

Society clearly demands from corporations that the products and services they offer do not violate human rights in any part of the process (Zadek, 2006) This guarantee must be respected by all types of corporations, regardless of their size, industry or country; and with autonomy regarding the will of the States or stakeholders.

The UN Guiding Principles recommend that corporations implement certain policies and processes, which should include, at least (Figure 3):

**Figure 3.** Degrees of integration of human rights in corporate management



Source: own production

The right to remedy acquires a two-fold dimension. On the one hand a substantive dimension, consisting of the repair of the damage caused through restitution, compensation,

rehabilitation, satisfaction and guarantees of non-repetition; on the other hand, a procedural dimension, as a means that allows for redress.

The guiding principles establish three types of mechanisms for redress that States should implement:

1. State judicial mechanisms, which reduce legal barriers, practises or other types that prevent effective access to mechanisms for redress.
2. Non-judicial mechanisms, such as administrative and legislative.
3. Non-State mechanisms, which would lead to speed in the redress, lower costs and/or transnational scope.

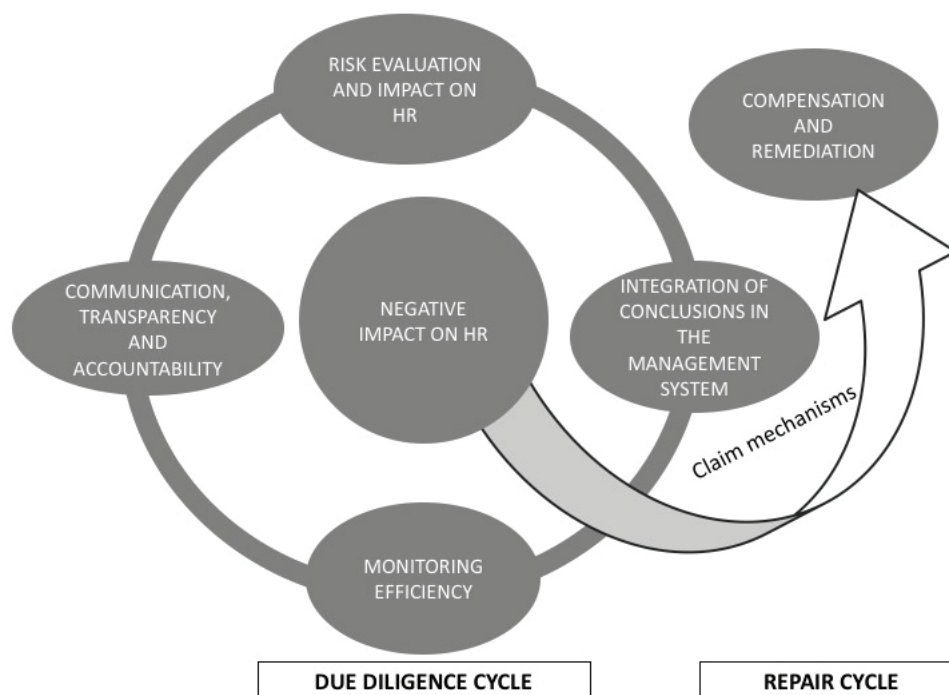
The due diligence process is relevant to this issue, because it is a continuous procedure to design and implement models that include the above stages; it also entails the implementation of a prolonged review, evaluation and learning process.

It requires four stages:

- 1) Consultation processes must be established with the individuals who could potentially be affected by the activity.
- 2) Once the adverse risks and impacts are identified, as well as their perception by any stakeholder, corporations must include the conclusions in the internal functions and processes, and take steps to prevent or, at least, soften the negative impacts detected.
- 3) Perform monitoring to record the efficiency of the steps taken to respect human rights. This may be by means of indicators, audits or any other control instrument.
- 4) Lastly, corporations must notify the stakeholders of the steps taken to remedy the negative effects of their activities.

The due diligence process is continuous, strategic and cross-sectional to all corporate processes. It is important that they publish the actions carried out regarding individuals who have been or may be affected.

**Figure 4.** Due diligence process



Source: own production

Figure 4 shows the importance of corporations outlining risks regarding human rights and management methods, as this is an ongoing process. Based on this profile and the subsequent analysis, they will plan the roadmap depending on their needs and priorities.

Due diligence prevents direct complicity in violation of human rights, profiting or obtaining advantages from this violation and, therefore, lack of reporting.

If in a case of due diligence application, the corporation's actions continue to cause negative effects on human rights, redress mechanisms must be applied, such as the resolution of claims.

## 5. CONCLUSIONS

To talk about human rights is to refer to *rights inherent in all human beings regardless of their nation, location, sex, national or ethnic origin, colour, religion, language or any other status. We all have the same human rights, without any discrimination whatsoever. These rights are interrelated, interdependent and indivisible*".

It is clear that this is a key element, assumed by corporations as a means for social adaptation and localisation in a certain environment. Thus, we must understand that human rights are inherent to people (and therefore inseparable) and their management should not be left to the individual arbitration of corporations. However, the process by which they implement the management systems is subject to evaluation.

We can thus speak of a process that contains the planning, organisation, coordination and control of all actions pertaining to respect for human rights. And this will result in the recognition by all stakeholders. Nonetheless, there is no established section for development or a sole direction to follow. The process must be ongoing and designed by each corporation.

A first superficial impression could give us the wrong idea that all corporations respect fundamental rights, when in truth we know that certain actions have a negative impact on certain people or communities. Unfortunately, the victims are usually vulnerable groups, who have difficulties accessing protection for their rights and justice.

The approval in 2011 of the United Nations Guiding Principles by the UN Human Rights Council brought about a change in corporate policies and strategies regarding respect for human rights. Since then, the relationship between corporations and rights is on the forefront of political and corporate agendas.

Although there is no international judicial organism that regulates corporate framework in respect for human rights, we know of corporations that render accounts in their country of origin on the procedures carried out in other territories. This results from the approval of more regulatory frameworks that favour implementing exemplary procedures internationally and, especially, in those countries where regulations are more limited.

However, there are still pending aspects that we must face in order to continue to progress, in spite of the difficult international situation that we are currently going through:

- A real and coordinated effort by all States. As long as there are no common international regulations that do not reduce competitiveness in some markets regarding others, it is difficult for States (individually) to force their corporations to act in a certain way.
- The need to create an environment that is favourable to collaboration between society and corporations. And this necessary trust may come from third-sector organisations that would act as assisting agents in the decision-making process.
- Actual application of the Guiding Principles framework. Most models of respect for human rights are theoretical and act as references for good practises. Integrating a human rights strategy requires the incorporation of both internal and external experts.
- Awareness raising on human rights issues. We must all understand the relationship between corporations and human rights, the impacts and implications of not respecting them, as well as the procedures that will guarantee the most suitable management.

- Establishment of an institutional framework. Legal references are necessary in order for corporations to be obligated to respect human rights.
- Learn to properly manage the supply chains. Sometimes, due to certain conditions (supplier's size and negotiating power, the degree of outsourcing, etc.) corporations cannot impose their conditions on their suppliers. Other times, they should not be excluded from the supply chain, as it is better to identify the violations of human rights and help to progressively correct them. This helps us understand the magnitude of this challenge in reality.

Statistical data show a high degree of client awareness of the positions of corporations on this matter. They value respect for human rights as a comprehensive behaviour, both in the production process and regarding its environment. It goes beyond the economic factor, such as the prices of products or services, and reaches the human factor, which adds complexity to the challenge of truly respecting human rights.

The crisis that began at the turn of this 21st century has not led to the most favourable economic climate for developing all of the human rights actions that corporations could have undertaken under other circumstances.

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## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 1,30****Subject****2.4.21. Women's rights****Lecturer:**

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## SUMMARY OF THE TOPIC

Equality between women and men and the elimination of all types of discrimination against women are part of the fundamental human rights and of the values of the United Nations. In spite of this, throughout their lives women around the world regularly suffer infringements of their human rights and it is not always a priority to make their rights effective. United Nations has a long history of defending women's rights and in recent decades has made great progress. However, there are still large gaps and the situation of women is constantly evolving, thus there are regularly new manifestations of discrimination against them. Some groups of women face additional forms of discrimination, for example, due to age, ethnic origin, nationality, religion, health condition, civil status, education, disability and socio-economic status.

The topic looks into the main international documents protecting women's rights, both universal and regional. It also covers the key concepts that need to be understood in order to approach and be able to evaluate the legal protection of women's rights. Thus, reference is made to the distinction between the public and private scope. The universality of human rights is also approached, and their validity within a certain local context that has been questioned with relativist arguments that present them as foreign ideas, incompatible with the local culture. Non-discrimination: de iure and de facto, direct and indirect, and equality: formal and substantive. There is insistence that States not only should eliminate obstacles to equality, they also have the obligation to adopt positive measures to guarantee it. This is the difference and the relation between equality and equity. Equity might mean justice, but it may also dilute the demands of rights when disassociated from equality and non-discrimination, and there is a risk that it is defined arbitrarily.

Within the framework of specific women's rights, education and the family context are particularly relevant. Based on these, we look at issues such as: Women's rights in the public and political life, sexual and reproductive health and rights, women's right to a suitable living standard, violence against women, the effects of migration and displacement on the



enjoyment of women's rights, women's rights in situations of conflict and crisis and women's access to justice.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

The following general and specific skills are included **in this topic**:

### GENERAL:

- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.
- To identify and apply international and regional human rights protection mechanisms.
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

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### International standards

- [Universal Declaration of Human Rights](#)
- [International Covenant on Civil and Political Rights](#)
- [International Covenant on Economic, Social and Cultural Rights](#)
- [Vienna Human Rights Declaration and Programme of Action](#)

### Focused on women's rights

- [Convention on the Elimination of All Forms of Discrimination against Women](#)
- [Optional Protocol to the Convention on the Elimination of Discrimination against Women](#)
- [Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages](#)
- [Beijing Declaration and Platform for Action](#)
- [Declaration on the Elimination of Violence against Women](#)

### Others

- [Convention on the Rights of the Child \(CRC\)](#)
- [Optional Protocol to the CRC on the sale of children, child prostitution and child pornography](#)

### Other International standards

- [Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime](#)
- [Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others](#)
- [ILO Convention No. 100 on equal remuneration](#)
- [ILO Convention No.111 on discrimination in employment and occupation](#)
- [ILO Convention 156 on workers with family responsibilities](#)
- [ILO Convention 183 on maternity protection](#)
- [ILO Convention 189 on domestic workers](#)

### Regional Instruments

- [African Charter on Human and Peoples' Rights](#)
- [Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa](#) [Maputo, Mozambique, 11 July 2003]
- [American Convention on Human Rights](#)
- [Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belém Do Pará"](#) (<http://www.oas.org/en/cim/>)
- [Additional Protocol to the American Convention on human rights in the area of economic social and cultural rights "Protocol of San Salvador"](#)
- [Council of Europe Convention on Human Rights](#)

- [The Council of Europe Convention on preventing and combating violence against women and domestic violence](#)
- [ASEAN Declaration on Violence against Women and Violence Against Children](#)
- [ASEAN Declaration Against Trafficking in Persons, especially women and children](#)
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- [UN Women](#)
- [Working Group on the issue of discrimination against women in law and in practice](#)
- [The Committee on the Elimination of Discrimination against Women \(CEDAW\)](#)
- [Commission on the Status of Women \(CSW\)](#)
- [The Office of the Rapporteur on the Rights of Women of the Inter-American Commission on Human Rights \(IACHR\)](#)
- [African Commission on Human and Peoples' Rights: Special Rapporteur on Rights of Women](#)
- [Council of Europe: Action against violence against women and domestic violence](#)

### World Conferences

- [World Conference on Human Rights, Vienna, 14-25 June 1993](#)
- [Vienna + 5](#)
- [International Conference on Population and Development, Cairo, 1994](#)
- [Fourth World Conference on Women \(Beijing, 1995\)](#)
- [Beijing +5](#)
- [Habitat II, Istanbul, 1996](#)
- [World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance \(Durban, 2001\)](#)
- <http://www.un.org/en/durbanreview2009/>

### [Special Rapporteur on violence against women](#)

- [Individual Complaints Model Questionnaire](#)
- [Annual Reports](#)
- [Country Visits](#)
- [Links](#)
- [Documents](#)
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## LEARNING PROCESS RESULTS

By the end of the topic, students should be able to:

- Know which are the main United Nations documents on the subject.
- Pinpoint the State's scope of responsibility regarding prohibition of discrimination against women, not only to prevent and protect against possible infringements of equality, but also to intervene to correct inequalities and achieve equality of results.
- Identify the current main obstacles to the protection of women's rights and equality, and the justifications they hide behind, especially those relating to cultural stereotypes.
- Counter those arguments that are in favour of restricting rights.
- Analyse the status of women's rights in special situations, for example during conflicts.

## METHODOLOGY

We include, as a suggestion, the following:

Methodology	Educational tools
Exposition method	Reading of texts and/or watching of audio-visual material
Problem-solving	Realice la actividad que se describe
Group discussions	Foro y elaboración de documento final

## SCHEDULING OF LEARNING ACTIVITIES

1. Study the topic content.
2. Read the layout of the Rights and their corresponding articles.
3. Choose 4 real-life situations where, in your opinion, there is discrimination.
4. In each of these situations, justify why there is an infringement of women's rights.
5. On what international regulations is your argument based on?
6. Presentation to the group of the various situations chosen by the group members.  
Discussion regarding the frequency of commission of these infringements, as well as on the measures that can be taken to prevent and eliminate them.
7. Produce one single final written document containing the main results of the learning activity, highlighting the proposed ways for prevention and elimination of the infringement of these women's rights.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1 Personal work	40 minutes	
Activity 2 presentation	10 minutes of presentation for each student	
Activity 3 Debate	20 minutes	
Activity 4 Production of the final document	15 minutes approx.	The action proposals will be especially taken into consideration.

# SUBJECT 2.4.:

## 2.4.21. WOMEN'S RIGHTS

### 1. INTRODUCTION<sup>677</sup>

Attaining equality between women and men and eliminating all forms of discrimination against women are fundamental human rights and United Nations values. The United Nations has a long history of addressing women's human rights and much progress has been made. However, gaps remain and women's realities are constantly changing, with new manifestations of discrimination against them regularly emerging. Some groups of women face additional forms of discrimination based on their age, ethnicity, nationality, religion, health status, marital status, education, disability and socioeconomic status, among other grounds.

### 2. PROTECTION OF THE HUMAN RIGHTS OF WOMEN UNDER INTERNATIONAL LAW

Since the founding of the United Nations, equality between men and women has been among the most fundamental guarantees of human rights. Adopted in 1945, the Charter of the United Nations sets out as one of its goals "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women". Furthermore, Article 1 of the Charter stipulates that one of the purposes of the United Nations is to promote respect for human rights and fundamental freedoms "without distinction as to race, sex, language or religion". This prohibition of discrimination based on sex is repeated in its Articles 13 (mandate of the General Assembly) and 55 (promotion of universal human rights).

In 1948, the Universal Declaration of Human Rights was adopted. It, too, proclaimed the equal entitlements of women and men to the rights contained in it, "without distinction of any kind, such as (...) sex, (...)". In drafting the Declaration, there was considerable discussion about the use of the term "all men" rather than a gender-neutral term. The Declaration was eventually adopted using the terms "all human beings" and "everyone" in order to leave no doubt that the Universal Declaration was intended for everyone, men and women alike.

#### 2.1. INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

After the adoption of the Universal Declaration, the Commission on Human Rights began drafting two human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Together with the Universal Declaration, these make up the International Bill of Human Rights. The provisions of the two Covenants, as well as other human rights treaties, are legally binding on the States that ratify or accede to them. Both Covenants use the same wording to prohibit discrimination based on, inter alia, sex (art. 2), as well as to ensure the equal right of men and women to the enjoyment of all rights contained in them (art. 3).

In 1967, United Nations Member States adopted the Declaration of the Elimination of Discrimination against Women, which states that discrimination against women is an offence against human dignity and calls on States to "abolish existing laws, customs, regulations

677. The topic provides a summary of the following publication: The Office of the United Nations High Commissioner for Human Rights (OHCHR), [Women's Rights are Human Rights](#), New York and Geneva, 2014 (HR/PUB/14/2).

and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women". Less than a year later a proposal for a legally binding treaty on women's rights was made. The Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly in 1979. Its preamble explains that, despite the existence of other instruments, women still do not enjoy equal rights with men.

The Convention articulates the nature and meaning of sex-based discrimination, and lays out State obligations to eliminate discrimination and achieve substantive equality. As with all human rights treaties, only States incur obligations through ratification. However, the Convention articulates State obligations to address not only discriminatory laws, but also practices and customs, and discrimination against women by private actors.

With these general principles as an overarching framework, the specific obligations of States to eliminate discrimination against women in political, social, economic and cultural fields are laid out in 16 substantive articles. The Convention covers both civil and political rights (rights to vote, to participate in public life, to acquire, change or retain one's nationality, equality before the law and freedom of movement) and economic, social and cultural rights (rights to education, work, health and financial credit). The Convention also pays specific attention to particular phenomena such as trafficking, to certain groups of women, for instance rural women, and to specific matters where there are special risks to women's full enjoyment of their human rights, for example marriage and the family.

The Convention defines discrimination in its article 1 as "... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".

Such discrimination encompasses any difference in treatment on the grounds of sex which:

- Intentionally or unintentionally disadvantages women;
- Prevents society as a whole from recognizing women's rights in both the private and the public spheres;
- Prevents women from exercising the human rights and fundamental freedoms to which they are entitled.

The Convention also specifies the different ways in which State parties are to eliminate discrimination, such as through appropriate legislation prohibiting discrimination, ensuring the legal protection of women's rights, refraining from discriminatory actions, protecting women against discrimination by any person, organization or enterprise, and modifying or abolishing discriminatory legislation, regulations and penal provisions. The Convention foresees that achieving equality may require positive action on the part of the State to improve the status of women. To accelerate women's actual equality in all spheres of life, States are permitted to use temporary special measures for as long as inequalities continue to exist. The Convention thus reaches beyond the narrow concept of formal equality and aims for equality of opportunity and equality of outcome. Temporary special measures are both lawful and necessary to achieve these goals. In principle, these measures should be removed once equal status has been achieved.

Importantly, the Convention adds new, substantive provisions to the other instruments which also deal with equality and non-discrimination. Article 5 establishes that in addition to recognizing women's legal equality and promoting their de facto equality, States should also strive to eliminate the social, cultural and traditional patterns that perpetuate harmful gender stereotypes and to create an overall framework in society that promotes the realization of women's full rights.

The convention on the Rights of the Child (art. 2) and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 7) also prohibit discrimination based on sex. The Convention on the Rights of Persons with Disabilities (art. 6) recognizes the multiple discrimination that women with disabilities are subjected to, and requires State parties to address this by taking "all appropriate measures to ensure the full



development, advancement and empowerment of women” in the enjoyment of their human rights. In its general recommendation N°. 25 (2000) on gender-related dimensions of racial discrimination, the Committee on the Elimination of Racial Discrimination, also recognized the gender dimensions of racial discrimination and said it would “endeavor in its work to take into account gender factors or issues which may be interlinked with racial discrimination”. The Committee against Torture, which monitors the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, also regularly addresses issues of violence against women and girls.

## 2.2. REGIONAL INSTRUMENTS

Regional human rights treaties, too, include crucial provisions aimed at promoting and protecting women’s human rights.

The African (Banjul) Charter on Human and Peoples’ Rights was adopted in 1981 by the Organization of African Unity. Its article 2 prohibits discrimination on any grounds, including sex, in the enjoyment of the rights guaranteed by the Charter. Article 18 specifically mentions the obligation of African States to “ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions”. The Charter’s Protocol on the Rights of Women in Africa (Maputo Protocol) was adopted in 2003.

The Charter of the Organization of American States includes a non-discrimination provision in its chapter II, article 3 (I), and the American Convention on Human Rights in its article 1. Moreover, in 1994 the Organization adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belém do Pará Convention).

The European Convention on Human Rights and Fundamental Freedoms prohibits discrimination on any grounds, including sex, in the enjoyment of rights contained in the Convention (art. 14). Since 1998 individuals can bring complaints to the European Court of Human Rights based on allegations of violations of the Convention. In 2011 the Council of Europe adopted a new Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).

Regional political organizations, including the Association of Southeast Asian Nations, the South Asian Association for Regional Cooperation, the Economic Community of West African States and the Southern African Development Community, have also adopted protocols and resolutions and issued declarations pertaining to women’s human rights.

## 2.3. GLOBAL COMMITMENTS

Women’s rights have been at the heart of a series of international conferences that have produced significant political commitments to women’s human rights and equality. Starting in 1975, which was also International Women’s Year, Mexico City hosted the World Conference on the International Women’s Year, which resulted in the World Plan of Action and the designation of 1975-1985 as the United Nations Decade for Women. The Fourth World Conference on Women held in Beijing in 1995. In addition, the rights of women belonging to particular groups, such as older women, ethnic minority women or women with disabilities, have been also addressed in various other international policy documents such as the International Plans of Action on Ageing (Vienna, 1982 and Madrid, 2002), the Durban Declaration and Programme of Action (2001) and the World Programme of Action concerning Disabled Persons (1982).

In 1993, the World Conference on Human Rights was held in Vienna. It sought to review the status of the human rights machinery in place at the time. Women’s rights activists mobilized to ensure that women’s human rights were fully on the agenda of the international community under the rallying cry “Women’s Rights are Human Rights”. Particularly around the issue of violence against women, civil society activists organized tribunals to put the spotlight on violations of women’s rights, previously unaddressed because they were considered part of the private sphere, taboo or simply accepted as an inevitable part of women’s lives. The Conference was successful in adopting the Vienna Declaration and Programme of Action, which stated that “the human rights of women and of the girl-child are

an inalienable, integral and indivisible part of universal human rights” (para. 18) and placed particularly heavy emphasis on eliminating all forms of gender-based violence. Importantly, the Programme of Action also called for “the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism” (para. 38).

The International Conference on Population and Development, which was held in 1994, represented a milestone for women’s rights. While the Conference was focused on population issues, the delegates meeting in Cairo agreed that population was not only about demographics but, more importantly, about people. The issues taken up in its Programme of Action are fundamentally related to women’s human rights, including gender equality, the family, reproductive health, birth control and family planning, women’s health, as well as immigration and education of women. Importantly, the Programme of Action is explicitly grounded in human rights and proclaims that “advancing gender equality and equity and the empowerment of women, and the elimination of all kinds of violence against women, and ensuring women’s ability to control their own fertility, are cornerstones of population and development-related programmes”. The Conference was also important for its clear statement of reproductive rights, explaining that these “rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes their right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents”.

### 3. KEY CONCEPTS

Examination of some of the key concepts that are critical to the protection and promotion of women’s human rights.

#### 3.1. THE PUBLIC-PRIVATE DIVIDE

State agents have to respect, protect and fulfil human rights standards and rules established at the international, regional and national levels. Historically, this set of rules and the concomitant scrutiny have focused on actions directly attributable to State agents, based on their commission or acquiescence, such as killings, torture and arbitrary detention. The obligation of States to respect human rights, including women’s rights, referred to the obligation to refrain from doing anything that could violate those rights. Any wrong committed within the private sphere, without any direct intervention by State agents, was not considered a human rights violation. However, since the 1980s and 1990s, the women’s rights movement has increasingly criticized this interpretation of human rights as perpetuating violations of women’s human rights and stemming from male bias.

It is now recognized that the obligations of States to protect and fulfil human rights clearly encompass the duty to protect women from violations committed by third parties, including in the private sphere, and to take positive steps to fulfil their rights.

The Convention on the Elimination of All Forms of Discrimination against Women covers both public and private acts. Its article 2 (e) specifically addresses the obligation of States to address discrimination against women perpetrated by any person, organization or enterprise, and its article 2 (f) concerns the modification and abolition not only of discriminatory laws and regulations, but also of customs and practices. Its article 5 (a) requires States “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.

The Committee on the Elimination of Discrimination against Women’s general recommendation N° 19 (1992) on violence against women spells out that “States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights...”. Similarly, the Human Rights Committee confirmed, in its general comment N° 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, that States have

both negative and positive obligations: to refrain from violating human rights and to protect as well as fulfil human rights, including by protecting rights holders against acts committed by private persons or entities. The due diligence standard serves to determine whether the State has taken effective steps to comply with its human rights obligations.

### 3.2. UNIVERSALITY OF HUMAN RIGHTS

Since the adoption of the Universal Declaration, States have repeatedly emphasized the universality and indivisibility of human rights. Despite these commitments by States, the question of universality has often been raised when States have tried to justify violations of women's rights in the name of culture.

The Special Rapporteur on violence against women in her report on cultural practices within the family that are violent towards women (E/CN.4/2002/83) highlights female genital mutilation, so-called honour killings of women, son preference and witch hunting as examples of customs that have been defended under the pretext of being part of a given culture. Stereotypes and cultural norms which dictate prescriptive roles for women in society also have a negative impact on women's enjoyment of their human rights. For instance, girls' lack of access to education has sometimes been justified on the presumption that, as mothers and wives, they will not enter the workforce and thus do not require education.

The universality of human rights and their validity in a given local context have often been contested through relativist discourses that brand them as foreign ideas incompatible with local culture. However, the Special Rapporteur in the field of cultural rights has warned against discourses that disregard the fact that culture is not static and changes over time.

The Special Rapporteur on violence against women argues that it is possible to negotiate human rights with culture, challenging discriminatory and oppressive aspects of culture while retaining its positive aspects. She concludes that "compromising women's rights is not an option. Therefore, the challenge that confronts us today is to respect and prize our diverse cultures while developing common strategies to resist oppressive practices in the name of culture, and to promote and uphold universal human rights while rejecting encroachments grounded in ethnocentric thinking" (A/HRC/4/34, para. 71).

### 3.3. NON-DISCRIMINATION AND EQUALITY BETWEEN WOMEN AND MEN

Non-discrimination and equality between women and men are central principles of human rights law. Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights prohibit discrimination on the basis of sex and guarantee women and men equality in the enjoyment of the rights covered by the Covenants.

The definition of discrimination in the Convention on the Elimination of All Forms of Discrimination against Women encompasses a variety of possible discriminatory actions (any distinction, exclusion or restriction) having either the express purpose or the actual effect of discriminating against women. The Convention goes further than other human rights treaties in also describing in detail the State obligations and actions to be taken to achieve gender equality in practice. It not only requires equality between women and men, but also prohibits practices that can perpetuate women's inequality. Substantive gender equality and formal gender equality, as well as de facto discrimination and de jure discrimination, are central concepts in the Convention's equality framework.

Discrimination and inequality can occur in different ways. Discrimination can occur through de jure or direct discriminatory provisions, such as when a law or policy restricts, prefers or distinguishes between certain groups, for instance, prohibiting women from driving, owning land or inheriting property. Ensuring formal equality requires eliminating all instances of de jure discrimination.

Laws, policies or programmes can also have detrimental effects on women even though they appear to be gender-neutral. This is known as de facto discrimination. For instance, aid programmes which distribute benefits to the "head of household" may not benefit women equally since men are often considered the head of a household. Similarly, given women's

disproportionate representation among those living in poverty, a government lending scheme to buy land may be inaccessible to women due to its cost –even if the scheme is open to both men and women.

Achieving substantive equality requires taking both historical inequalities and the present conditions of women in a certain context into account. Substantive equality may consequently require positive action by the State to address the specific disadvantages and needs of women. The Convention on the Elimination of All Forms of Discrimination against Women encompasses substantive equality, recognizing that gender-neutral laws can have discriminatory effects and that formal equality is not enough to address them.

The Committee on the Elimination of Discrimination against Women has explained that, to achieve actual equality, the underlying causes of women's inequality must be addressed; it is not enough to guarantee identical treatment with men. In the Committee's view, the Convention requires that women should be given an equal start and also that the State should create an enabling environment for the empowerment of women in order to achieve *equality of results*. Equality of results is the logical consequence of de facto or *substantive equality*, according to the Committee. Through special measures, historical wrongs and inequalities are corrected by temporarily giving advantages to women, and giving them access to opportunities that traditionally have been out of their reach. Achieving substantive equality requires a change in attitudes, in gender roles and stereotyping. (Committee on the Elimination of Discrimination against Women, general recommendation N° 25 (2004) on temporary special measures).

#### Direct and indirect discrimination

**Direct discrimination** occurs when a difference in treatment relies directly and explicitly on distinctions based exclusively on sex and characteristics of men or of women which cannot be justified objectively.

**Indirect discrimination** occurs when a law, policy or programme does not appear to be discriminatory, but has a discriminatory effect when implemented. This can occur, for example, when women are disadvantaged compared to men with respect to the enjoyment of a particular opportunity or benefit due to pre-existing inequalities (...) a gender-neutral law may leave the existing inequality in place, or exacerbate it. (Committee on Economic, Social and Cultural Rights, General Comment N° 16 2205).

In its general comment N° 28 (2000) on the equality of rights between men and women, the Human Rights Committee explains that States parties must not only remove obstacles to equality, but that they also have obligations to adopt positive measures to ensure equality.

### 3.4. EQUALITY AND EQUITY

The Convention on the Elimination of All Forms of Discrimination against Women requires that women be accorded rights equal to those of men and that women be able to enjoy all their rights in practice. While international human rights treaties refer to "equality", in other sectors the term "equity" is often used.

The term "gender equity" has sometimes been used in a way that perpetuates stereotypes about women's role in society, suggesting that women should be treated "fairly" in accordance with the roles that they carry out. This understanding risks perpetuating unequal gender relations and solidifying gender stereotypes that are detrimental to women.

### Equality, equity and gender equity

“Inherent to the principle of **equality between men and women**, is the concept that all human beings, regardless of sex, are free to develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices”. The concept of equality between men and women includes both formal and substantive equality.

“**Equity** is the moral imperative to dismantle unjust differences based on principles of fairness and justice. It requires a focus on the most disadvantaged and the poorest. Many [development organizations] have made equity a central part of their agenda. However, from a human rights perspective, relying on equity has certain risks because its definition is a malleable concept that is not legally binding. While equity may denote justice, it may denote justice, it may dilute rights claims if considered separately from equality and non-discrimination and risks being defined arbitrarily according to political and ideological expedience”.

**Gender equity** “is used in some jurisdictions to refer to fair treatment of women and men, according to their respective needs. This may include equal treatment, or treatment that is different but considered equivalent in terms of rights, benefits, obligations and opportunities”

The Committee on the Elimination of Discrimination against Women has emphasized in its general recommendations and concluding observations on different countries, e.g., in its general recommendation N°. 28 (2010) on the core obligations of States parties under article 2 of the Convention, that “States parties are called upon to use exclusively the concepts of equality of women and men or gender equality and not to use the concept of gender equity”.

### 3.5. GENDER

Gender refers to socially constructed identities, attributes and roles for women and men. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors, and can be changed by culture, society and community.

Gender constructions are dynamic and fluid; they change over time and can be different in different cultures.

### Gender mainstreaming

Gender mainstreaming (or integration) is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes. It is a strategy for making women’s as well as men’s concerns and experiences an integral dimension of the design, implementation of policies in all spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve equality. Gender integration as a strategy and methodology does not in theory mean an emphasis on women’s experiences. However, given the socially constructed differences and relations between males and females in most of the world’s societies, in practice it often results in a specific focus on women because they are mostly adversely affected by existing gender inequalities.

### 3.6. INTERSECTIONALITY AND MULTIPLE FORMS OF DISCRIMINATION

Multi-level and intersecting forms of discrimination have always existed, although they have been more broadly acknowledged only in recent decades. Age, socioeconomic status, racial or ethnic background, religion, national origin, citizenship, status, health, particularly HIV/AIDS and disability, as well as poverty and sexual orientation, are examples of factors that can exacerbate or otherwise influence the nature of discrimination faced by women.

The Special Rapporteur on violence against women has recognized the need to apply an intersectional analysis when researching gender-based violence to demonstrate different categories of discrimination against women. In a recent report on multiple and intersecting forms of violence against women (A/HRC/17/26), the Special Rapporteur argues that the elimination of violence requires holistic measures that address both inter-gender and intra-gender inequality and discrimination. This means that the analysis of gender-based violence should take into account factors that increase women's and girls' vulnerability, such as geographic location, level of education, employment situation, household size, marital relationships, access to political and civic participation, race, skin colour, intellectual and physical abilities, age, language skills and fluency, ethnic identity and sexual orientation.

## 4. THE HUMAN RIGHTS FRAMEWORK IN PRACTICE

This publication does not aim to cover every human rights issue which touches women's lives. Across all of these, education and the family context are particularly pertinent.

The rights to education is recognized in the International Covenant on Economic, Social and Cultural Rights (art. 13), the Convention on the Rights of the Child (art. 28), the Convention on the Elimination of All Forms of Discrimination against Women (art. 10) and the Convention on the Rights of Persons with Disabilities (art. 24). Besides calling for non-discrimination in the enjoyment of the right to education and free universal primary education, the law also requires States to address the particular obstacles that girls and women face in accessing education, such as early marriages, pregnancies, child labour and violence. The needs of girls suffering from multiple forms of discrimination –e.g., with disabilities, from poor or rural areas and belonging to minority communities– should also be considered. Ensuring equality in education requires financial resources as well as continued awareness-raising about the importance of girls' education.

The right to equality between men and women in marriage and family life is also recognized in various human rights instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Nationality of Married Women, and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages. Women nevertheless lag behind men in the enjoyment of rights related to the private sphere. In many countries, women are forced to enter marriage, they do not enjoy the same rights with regard to guardianship and adoption, they are not allowed to transfer their nationality to their children and husbands, and they do not have equal legal capacity. The Convention on the Elimination of All Forms of Discrimination against Women requires State parties to take "all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations" (art. 16). This includes ensuring the same right to enter into marriage with free and full consent and to freely choose a spouse, the same rights and responsibilities during marriage and its dissolution and with respect to their children, and the same personal rights as husband and wife, such as the right to choose a family name, a profession and an occupation. Rights related to access to property and sexual and reproductive health. In its general recommendation N° 21 (1994) on equality in marriage and family relations, the Committee on the Elimination of Discrimination against Women called on States to resolutely discourage any notions of inequality of women and men in the private sphere which are affirmed by law, religion or custom. The Committee also noted that States should prohibit polygamous marriages as they contravene a woman's right to equality with men and can have serious emotional and financial consequences for her and her dependants.



#### 4.1. WOMEN'S RIGHTS IN PUBLIC AND POLITICAL LIFE

Historically, women have been excluded from political life and decision-making processes. Women's campaigns for participation in the public and political arena date back to the nineteenth and twentieth centuries and continue today. In 1945, when the United Nations was established, more than half of the 51 nations that ratified the Charter still did not allow women to vote or gave them only restricted voting rights. According to the Universal Declaration of Human Rights, everyone has the right to take part in the government of his or her country. One of the first tasks of the Commission on the Status of Women was to write the 1952 Convention on the Political Rights of Women. The Convention on the Elimination of All Forms of Discrimination against Women builds on previous conventions and its article 7 concerns women's access to decision-making in political and public life. Article 7 guarantees the right of women to vote in all elections and public referendums and to be eligible for election to all publicly elected bodies, the right to participate in the formulation of government policy and its implementation, to hold public office and perform all public functions at all levels of government, and the right to participate in non-governmental organization (NGOs) or associations concerned with the public and political life of the country. Article 8 requires State parties to "take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations".

Although women's right to vote has been secured in nearly every country of the world, in practice, the right to vote can sometimes be meaningless when other conditions make it virtually impossible or very difficult for both men and women to vote, such as the absence of free and fair elections, violations of freedom of expression, or lack of security, which tends to affect women disproportionately.

Progress still needed to increase women's political participation. The Beijing Platform for Action sets the objective of achieving a balance between women and men in national decision-making positions. However, the goal of equality still eludes many countries. According to the Inter-Parliamentary Union (IPU), women represent on average 21.4 % of all parliamentarians in 187 countries as of 2013.

The United Nations Millennium Development Goals, and especially Goal 3 on gender equality and women's empowerment, entail a commitment by States to promote mechanisms that give women a voice in politics and governance institutions. Reviews of the progress achieved on the Goals show that women are slowly gaining political power, mainly thanks to quotas and special measures. Regional variations remain, however.

#### 4.2. SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS

In 2004, the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health defined sexual health as a state of physical, emotional, mental and social well-being related to sexuality, not merely the absence of disease, dysfunction or infirmity (E/CN.4/2004/49). Women's sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education and the prohibition of discrimination.

The Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women have both clearly indicated that women's right to health includes their sexual and reproductive health. This means that States have obligations to respect, protect and fulfil rights. The Special Rapporteur on the right to health maintains that women are entitled to reproductive health-care services, goods and facilities that are: (a) available in adequate number; (b) accessible physically and economically; (c) accessible without discrimination; and (d) of good quality (A/61/338). Despite these obligations, violations of women's sexual and reproductive health rights are frequent. These take many forms, such as denying access to services that only women require, providing poor-quality services, subjecting access to third-party authorization or performing procedures without the woman's consent, including forced sterilization, forced virginity examinations and forced abortion. Women's sexual and reproductive health rights are also at risk when they are subjected to female genital mutilation and early marriage.



Violations of women's sexual and reproductive health rights are often deeply ingrained in societal values pertaining to women's sexuality. Patriarchal concepts of women's roles within the family mean that women are often valued according to their ability to reproduce. Early marriage and pregnancy or repeated pregnancies spaced too closely together, often as the result of efforts to produce male offspring because of the preference for sons, have a devastating impact on women's health. Women are also often blamed for infertility, and ostracized and subjected to various human rights violations as a result.

Complications during pregnancy and childbirth are a leading cause of death and disability among women of reproductive age in developing countries.

#### 4.3. WOMEN'S RIGHT TO AN ADEQUATE STANDARD OF LIVING

The International Covenant on Economic, Social and Cultural Rights mentions the right to adequate food, clothing and housing, and the continuous improvement of living conditions as part of the right to an adequate standard of living for oneself and one's family (art. 11). Women's rights to land, property, food, water and sanitation, as well as work and social security, are intrinsically linked to the right to attain an adequate standard of living. All these rights are guaranteed under international human rights law, including the right to enjoy these rights on an equal basis with men, without discrimination. Women's access to services, to education and to productive resources is paramount to the realization of the above-mentioned rights.

##### Land, property, housing

Women's rights in, access to and control over land, housing and property are a determining factor in their living conditions especially in rural economies, essential to women and their children's daily survival, economic security and physical safety. Despite the importance of these rights for women and female-headed households, women still disproportionately lack security of tenure. This is often because property is registered in a man's name; the father, husband or brother. In the event of separation, divorce or widowhood, the man or his family often retains rights to the property or the land whereas the woman becomes homeless or will have to share the property with her in-laws.

##### Violence against women and their right to housing

Research has demonstrated the links between domestic violence and women's right to adequate housing. If women's right to adequate housing is not sufficiently protected, women become more vulnerable to violence. Domestic violence has been found to be a leading cause of women's (and often their children's) homelessness, and many women try to avoid homelessness by staying in abusive relationships. Assumptions that a woman has to "leave" an abusive home instead of removing the abusive husband and the lack of support for removing the abusive partner by local authorities, community and/or family laws and regulations, greatly undermine women's right to adequate housing as well as their right to live a life free of violence. Overcrowding, poverty and unemployment also have an impact on the above-mentioned rights and directly affect the level of violence and sexual abuse in homes and communities.

##### Food, water and sanitation

The rights to food, water and sanitation are crucial for women's well-being, dignity and enjoyment of other human rights. Poor female nutrition early in life reduces learning potential and increases reproductive and maternal health risks. This undermines attempts to eliminate gender inequalities throughout a woman's lifespan, having an effect on issues such as women's access to resources. Investing in women's nutrition improves the overall development capacity of a country, considering the role women have in the household with regard to food production, food preparation and childcare.

## The right to decent work and to social security

The right to work and to social security is closely linked to the right to an adequate standard of living and the continuous improvement of living conditions. According to the International Labour Organization (ILO), women experience systemic barriers in almost every aspect of work, ranging from whether they have paid work at all, to the type of work they obtain or are excluded from, the availability of support such as childcare, the level of their pay, their working conditions, their access to higher paying “male” occupations, the insecurity of their jobs, the absence of pension entitlements or benefits, and the lack of time, resources or information necessary to enforce their rights.

### 4.4. VIOLENCE AGAINST WOMEN

The Declaration on the Elimination of Violence against Women defines “violence against women” as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.

Women in all countries, irrespective of status, class, age, caste or religion, experience violence in virtually all spheres of life, whether in the home, at work, on the street, in government institutions, or in times of conflict or crisis.

Country visits by the Special Rapporteur on violence against women have shown that domestic violence remains widespread and affects women of all social strata (A/66/215). Harmful and degrading practices, such as dowry-related violence or so-called honour crimes, also continue, without systematic monitoring, punishment or redress, despite advances in legislation prohibiting them. Other examples of violence in the family are domestic assault (physical, psychological, emotional, financial or sexual violence), marital rape, femicide or gender-motivated killings (domestic murder, ritual killings or killings of women accused of witchcraft, lynching, as well as gender identity -and sexual orientation- related or ethnic or indigenous identity-related killings), child marriage, female genital mutilation and sex-selective abortion. Other forms of violence against women occur in the community. Examples of such violence can be rape/sexual assault, sexual harassment, violence within institutions, violence against women migrant workers, witchcraft or sorcery-related violence or killings (A/66/215 and A/HRC/11/2).

Violence against women is also perpetrated or condoned by the State. This type of violence can include gender-based violence during conflict, disappearance or extrajudicial killings, custodial violence, violence against refugees and internally displaced women, or women from indigenous or minority groups (A/66/215).

The Committee clarifies in its general recommendation N° 19 (1992) that State parties may be held responsible for private acts of violence, if they “fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation”.

### Vulnerability to trafficking related to discrimination and violence against women

According to the Palermo Protocol to Prevent, Suppress and Punish the Trafficking in Persons, Especially Women and Children, trafficking in persons means “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms or coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs” (art. 3.a).

#### 4.5. IMPACT OF MIGRATION AND DISPLACEMENT ON THE ENJOYMENT OF WOMEN'S RIGHTS

Female migration has both positive and negative repercussions. It has great potential and can advance gender equality by empowering migrant women, since many migrate independently nowadays and become the main breadwinners for their families. However, migration can also increase vulnerabilities and put migrant women at risk of discrimination and violence.

Women migrants are often found in segregated and unregulated sector of the economy, such as domestic work, typically unprotected by law.

The Special Rapporteur on the human rights of migrants encouraged States to give particular attention to the situation of migrant women in detention. While women migrant who are travelling with their families and are detained should be kept together in accordance with the principle of family unity, other women migrant detainees should be separated from men, and attended and supervised only by women officers, in order to protect them against sexual violence. The Special Rapporteur also recommended that pregnant women and breastfeeding mothers should not be detained.

#### 4.6. WOMEN'S HUMAN RIGHTS IN CONFLICTS AND CRISES

**Sexual and gender-based violence in conflict and post-conflict settings:** Despite increased global effort to combat gender-based violence in conflict and post-conflict settings, women continue to be subjected to gender-based violence such as rape, sexual slavery, kidnapping or trafficking, forced impregnation or miscarriages, and sexual abuse such as forced nudity, strip searches and other publicly humiliating and violating acts in conflict and post conflict.

The Committee on the Elimination of Discrimination against Women recognized, in its general recommendation N°. 19 (1992), that “wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures”. Both State and non-State actors commit this violence. With the intent of intimidating and humiliating the adversary, rape and sexual violence are also routinely used by all parties to conflict as a tactic of war. Moreover, during conflict, domestic violence and sexual abuse also increase dramatically.

The adoption by the Security Council of resolution 1325 (2000) on women, peace and security also represents a landmark in recognizes the devastating impact of conflict on women and girls, and reaffirms the need to protect their rights during conflict. It focuses on four main areas: prevention, participation, protection, and relief and recovery.

**Women's participation in peace processes and their role as agents of change:** Despite the challenges that the post-conflict vacuum poses for the enjoyment of women's human rights, it can also be viewed as an opportunity for transformation -to change the societal structures and norms in place before the conflict which contributed to the violence against women in the first place.

United Nations Security Council resolution 1889 (2009) reiterates the key role of women in preventing conflict and in peacebuilding, and urges the participation of women in all phases of the peace process, including in conflict resolution and post-conflict planning. It emphasizes the development of strategies that address the needs of women and girls in post-conflict situations, including access to education, health services and justice, and gender equality.

**Women's economic, social and cultural rights and conflict:** Women's particular vulnerability to social and economic deprivation worsens in conflict and post-conflict situations, as conflict exacerbates gender-based discrimination and is accompanied by the loss of livelihoods and the destruction of family and community structures.

Importantly, the Convention on the Elimination of All Forms of Discrimination against Women also guarantees women's access to health care and services (art. 12), training and education (art. 10), and employment opportunities (art. 11). The Convention grants special protection to those who have been displaced or rendered stateless or have become refugees or asylum seekers by providing for women's right to a nationality, movement and choice of domicile (arts. 9 and 15.4).

#### 4.7. WOMEN'S ACCESS TO JUSTICE

Ensuring women's access to justice requires that women enjoy their right to equality before the law, that procedures are in place to guarantee non-discriminatory access to justice and that women have effective access to remedies when their rights have been violated. These rights are provided for under international human rights law, including articles 2.3 (right to a remedy) and 26 (equality before the law) of the International Covenant on Civil and Political Rights.

The Convention on the Elimination of All Forms of Discrimination against Women requires State parties to establish legal protection of the rights of women on an equal basis and to ensure the effective protection of women against any act of discrimination (art. 2 (c)).

Justice systems reflect society's power imbalances, including those that disadvantage women. Both social and institutional barriers inhibit women's access to justice- social barriers include the lack of knowledge of their rights, illiteracy, lack of information and dependence on male relatives for assistance and resources. Institutional barriers such as geographical distance, suitable facilities, infrastructure and language have to be taken into account to ensure access to justice for rural, minority or indigenous women or women with disabilities. In addition to these barriers, women face indifference or gender bias and stereotyping by State authorities such as the police and the judiciary when it comes to investigating crimes committed against them.

An essential aspect of the State obligation to ensure the right to access to justice for women is to train judges and lawyers in women's rights and gender sensitivity, to raise awareness or organize training to inform women and communities of their legal rights and to ensure that the provision of legal aid and the availability of effective protection mechanisms such as shelters and counselling for victims are accessible to all women without discrimination. Ensuring adequate representation of women in the judiciary is also important. The Human Rights Committee specified in its general comment N° 28 (2000) that State parties should provide information on "whether measures are taken to ensure women equal access to legal aid, in particular in family matters".

In some countries, issues related to women's rights have been given little importance and have always been resolved informally, by alternative or local mechanisms. There may be parallel legal orders that are not sanctioned by the State or formally recognized State legal orders that are plural, i.e., combining informal (e.g., traditional, religious or customary) and formal mechanisms of justice. The Special Rapporteur on the independence of judges and lawyers has drawn attention to the problems of informal justice systems in relation to women's rights to access to justice and to an effective remedy. For instance, she has highlighted cases of gender-based violence in which staff of the public prosecution service pressured victims into dropping their charges and resolving the situation through conciliation or mediation (A/HRC/17/30/Add.3).

It is the responsibility of States to ensure that, if informal systems or mechanisms of justice like reconciliation are used, these comply with international human rights standards. In practice, however, research has shown that informal justice mechanisms often discriminate against women, and that women are excluded from the decision-making processes when their cases are being reconciled and decided upon. Research has demonstrated that, in cases of intrafamily violence, reconciliation is inadvisable. The parties to the process do not have equal bargaining positions.

Some good practices that have increased women's access to justice have been so-called one-stop shops. They integrate services and offer women victims everything from health care and counselling to legal aid and collection of evidence in one place, reducing barriers and cost. Specialized and mobile courts are another successful example of how women's access to justice can be improved in practice. These courts can bring justice closer to victims, especially women living in remote areas, to address issues such as gender-based violence effectively. Increased representation of women within the police and the judicial system as well as mainstreaming gender within the judiciary can also improve their responsiveness to gender issues and make it easier for women to seek assistance or report their cases.

Un aspecto esencial de la obligación de los Estados de garantizar el acceso de la mujer a la justicia consiste en impartir a los jueces y abogados formación y sensibilización acerca de los derechos de la mujer, en promover la concienciación y en organizar formación para

informar a las mujeres y las comunidades de sus derechos y en garantizar que la asistencia jurídica y los mecanismos de protección, como refugios y asesoramiento para las víctimas, estén efectivamente a disposición de todas las mujeres, sin discriminación. Es igualmente importante que las mujeres estén representadas en la administración de justicia. El Comité de Derechos Humanos, en su observación general N° 28 (2000), señaló el deber de los Estados Partes de informar de si han “adoptado medidas para que la mujer tenga igual acceso a la asistencia letrada, particularmente en cuestiones de familia”.

En algunos países, no se da importancia a los problemas relativos a los derechos de la mujer, que siempre se han resuelto de manera oficiosa, mediante mecanismos alternativos o locales. Pueden existir ordenamientos jurídicos paralelos reconocidos formalmente o no sancionados por el Estado, de carácter plural, es decir que combinan mecanismos de justicia informales (por ejemplo, tradicionales, religiosos o consuetudinarios) y formales. La Relatora Especial sobre la independencia de los magistrados y abogados llamó la atención sobre los problemas que los sistemas de justicia informales planteaban para el acceso de la mujer a la justicia y a vías de recurso efectivas. Por ejemplo, destacó casos de violencia de género en que agentes de las procuradurías presionaban a las víctimas para que se desistieran de sus denuncias y resolvieran la situación mediante conciliaciones o mediaciones (A/HRC/17/30/Add.3).

Incumbe a los Estados la responsabilidad de garantizar que, en el caso de utilizar sistemas o mecanismos informales de justicia, éstos se ajusten a las normas internacionales de derechos humanos. Sin embargo, en la práctica, los estudios han mostrado que los mecanismos de justicia informales suelen discriminar a las mujeres, a las que se excluye de los procesos de adopción de decisiones cuando sus casos son sometidos a conciliación y resueltos. Se ha comprobado que no es aconsejable utilizar la conciliación en caso de violencia intrafamiliar. Las partes en el proceso no tienen la misma capacidad de negociación.

Una de las buenas prácticas para mejorar el acceso de las mujeres a la justicia es la implantación del sistema conocido como ventanilla única, que integra distintos servicios y proporciona a las víctimas asistencia que abarcan desde la atención médica y el asesoramiento hasta la asistencia jurídica y la recogida de pruebas, todo ello en un mismo lugar, lo que reduce los obstáculos y los gastos. Otro buen ejemplo del modo en que se puede mejorar en la práctica el acceso de las mujeres a la justicia son los tribunales especializados e itinerantes. Estos acercan la justicia a las víctimas, especialmente a las mujeres que viven en zonas apartadas, para tratar eficazmente asuntos como la violencia de género. El aumento de la representación femenina en la policía y el sistema judicial y la integración de la perspectiva de género en la administración de justicia también pueden hacer que estos respondan mejor a las cuestiones de género y que a las mujeres les resulte más fácil solicitar asistencia o denunciar su situación.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 3****Subject****2.4.22.** Children's rights**Lecturer:**Alejandro González-Varas Ibáñez.  
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## SUMMARY OF THE TOPIC

**This** unit looks at the legal regime of the rights of the child. To this end we will refer to the international declarations and conventions on human rights, and more specifically to: The Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966) and, in particular, the Convention on the Rights of the Child (1989) approved, as all the others, by the United Nations. This last Convention was ratified by almost all the countries in the world, with the United States being almost the only exception. The content of this text will be the basis for this lesson, taking into account its high degree of acceptance, the wide range of rights that it recognises, its importance to purposes of establishing children as rights-holders and because, as it is a covenant instead of a declaration, it is legally binding to the parties. Based on this last characteristic, we will pay special attention to the obligations that the States assume by ratifying the covenant, as well as the functions of the Committee on the Rights of the Child as a monitoring entity for the correct application of this agreement. This study is complemented with the corresponding references to several documents approved by Islamic organisations on fundamental rights that refer to the rights of the child. Specifically, the 2005 Covenant on the Rights of the Child in Islam; the 2009 Khartoum Declaration *Towards a Brighter Future for our Children*; and the 2011 Tripoli Declaration *On accelerating early Childhood Development in the Islamic World*.

This content is divided into several sections. The first section analyses the source system. The above-mentioned covenants and declarations are identified. The origins of the international protection of the rights of the child, which dates back to early 20th century, will be explained in detail. We will also look at the Committee on the Rights of the Child.

The nature of the rights of the child will then be explained, which is shared with the other human rights and is therefore based on the dignity of the human person.

The third section is reserved for identification of the holders of these rights. We know that it is children, but we must point out the concept of what a child is. It is also of interest to see that the fact of making them rights-holders has important consequences when determining the legal relations with adults, because the Covenant takes them beyond their traditional



position of protected subject who had to act judicially through third parties representing them.

Section four is aimed at looking into the content of the rights set forth in the Covenant on the Rights of the Child. It is easy to see that they do not contemplate particularly special contents, rather they are common to those acknowledged in other international covenants and declarations. The peculiarity lies in that, apart from making the children the holders themselves, it gathers different types of rights such as civil, political, economic or cultural in one single text.

Below is a look at the obligations undertaken by States when ratifying this covenant, as well as the mechanisms that the Committee has to verify the correct and effective application of the Covenant and the recommendations provided by the States for improvement. Lastly, the limits of these rights, and the current challenges to their application and efficiency verification are approached.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules comprised in the HRBA Training Program and in alignment with the governing principles of the plan of action for development of the World Program for human rights education approved by the United Nations (General Assembly, 2010, p.8; 2012 pp 26 and 27), at the end of the course the participating teachers must be able to recognise the pedagogical potential of the *general and specific competencies* described below, to achieve a significant awareness of human rights, as well as to include these competencies in their teaching plans from an integrative approach, aimed at effectively applying the knowledge acquired.

The following general and specific skills are included **in this topic**:

### GENERAL:

- **Appreciate diversity and multiculturalism:** Understand and accept social and cultural diversity as an element of personal and collective enrichment to develop coexistence between people without incurring in discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** Analyse and evaluate the consistency of definitions, especially those statements or ideas that society accepts as true within the immediate context where a person lives.
- **Ethical sense and commitment:** Positively sway towards one's own or someone else's moral good (in other words, towards everything that is or means good, meaningful life, personal fulfilment, sense of justice) and persevere in this moral good.

### SPECIFIC:

- Properly identify, interpret and apply international, regional and national regulations on human rights applicable to the various cases proposed in the respective professional disciplines and fields.
- Define and differentiate who are the rights-holders and duty-bearers regarding each human right in specific situations.
- Identify the specific obligations of respect, protection and realisation of each human right and the minimum regulatory content required for their realisation and to question their fulfilment in specific situations.
- Identify, analyse, discuss and evaluate the critical deficiencies and deficiencies in the capacity and responsibility of the claim-holders and duty-holders that hinder the action or the transformation of a situation where human rights are infringed.



- Compare and evaluate local and national situations, practises, legislation and policies pursuant to the legal instruments on human rights ratified by your country; propose and plan efficient alternatives.
- Identify and apply the international and regional mechanisms for human rights protection.

## REQUIRED READINGS AND RESOURCES

- [Universal Declaration on Human Rights, 1948](#)
- [Convention on the Rights of the Child, 1989:](#)
- [Covenant on the rights of the child in Islam, adopted at the 32nd Islamic Conference of Foreign Ministers, 28- 30 June 2005.](#)
- [Khartoum Declaration Towards a Brighter Future for Our Children \(2009\)](#), adopted at the Second Islamic Conference of Ministers in Charge of Childhood, 2- 3 February 2009
- [Tripoli Declaration on Accelerating Early Childhood Development in the Islamic World \(2011\)](#), adopted at the Third Islamic Conference of Ministers in Charge of Childhood, 10- 11 February 2011.
- [African Charter on the rights and welfare of the child](#), adopted by the Twenty-sixth Ordinary Session of the Assembly of Heads of State and Government of the OAU, Addis Ababa, Ethiopia - July 1990
- [Council of Europe Convention Protection of Children against Sexual Exploitation and Sexual Abuse](#), Lanzarote, 25.X.2007
- [The Committee on the Rights of the Child \(CRC\)](#)
- [African Committee of Experts on the Rights and Welfare of the Child](#)
- [UNICEF](#)
- [Institut International des droits de l'enfant](#)
- [SRSG on Violence against Children](#)
- European Court of Human Rights: [Factsheet on international child abductions](#) / [Factsheet on the protection of minors](#)

## OPTIONAL READINGS AND RESOURCES

SPECIAL RAPPORTEUR ON THE SALE OF CHILDREN, [Child prostitution and child pornography:](#)

SPECIAL RAPPORTEUR ON FREEDOM OF RELIGION OR BELIEF:

- [Freedom of religion or belief and school education](#), 2011 (UN Doc. A/HRC/16/53).
- [The rights of the child and his or her parents in the area of freedom of religion or belief](#), 2015 (UN Doc. A/70/286).

AOIFE DALY, SANDY RUXTON AND MIEKE SCHUURMAN, [Challenges to children's rights today: what do children think?](#), A desktop study on children's views and priorities to inform the next Council of Europe Strategy for the Rights of the Child, Council of Europe, Strasbourg Cedex, 2016.

COUNCIL OF EUROPE, [Child participation assessment tool. Implementation Guide](#), Strasbourg Cedex, 2016.

COUNCIL OF EUROPE, [Child participation assessment tool](#). Indicators for measuring progress in promoting the right of children and young people under the age of 18 to participate in matters of concern to them, Strasbourg Cedex, 2016.

COUNCIL OF EUROPE, [Children's rights under the European social charter](#)

COUNCIL OF EUROPE, [The best interests of the child –dialogue between theory and practice](#), Council of Europe Publishing, Strasbourg Cedex,

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), [Children's rights and constitutions: Report on the protection of children's rights](#). International standards and domestic constitutions, Adopted by the Venice Commission at its 98th Plenary Session (Venice, 21-22 March 2014).

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS AND COUNCIL OF EUROPE, [Handbook on European law relating to the rights of the child](#), 2015.

INTER-PARLIAMENTARY UNION and UNICEF, Combating Child trafficking, Handbook for parliamentarians, n° 9, 2005.

INTER-PARLIAMENTARY UNION and UNICEF, Eliminating violence against children, Handbook for parliamentarians, N° 13, 2007.

SAVE THE CHILDREN, Getting it Right for Children. A practitioners' guide to child rights programming, London, 2007.

[Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse](#) Adopted by the Interagency Working Group in Luxembourg, 28 January 2016.

THE OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS OF THE UNITED NATIONS, Fact Sheet N°. 10 (Rev.1), [The Rights of the Child](#)

THE OFFICE OF THE HIGH COMMISSIONER ON HUMAN RIGHTS OF THE UNITED NATIONS, [Harmful Traditional Practices Affecting the Health of Women and Children](#), n° 23.

UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Annual Report Technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce and eliminate preventable mortality and morbidity of children under 5 years of age, 2014 (UN Doc. A/HRC/27/31).

UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, Annual Report Impact of the arbitrary deprivation of nationality on the enjoyment of the rights of children concerned, and existing laws and practices on accessibility for children to acquire nationality, inter alia, of the country in which they are born, if they otherwise would be stateless, 2015 (UN Doc. A/HRC/31/29).

## LEARNING OUTCOMES

Upon completion of this topic, the student shall be able to:

1. Identify the rights of the child internationally, the origin of their protection and the mechanisms for defence.
2. Know the obligations undertaken internationally by the States to guarantee the rights of the child, the manner in which they are internationally accountable, and the recommendations provided by international organisations to achieve proper recognition and defence of such rights.
3. Interpret international texts on human rights, draft a critical report on them, present it verbally and discuss it.
4. Understand each country's approach to the rights of the child.

Understand the threats to children in each country.

## METHODOLOGY

Methodology	Teaching tools
Explanatory method	Read the unit and one of the texts proposed in the learning activities
Group discussions	Discussion on the content and observation of some of the general observations of the Committee for Children's Rights as indicated in the learning activities.
Work groups	The learning activity may be carried out in groups

## SYLLABUS

Each group must choose one of the “[General Comments](#)” approved by the Committee on the Rights of the Child. It must draft a report with the main conclusions and any comments that may have derived from them. It will then be presented verbally to the other participants, with whom the members of the group will hold a debate.

## TIMELINE OF ACTIVITIES

Activity name	Estimated work time	Evaluation criteria
Read and study the lesson	2 hours	
Read one of the general comments of the Committee on the Rights of the Child. Summary of the content and production of a report. Verbal presentation and discussion	Reading: 15 minutes Drafting of the report: 20 minutes Verbal presentation: 10 minutes Discussion: 15 minutes	Suitability of the interpretation and originality of ideas: 40% Capability to concisely express the ideas: 20% Clarity of the presentation: 20% Participation in the debate: 20%

## EVALUATION SELF-TEST

1. The 1989 Convention on the Rights of the Child...
  - a) Is a universal declaration of rights
  - b) Is the first convention on the rights of the child that is produced with a universal nature
  - c) Is an international convention that is compulsory for all parties involved
  - d) Its monitoring organism is the Committee on Human Rights

2. The rights of the child are based on:
  - a) Dignity of the human person
  - b) The agreement reached by the international organisations and other groups producing the Convention on the Rights of the Child
  - c) Ratification of the Convention on the Rights of the Child by the States
  - d) That they are the result of the proposal made at the time by the Secretary-General of the United Nations
  
3. Choose the correct answer regarding the Convention on the Rights of the Child
  - a) Contains for the first-time rights that were not contained in other international declarations or covenants on human rights
  - b) Contains a wide range of children's rights, but some may only be implemented depending on the geographical area of the planet where the right-holder lives
  - c) The child may renounce the right if the circumstances so recommend it
  - d) It includes a set of civil, political, social, economic and cultural rights, some of which were already included in other international texts
  
4. Regarding the Committee on the Rights of the Child, choose the correct answer
  - a) States parties must submit reports only when the Committee requests them
  - b) The Committee may not receive individual complaints, only from States, or initiate investigations when it has record that the rights of the child have been infringed, based on the content of the reports submitted by the States
  - c) The Committee interprets children's rights by means of the so-called "concluding observations"
  - d) None of the above is correct
  
5. Choose the correct answer
  - a) The child's opinion will only be taken into account if it coincides with that of his or her parents or legal guardians
  - b) The child has the right to express their opinion and that this opinion be taken into consideration in all matters affecting them pursuant to their age and degree of maturity
  - c) The child is entitled to express his or her opinion, but that of the parents or legal guardians will prevail in any case
  - d) The child is entitled to express his or her opinion when it is requested by the competent authority in each case
  
6. Regarding the correct application of the Convention on the Rights of the Child, choose the correct answer:
  - a) States should evaluate the possibility of creating specific institutions or organisms that will ensure the proper guarantee of these rights
  - b) The Committee on the Rights of the child has established a series of recommendations for States to achieve the correct application of the Convention
  - c) States should ensure that the regulations contained in the Convention can be invoked directly in court
  - d) All of the above are correct

## EVALUATION SELF-TEST

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Question	Question key
Question 1	c
Question 2	a
Question 3	d
Question 4	d
Question 5	b
Question 6	d

## SUBJECT 2.4.:

# 2.4.22. CHILDREN'S RIGHTS

### 1. SOURCES ON CHILDREN'S RIGHTS

There are several international documents, with a universal scope, that refer to children's rights. We must begin by the reference text in this area: *The Universal Declaration of Human Rights* (1948). It refers to children on several occasions. One of these instances is article 25, when it states that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection". Article 26 also acknowledges the right to education and freedom of education, which is closely linked to children, as they are the main recipients of these rights, along with their parents. The relationship between parents and children is particularly close in this right, and is evidenced by article 26.3 of the Declaration when it states that "Parents have a prior right to choose the kind of education that shall be given to their children".

The *International Covenant on Civil and Political Rights* (1966) also specifically refers to children's rights in article 24. It expressly states that:

1. Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State
2. Every child shall be registered immediately after birth and shall have a name.
3. Every child has the right to acquire a nationality.

Articles 14 and 10 also establish rules that shall be applied to minors in case they should be convicted. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

The other universal covenant on fundamental rights –the *International Covenant on Economic, Social and Cultural Rights*, approved by the United Nations in 1966- also expresses concern for the situation of minors regarding their rights. Thus, article 10.3 states that "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law". In turn, article 12 obligates States to commit to the reduction of the stillbirth-rate and of infant mortality and to the healthy development of the child.

The importance of children internationally has led to the United Nations approving a specific covenant to protect their rights. The *Convention on the Rights of the Child* was adopted by the General Assembly by resolution 44/25, of 20 November 1989, in force since 9 September 1990. The wish to approve a text of this kind dates even further back. In fact, the League of Nations sanctioned the 1924 Declaration of Geneva on the Rights of the Child. Subsequently, in 1959, the United Nations Organisation approved a Declaration of the Rights of the Child that included 10 principles. But it was not enough to protect the rights of children, since it was not legally binding. Several treaties on humanitarian rights and human rights had included specific provisions regarding children. However, some States considered that it was necessary to have an extensive declaration on the rights of the child that would be binding by virtue of international law.

The reports on the serious injustices that children were subject to influenced this opinion: a high rate of child mortality, deficient health care and limited opportunities for basic education. There were also shocking reports of children who were objects of abuse or exploitation for prostitution or dangerous jobs, imprisoned children or undergoing other difficult circumstances and children refugees and victims of armed conflicts.

The Convention was drafted within a working group set up by the United Nations' Committee on Human Rights. The basic core of the group comprised government representatives, but also representatives from United Nations specialised organisms and entities, including The Office of the United Nations High Commissioner for Refugees (UNHCR), the International Labour Organisation (ILO), the United Nations Children's Fund (UNICEF) and the World Health Organisation (WHO) as well as several non-government organisations. In 1978, the Polish government submitted a draft resolution on the Convention on the Rights of the Child to the United Nations. After ten years of negotiations with governments from around the world, religious leaders, NGOs and other institutions, the final text of the Convention on the Rights of the Child was approved on the 20 November 1989.

We must bear in mind that this Convention is an international treaty, therefore members States must abide by it. It was ratified by 195 countries, making one of the treaties with the highest number of signatories in history. The main exception was the United States, which still has not ratified it. It also contains obligations and responsibilities of other agents, such as parents, teachers, researchers, health professionals and the children themselves. It contains the rights of the child and it is the first legally binding instrument that recognises boys and girls as social agents and as active holders of their own rights.

In order to guarantee its fulfilment, the UN created a **Committee on the Rights of the Child (CRC)** pursuant to articles 43 to 45 of the Convention. This committee comprises 18 experts on children's rights who are independent and originating from different countries and legal and cultural contexts. They monitor, as will be explained in section 5, that the States parties properly comply with the Convention, as well as with the three additional protocols:

- Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography; Resolution A/RES/54/263 of the 25 May 2000.
- Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict; Resolution A/RES/54/263 of the 25 May 2000.
- Optional Protocol to the Convention on the Rights of the Child on a communications procedure; Resolution A/RES/66/138 of the 27 January 2012. As of its effective date individual communications on the violation of the Convention may be submitted to the Committee. It also enables the Committee to carry out investigations in the event of serious or systematic violations of the Convention.

In addition to the Committee on the Rights of the Child, other organs within the United Nations also protect them. The UNICEF, the UNESCO and the World Health Organisation frequently approve texts pertaining to children's education and health. On the other hand, the *Human Rights Council* approved resolution 7/29 on the rights of children in March 2008. It stated the need to effectively integrate the rights of the child in its work and that of its mechanisms in a regular, systematic and transparent manner, considering specific needs of children. It also decided to "incorporate into its programme of work sufficient time, at a minimum an annual full-day meeting, to discuss different specific subjects on the rights of the child, including the identification of challenges in the realization of the rights of the child, as well as measures and best practices that can be adopted by States and other stakeholders", beginning in 2009.

Since this resolution was adopted, the **Human Rights Council** has held a number of panel discussions on children's rights and has received the request from the United Nations High Commissioner for Human Rights to produce specific studies, reports and summary reports for their consideration. These include the following, which may be viewed [online](#):

- [Study on the protection and promotion of the rights of children working and/or living on the street \(May 2012\)](#)



- [Joint report by OHCHR, UNODC and the SRSG on violence against children on the prevention of violence against children in the juvenile justice system \(June 2012\)](#)
- [Report on the panel on children and the administration of justice \(June 2012\)](#)
- [Report on the rights of juveniles deprived of liberty \(August 2012\)](#)
- [Report on the right of the child to the enjoyment of the highest attainable standard of health \(December 2012\)](#)
- [Report on the panel on right of the child to the highest attainable standard of health \(April 2013\)](#)
- [Report on access to justice for children \(December 2013\)](#)
- [Summary of the panel discussion on the human rights of children of parents sentenced to the death penalty or executed \(December 2013\)](#)
- [Report on preventing and eliminating child, early and forced marriage \(April 2014\)](#)
- [Report on the panel on access to justice for children \(June 2014\)](#)
- [Technical Guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce and eliminate preventable mortality and morbidity of children under 5 years of age \(June 2014\) - A C E F R S](#)
- [Report on birth registration and the right of everyone to recognition everywhere as a person before the law \(June 2014\)](#)
- [Report on the panel discussion on preventing and eliminating child, early and forced marriage - \(July 2014\)](#)
- [Report of the panel discussion on accelerating global efforts to end violence against children \(December 2014\)](#)
- [Towards a better investment in the rights of the child](#)
- [Report on the panel on better investment in the rights of the child \(June 2015\)](#)
- [Report on the panel discussion on realizing the equal enjoyment of the right to education by every girl \(July 2015\)](#)
- [Information and communications technology and child sexual exploitation](#)
- Strengthening existing policies and programmes aimed at universal birth registration and vital statistics development
- [Application of the technical guidance on the application of a human rights based approach to the implementation of policies and programmes to reduce and eliminate preventable mortality and morbidity of children under five years of age](#)
- [Follow up report on investment in the rights of the child](#)

The **Special Rapporteur on freedom of religion or beliefs** has also produced reports affecting them. This is the case of the report on *The rights of the child and their parents in the area of freedom of religion or beliefs*, in 2015. As well as the report on *freedom of religion or belief and school education* from 2011.

Lastly, we must point out that the UN has placed special importance on the sexual exploitation and abuse of children. In 2000 a voluntary protocol was approved, specific to the Covenant on the Rights of the Child. However, prior to this the figure of the **Special Rapporteur on the sale of children, child prostitution and child pornography** was created. By 1990 international awareness on these issues had reached such a point that the UN Human Rights Committee decided to appoint this Special Rapporteur by resolution 1990/68. He was given the mission to investigate cases of exploitation of children around the world and to submit to the General Assembly and to the Human Rights Committee reports containing recommendations for protecting the rights of the children involved. These recommendations were mainly aimed at governments, UN organisms and non-government organisations.

In its resolution 7/13, the Human Rights Committee commissioned the Special Rapporteur, particularly by visiting the countries and through continuous and constructive dialogue with Governments, with the following tasks, among others:

- The analysis of the root causes of sale of children, child prostitution and child pornography.
- To identify new patterns of sale of children, child prostitution and child pornography.
- To identify, exchange and promote best practices on measures to combat the sale of children, child prostitution and child pornography.
- To continue his/her efforts to promote comprehensive strategies and measures on the prevention of sale of children, child prostitution and child pornography.
- To make recommendations on the promotion and protection of human rights of children, actual or potential victims of sale, prostitution and pornography, as well as on the aspects related to the rehabilitation of child victims of sexual exploitation.

Lastly, it is interesting to bear in mind that there are declarations and covenants on the rights of the child within the regional scope of Islam. These texts are particularly important:

- Covenant on the Rights of the Child in Islam, adopted by the Islamic Conference Organisation (ICO) in June 2005.
- Khartoum Declaration *Towards a Brighter Future for our Children*, adopted at the Second Islamic Conference of Ministers in Charge of Childhood, February 2009.
- Tripoli Declaration *On accelerating early Childhood Development in the Islamic World*, adopted at the Second Islamic Conference of Ministers in Charge of Childhood, February 2011.

## 2. NATURE OF THE RIGHTS OF THE CHILD

As any other rights contained in human rights declarations or covenants, it is understood that those guaranteed in the texts stated so far stem from human nature itself and, specifically individual dignity. Neither the Universal Declaration of Human Rights, the 1966 Covenants nor the Convention on the Rights of the Child explain the nature of children's rights. Of course, this is not their purpose, as it is not the purpose of any legal text. However, it is understood that they are recognised because it is the best way to respect the dignity of all individuals, especially if they are particularly vulnerable, as is the case of children. Thus, the Preamble of the Covenant on the Rights of the Child states that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

This explains the universality of these rights. This means that the rights-holders are all children of the world, regardless of their race, colour, religion, origin or any other factor. This also leads to the fact that these rights cannot be dispensed with, in other words, no one can renounce their rights. They may not always have to be exercised, but this does not mean that a right that the child will always hold is renounced. For this reason, it is also guaranteed that, in the event of harm, the infringed legal asset may be redressed through the protection mechanisms established in the corresponding regulations. They are, in turn, indivisible rights: all children are equal holders of all those rights as a whole, and there is no hierarchy within those rights.

As for the Islamic declarations and covenants on the rights of the child, they do not provide the basis for the nature of these rights either. Reference is made to the important historical and civilising function of the *umma* and its contribution to the respect for human rights. They also state that respect for fundamental rights and public freedoms is essential within Islam, as is respect for children and protection of the family.

### 3. RIGHTS-HOLDERS

We have already said that the rights of the child, insofar as they are human rights derived from an individual's intrinsic dignity, are universal rights. Therefore, all children in the world are rights-holders. Another question is what we understand a child to be. The 1989 Covenant on the Rights of the Child provides an answer. Its first article states that for application purposes, a child means every human being below the age of eighteen unless under the law applicable to the child, majority is attained earlier. Article 2.1 continues by stating that each child will hold these rights, irrespective of the children's or their parents' or legal guardians' race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. As for the Covenant on the Rights of the Child in Islam, it identifies children as human beings who, according to the law applicable to them, have not attained maturity.

The fact that children are rights-bearers is an important change in the legal concept of a child regarding the past: the child goes from being considered as an object of protection, who can only act legally through their parents or guardians, to become a true rights-holder. This is precisely one of the keys of the Covenant and of other similar regulations. Indeed, the aim is not to recognise new rights (in fact, as we will see below, the rights object of guarantee are the usual ones contained in the human rights declarations and covenants), but to highlight that the rights-holder is precisely the child, and to declare that it is the State who has to guarantee them on behalf of the child, ensure that their opinion is heard, and verify that all actions are always in their best interest. In short, the quality of the child as the subject of rights is pointed out, which leads to a new legal relationship between minors and adults.

### 4. REGULATORY CONTENT

The Convention on the Rights of the Child has the particularity that it contains, in one single text, rights of a civil, political, social, economic and cultural nature. It comprises 54 articles and three additional protocols. These contain rights that had already been recognised previously in other covenants and declarations, as we saw in section 1. In fact, we can see that some of the articles of this Covenant contain, sometimes even literally, precepts that had already appeared in the Universal Declaration of Human rights or in the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights.

The Convention on the Rights of the Child expressly recognises these rights for *all* children:

- The inherent right to life (article 6).
- The right from birth to a name and to a nationality (article 7).
- The best interests of the child shall be a primary consideration (article 3).
- The right to express their opinion and that this opinion be taken into consideration in all matters affecting them (article 12).
- The right to not be separated from his or her parents, except when such separation is necessary for the best interests of the child (article 9).
- The right to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health and, in particular primary health care, preventive care and reduction of infant and child mortality (article 24). The right to health includes protection of children from the illicit use of narcotic drugs and psychotropic substances and prevention of the use of children in the illicit production and trafficking of such substances (article 33).
- Every child has the right to benefit from Social Security (article 26).
- The child is entitled to protection from all forms of sexual exploitation and sexual abuse, including prostitution and exploitative use of children in pornographic performances (article 34).

- States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country for the purpose of family reunification or to maintain personal relations between them (article 10).
- The right to seek, receive and impart information and ideas of all kinds, provided that it does not harm the rights of others (article 13).
- The right to freedom of thought, conscience and religion under the direction of the parents, subject only to such limitations as are prescribed by law (article 14).
- The right to freedom of association and to freedom of peaceful assembly, provided that it does not infringe on the rights of others (article 15).
- The right to not be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation (article 16).
- The right to education. If applicable, school discipline shall be administered in a manner consistent with the child's human dignity (article 28).
- A child belonging to a minority or who is indigenous shall not be denied the right to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language (article 30).
- The right to rest and leisure, to engage in play and to participate freely in cultural life and the arts (article 31).
- No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and neither capital punishment nor life imprisonment without possibility of release, nor to deprivation of his or her liberty unlawfully or arbitrarily. Every child deprived of liberty shall be treated with humanity, separated from adults, shall have the right to maintain contact with his or her family and to prompt access to legal and other appropriate assistance (article 37).
- The right to a fair trial and legal assistance if convicted (article 40).

Within the Islamic context, we find that the set of rights contained in the covenants and declarations mentioned until now do not differ substantially from the universal texts. However, they must be interpreted from the standpoint of the *Sharia*. Thus, among other purposes, the rights recognised are to ensure the succession of generations of Muslim children who believe in their Creator, adhere to their faith, are loyal to their country, and who have a sense of belonging to the Islamic civilisation, as set forth in articles 2.3 and 4 of the Covenant on the rights of the Child in Islam and section 2 of the Khartoum Declaration.

## 5. OBLIGATIONS OF THE PARTIES

As for the rights contained in the international declarations of rights, such as the Universal Declaration of Human rights, the States Parties are not under the obligation to fulfil them. However, in the case of conventions or covenants, as they are international treaties, there is a legal duty to fulfil their content. This is why these documents usually contain control, and even sanctioning mechanisms, to verify that States comply with their commitments. In the case of the 1989 Convention on the Rights of the Child, the Committee on the Rights of the Child, as referred to in section one, assumes this role. Regionally, article 24 of the Convention on the Rights of the Child in Islam establishes the creation of the Islamic Committee on the Rights of the Child in order to verify the degree of compliance with the Convention.

Returning to the United Nations, we must point out that all States parties must submit regular reports to the Committee on how the rights are being implemented. States must submit an initial report two years after acceding to the Convention and then periodic reports every five years. The Committee examines each report and addresses its concerns and recommendations to the State party in the form of "concluding observations". The Committee also reviews the initial reports which must be submitted by States who have acceded to the first two Optional Protocols to the Convention.

The Committee also publishes its interpretation of the content of human rights provisions, known as general comments on thematic issues and organizes days of general discussion. This is valuable information that enables the States to correctly apply the Convention. Along these lines, it is of interest to note that the Committee established in its general comment no 5, of 3 October 2003, that the States are under the obligation to observe the following **general principles**:

- States parties take action to ensure the realization of all rights in the Convention (see section 4) and to guarantee their application for all children in their jurisdiction, with no distinctions.
- In all actions concerning children, the best interests of the child shall be a primary consideration.
- The child's inherent right to life and the obligation of the States parties to ensure to the maximum extent possible the survival and development of the child.
- States Parties shall assure to the child the right to express his or her views freely in all matters affecting the child, the views of the child being given due weight.

In addition to these principles, the Convention issues certain specific mandates for States, such as:

- States shall undertake all appropriate measures for the implementation of the rights recognized in the present Convention (article 4). The best interests of the child shall be a primary consideration (article 3).
- States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law (article 12).
- States Parties shall respect the responsibilities and rights of parents or the members of the extended family to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance (article 5). States Parties shall render appropriate assistance in the performance of their child-rearing responsibilities (article 18). However, when his or her parents or other individuals legally responsible for him or her are not able to provide suitable protection and care, the State must do so (articles 3, 20 and 27).
- States shall take all appropriate measures to protect the child from all forms of maltreatment while in the care of parent(s), legal guardian(s) or any other person who has the care of the child, and establish preventive and treatment measures (article 19)
- States shall protect the child from performing any work that is likely to be harmful to the child's health, education or development; establish minimum age for admission to employment and regulate its conditions (article 32).
- States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and that all necessary guarantees are in place to ensure that the adoption is permissible, as well as authorized by competent authorities (article 21).
- States Parties shall ensure the survival and development of the child (article 6). This aim is achieved by public authorities guaranteeing children access to health care services and preventing traditional practises that are detrimental to their health (article 24). It is interesting to note that it also expressly states that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation

- in the community (article 23). If a child has been placed for the purposes of care, protection or treatment of his or her physical or mental health, a periodic review of all circumstances relevant to his or her placement will be guaranteed (article 25).
- States shall protect and, if necessary, re-establish the child's identity, if he or she had been deprived of all or part of it (name, nationality and family ties) (article 8).
  - States Parties shall take measures to combat the illicit transfer and non-return of children abroad, whether by their father or mother or by a third party (article 11).
  - Special protection will be afforded to a child who is seeking refugee status or who is considered a refugee, and States shall provide co-operation with competent organisations to protect and assist such a child (article 22).
  - States shall encourage the mass media to disseminate information and material aimed at the promotion of his or her moral well-being, knowledge, understanding between people and that respects the child's culture. Political powers shall protect the child from information and material injurious to his or her well-being (article 17).
  - States Parties agree that education shall be directed to the development of the child's personality and talents, in preparation of the child for an active adult life, in the spirit of respect for elemental human rights and to develop respect for his or her own cultural and national values, as well as for civilisations other than their own (article 29).
  - States Parties shall take all appropriate measures to prevent the abduction of, the sale of or traffic in children (article 35).
  - States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts (article 39).
  - States Parties undertake to make the principles and provisions of the Convention widely known to adults and children alike (article 42).

After reading these obligations for the States, we might ask what mechanisms must they apply to effectively fulfil them. We again find a series of proposals in the general comment no. 5, of 2003, by the Committee on the Rights of the Child. In summary, they would be:

- Review of their legislation and, consequently, repeal any regulations that are not compatible with the content of the convention, and approval of the provisions leading to its fulfilment.
- States must guarantee that these norms are effectively applied. Specifically, they must ensure that the Convention provisions can be directly invoked before the courts, that national authorities apply them, and that the Convention shall prevail in the event of conflict with domestic legislation or common practices.
- Creation of specific organisms or institutions aimed at guaranteeing the rights of the child. These may be, for example a "Children's ombudsman", or the creation of specific children's sections within existing institutions on matters of defence of fundamental rights.
- Improve the coordination of policies on children and of the organisms in charge of applying them.
- Compilation of data on the situation of children within their borders, and duly assess them in order to produce strategic programmes.
- Education, training and awareness-raising on the importance of the rights of the child. Indeed, better awareness and more knowledge on the Convention by the general population would be a good basis for its application, as stated in its article 42, and as summarised above.

As for the Islamic context, there are also a series of obligations for the States which, in any case and as stated in section 4, must be based on respect for the *Sharia*, on the highest interest of the child and on continuity in History of the *umma*. According to article 4 of the Covenant on the Rights of the Child in Islam, States shall observe the contents of this Covenant and take the necessary steps to enforce it in accordance with their domestic regulations. They must also respect the responsibilities and duties of parents or other persons who are legally responsible for the child as required by the child's interest. They must also suppress any actions based on customs, traditions or practices that are in conflict with the rights and duties stipulated in the Covenant. The Khartoum and Tripoli Declarations also call on States to ensure the implementation of the provisions of the OIC, in addition to encouraging them to achieve specific objectives such as children's health, education, protection and other objectives set forth in each declaration.

## 6. LIMITS

The limits to the rights of the child are common to the whole of human rights. These are the rights of others, and public order. The content of the latter expression is hard to pinpoint, and it will depend on what is understood as such at any given time or place. In any case, it is deemed positive that the limits of the rights are established by law, that they do not restrict the exercise of the right beyond what is necessary. In other words, that they are proportional to the good that is intended to be safeguarded by such limitation and, in the event of doubt, those limits shall be interpreted in a restrictive manner in order to allow the rights-holder the highest capability for action.

## 7. CURRENT CHALLENGES

One of the main challenges is the difficulty in guaranteeing that States duly meet their obligations and, consequently that the rights of children are suitably respected. On the one hand, it is not easy to monitor the specific legislation in each country, or if such legislation is properly applied, or if training activities are being efficiently implemented. On the other hand, the international monitoring organisms (the committees for each treaty or covenant) do not have enough coercion capacity to persuade each State of the need to comply with such texts. Instead of actual sanctions, we have reports in place that reveal the situation of each country. States may be placed in a compromising situation, but it is difficult to implement effective sanctions. Lastly, the Convention on the Rights of the Child was signed by almost all countries on the planet. Its Committee only comprises 18 experts, which means that it is a workload quite difficult to bear.



## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60****Subject****2.4.23.** Rights of persons with disabilities**Lecturer:**

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## SUMMARY OF THE TOPIC

Disability is a concept that evolves and results from the interaction between persons with disabilities and the barriers associated with behaviour and the environment that hinder their full and effective participation in society in conditions of equality with others. Furthermore, any discrimination towards a person on the basis of a disability is a violation of the dignity and worth inherent in human beings.

Therefore, the rights of persons with disabilities and their protection by virtue of the International Convention of Human Rights are the same as for any other person and they should have the opportunity to actively participate in decision-making on policies including those that directly affect them, just as the rest of the population. The United Nations Convention on the rights of persons with disabilities was adopted in December 2006. It is the normative instrument regulating these persons' rights, their nature, their limits and the measures for making their benefit real and effective.

## GENERAL AND SPECIFIC SKILLS

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course, participating teachers shall be able to recognise the educational potential of the general and specific skills described below in order to achieve significant learning in human rights. Moreover, these skills shall be included within teaching plans through a unifying approach and directed towards the effective implementation of the knowledge acquired.

The following general and specific skills are included in this topic:

## GENERAL:

- **Adaptation to the environment:** Face critical situations in the psychosocial environment, thus maintaining a state of well-being as well as a physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** Positively relate to other people through empathetic listening and a clear and assertive expression of what a person thinks and/or feels, by verbal and non-verbal means.
- **Critical thinking:** Analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts to be true in the immediate context where a person's life takes place.
- **Ethical sense and commitment:** Be positively inclined towards the moral good of oneself or others (i.e., everything that is or means good, the experience of meaning, personal fulfilment, sense of justice) and persevere in this said moral good.

## SPECIFIC:

- Based on a specific situation within the context of the university, plan the educational activity with a skill-based approach focused on learning about the rights of persons with disabilities.
- Select and prepare valid measurement tools to check the level of fulfilment of the expected human rights learning results, acknowledging their advantages and disadvantages for an effective use during the assessment process.
- Plan with accuracy and precision the assessment of the skill-based approach to human rights learning, paying special attention to validity and reliability criteria during the process.
- Properly identify, interpret and implement international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional fields.
- Precisely define and distinguish who the holders of the rights are and who the holders of the obligations are in relation to each human right in a specific situation
- Identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment; and question their fulfilment in a specific situation.
- Design and direct a service-learning project linked to the support or promotion of human rights in relation to the field of knowledge.
- Appraise, evaluate and reflect on the processes and results: (a) of the action carried out in contact with reality and (b) of the students' achievements in service learning projects.
- Evaluate the needs and possible options by means of participative methods to guide an intervention and management strategy aimed at ensuring that the activities carried out are in line with the expected results (result-based participative management models).
- Identify, interpret and act to solve risk situations.
- The student is able to implement the above-mentioned skills to improve the current state of the rights of persons with disabilities within a university setting.

## BIBLIOGRAPHY AND OTHER OBLIGATORY TEACHING RESOURCES

- The [Convention on the Rights of Persons with Disabilities](#) 2006.
- The [Optional Protocol](#) on the Convention on the Rights of Persons with Disabilities, 2006.

### Committee on the rights of persons with disabilities

- General Comment nº 1: [Article 12: Equal recognition before the law](#) (Adopted 11 April 2014)
- General Comment nº 2: [Article 9: Accessibility](#) (Adopted 11 April 2014)
- General Comment nº 3: [Article 6: Women and girls with disabilities](#) (Adopted 26 August 2016)
- General Comment nº 4: [Article 24: Right to inclusive education](#) (Adopted 26 August 2016)

### International Conventions from the International Labour Organisation

- Employment Service Convention, 1948 (no. 88).
- The Social Security (Minimum Standards) Convention, 1952 (No. 102)
- Vocational Rehabilitation (Disabled) Recommendation, 1955 (No. 99)
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111)
- Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121)
- Human Resources Development Recommendation, 1975 (No. 150)
- Labour Administration Recommendation, 1978 (No. 158)
- Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159)
- Vocational Rehabilitation and Employment (Disabled Persons) Recommendation, 1983 (No. 168)
- Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169)
- Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168)

United Nations High Commissioner for Human Rights, [The convention on the rights of persons with disabilities](#). Training Guide nº 19, New York and Geneva, 2014, pp. 7-20.

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

### General

- [Human rights of persons with disabilities](#)
- [Division for Social Policy and Development \(DSPD\) of the United Nations / Disability](#)
- [Special Rapporteur on the rights of persons with disabilities](#)
- [Handbook for parliamentarians on the Convention on the Rights of Persons with disability](#)
- [International Disability and Development Consortium](#)

## Studies, reports and documents

- General Assembly United Nations: [Outcome document of the high-level meeting of the General Assembly on the realization of the Millennium Development Goals and other internationally agreed development goals for persons with disabilities: the way forward, a disability-inclusive development agenda towards 2015 and beyond](#), UN Doc. Res. A/68/L.1, 2013.
- Report of the Special Rapporteur on the right to education, Vernor Muñoz: [The right to education of persons with disabilities](#), 2007 (UN Doc.A/HRC/4/29).

### United Nations High Commissioner for Human Rights:

- [The rights of persons with disabilities on situations of risk and humanitarian emergencies](#)
- [The right of persons with disabilities to live independently and to be included in the community](#)
- [The right of persons with disabilities to education](#)
- [Work and employment of persons with disabilities](#)
- [Violence against women and girls with disabilities](#)
- [Training Package on the Convention on the Rights of Persons with Disabilities](#)
- [Monitoring the Convention on the Rights of Persons with Disabilities Guidance for human rights monitors](#). Professional training series N°. 17, New York and Geneva, 2010. HR/P/PT/17.
- [From Exclusion to Equality: Realizing the rights of persons with disabilities](#), 2007, N° 14.

ILO, [Achieving equal employment opportunities for people with disabilities through legislation. Guidelines](#), Geneva, 2007.

ILO, [Achieving Equal Employment Opportunities for People with Disabilities through Legislation. An Education and Training Guide](#), Geneva, 2011.

International Council on Human Rights Policy / Office of the United Nations High Commissioner for Human Rights, [Assessing the Effectiveness of National Human Rights Institutions](#), Geneva, 2005.

Bing, J. Levy, M., *Harmonisation et unification des législations de réparation du handicap*, *Droit Social*, janv. 1978.

El-Kassas, M. Med., Social empowerment of people with special needs, The 2nd Arab conference "mental disability between care and avoiding", Asuit University, Egypt, 14-15 December 2004, [\[Arabic version\]](#).

König, A. et Schalock, R.L., *Emploi assisté: un peu plus d'égalité des chances pour les personnes gravement handicapées*, *Revue internationale du Travail*, vol. 130, no 1, 1991, pp. 23-41.

Momm, W. / König, A., *Insertion des personnes handicapées dans la collectivité: une nouvelle conception de leur réadaptation professionnelle et de leur emploi*, *Revue internationale du Travail*, vol. 128, no 4, 1989, pp. 545-559.

O.M.S., *Classification internationale des handicaps: déficiences, incapacités et désavantages*(C.I.D.I.H.), Genève, 1980.

Programme d'action mondial des Nations Unies concernant les personnes handicapées), New York, 1982.

Rouab, A., [Vision de l'islam aux personnes à besoins spécifiques](#), *Revue de la faculté des lettres et des sciences humaines et sociales*, Université de Biskra, N° 2 et 3, Juin 2008, [\[Arabic version\]](#).

Zribi, G. / Sarfaty, J., *Handicapés mentaux et psychiques - Vers de nouveaux droits*, *Editions de l'Ecole nationale de la santé publique*, Rennes/France, 2003.

## LEARNING PROCESS RESULTS

Upon completion of this topic, the student shall be able to:

- Understand the nature and scope of the right
- Identify the holders of the right, and especially, risk groups and situations of human rights violations
- Use the toolkit from the United Nations for the right of persons with disabilities
- Determine the challenges to the right of persons with disabilities in the Maghreb in general and in their particular context
- Integrate the right of persons with disabilities to participate in the teaching programme, proposing a learning service project regarding an identified situation in which that right is violated.
- Understand the value and importance of the rights of persons with disabilities in different settings
- Interpret the change and historical evolution of the notion of disability made clear by the current challenges and reflect on potential solutions.
- List the positive measures implemented for the social insertion of persons with disabilities. Reinforce the analytical work on the rights of persons with disabilities in the student's social, economic and cultural context.
- Develop a critical debate on the topic.

## METHODOLOGY

Methodology	Educational tools
Exposition method	Text reading and/or audiovisual material
Preparation of projects	Blog /Forum / Wiki
Learning contract	Blog/ Forum/ Wiki

## SYLLABUS OF LEARNING ACTIVITIES

### 1) Reading the learning guide of the topic.

By reading the guide the participant will obtain a general approach on the content of the topic and the corresponding activity to be carried out.

### 2) Reading the contents on the topic of the rights of persons with disabilities

By reading the contents on the topic the student will obtain a general idea summing up the main elements to the right of persons with disabilities.

This first reading will let the participant identify what part of the teaching activity is for delving deeper into the study of the right of persons with disabilities and for the practical implementation of the course.

### 3) Analysis of the toolkit from the United Nations for the rights of persons with disabilities

The toolkit will be analysed by making a general review of the contents available at the [United Nations website on persons with disabilities](#).

A brief log of the work done will be included in the course participant's portfolio and will describe the main aspects analysed.

### 4) Search for documentation on the challenges involved in the rights of persons with disabilities in the Maghreb and its context.

In conjunction with the previous activity, a search will be carried out for official documentation regarding the situation of persons with disabilities in the Maghreb. On the one hand, this documentation shall show the constitutional protection of this right as well as the national legislation and public policies concerned and, on the other hand, the recommendations made for the country by the different bodies of the United Nations that monitor the implementation of this right: treaty organisations that monitor the implementation of international treaties on human rights, special procedures and universal periodic examinations. This part of the methodology requests that at least 5 documents be consulted. After the search, a record document shall be written logging the work done, which shall clearly show the country's degree of compliance with the international legal obligations derived from this right.

### 5) Analysis of the context on the right of persons with disabilities in the chosen situation or group, with an indication of the main challenges.

The previous research works shall be accompanied by an analysis of the context on the right of persons with disabilities. This will be done by applying the three-tier model of analysis (causal analysis, role analysis and analysis of gaps in capacity) as well as the bibliography used in Module 2 of the course. A descriptive document shall be written outlining the methodology used in performing the analysis.

### 6) Writing the report on the challenges of this right in the chosen country and in the context of the intervention.

A status report of no fewer than 5000 words shall be written presenting a diagnosis based on the reference information consulted, which may be taken as a starting point to guide a service learning project. It is suggested that a SWOT analysis be used to illustrate the synthesised situation.

### 7) Design a syllabus by incorporating the service learning to approach the topic from the field of speciality (Communication, Laws, Education, Social Work).

The practical part of the course involves starting up a program on a subject or discipline. The participants shall identify the situation of infringement of the right to adequate housing on which to focus their service learning project and shall apply the syllabus, integrating the concepts analysed in modules 1 and 3.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Reading the Educational Guide of the topic	15 min	
Reading the exposition of the topic	45 min	Self-evaluation
Analysis of the United Nations Toolkit for the right of persons with disabilities	2 h	Portfolio: writing and consultation
Search for documentation on the challenges of the right of persons with disabilities in the Maghreb and its context.	2 h	Portfolio: annotated bibliography
Analysis of the context on the right of persons with disabilities in the chosen situation or group	5 h	Portfolio: methodology used
Write-up of the context report	10 h	Portfolio: Status Report
Design of a syllabus incorporating the methodology of service learning to approach the topic from the field of personal speciality (Communication, Laws, Education, Social Work).	40	Final practicum work
	60 h	



## SUBJECT 2.4.:

# 2.4.23. RIGHTS OF PERSONS WITH DISABILITIES

## 1. INTRODUCTION

The Convention on the Rights of Persons with Disabilities is the response of the international community to the long history of discrimination, exclusion and dehumanization of persons with disabilities. It is historic and ground-breaking in many ways, being the fastest negotiated human rights treaty ever and the first of the twenty-first century. The Convention is the result of three years of negotiations involving civil society, Governments, national human rights institutions and international organizations. After adopting the Convention in the United Nations General Assembly in December 2006, a record number of countries demonstrated their commitment to respecting the rights of persons with disabilities by signing the Convention and Optional Protocol when they opened for signature in March 2007.

The Convention ensures that the world's largest minority enjoys the same rights and opportunities as everyone else. It covers the many areas where persons with disabilities have been discriminated against, including access to justice; participation in political and public life; education; employment; freedom from torture, exploitation and violence, as well as freedom of movement. Under the Optional Protocol, individuals of States Parties to the Protocol who allege violations of their rights, and who have exhausted national remedies, can seek redress from an independent international body.

The Convention is long overdue. It is over 25 years since the 1981 International Year of Disabled Persons brought global attention to the issues affecting persons with disabilities.

## 2. THE PURPOSE OF THE CONVENTION

Article 1 of the Convention on the Rights of Persons with Disabilities states that the purpose of the Convention is "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."

The Convention promotes and protects the human rights of persons with disabilities in economic, social, political, legal and cultural life. It calls for non-discriminatory treatment and equality in access to justice, in treatment by the courts and by the police and in undertaking administrative tasks by providing the necessary reasonable, procedural and age-appropriate accommodations in education, in health care, in the work-place, in family life, in cultural and sporting activities, and when participating in political and public life. The Convention ensures that all persons with disabilities are recognized before the law. It also prohibits torture, exploitation, violence and abuse, and protects the life, liberty and security of persons with disabilities, their freedom of movement and expression, and respect for their privacy.

## 3. DEFINING DISABILITY

The Convention does not explicitly define the word "disability"; indeed, the Preamble to the Convention acknowledges that "disability" is an evolving concept (subpara. (e)). Nor does the Convention define the term "persons with disability". However, the treaty does state that the term includes persons who have long-term physical, mental, intellectual or sensory

impairments that, in the face of various negative attitudes or physical obstacles, may prevent those persons from participating fully in society (article 1).

The recognition that “disability” is an evolving concept acknowledges the fact that society and opinions within society are not static. Consequently, the Convention does not impose a rigid view of “disability”, but rather assumes a dynamic approach that allows for adaptations over time and within different socioeconomic settings. The Convention’s approach to disability also emphasizes the significant impact that attitudinal and environmental barriers in society may have on the enjoyment of the human rights of persons with disabilities. In other words, a person in a wheelchair might have difficulties taking public transport or gaining employment, not because of his/her condition, but because there are environmental obstacles, such as inaccessible buses or staircases in the workplace, that impede his/her access.

Similarly, a child with an intellectual disability might have difficulties in school because of teachers’ attitudes toward him/her, inflexible school boards and possibly parents who are unable to adapt to students with different learning capacities. It is thus vital to change those attitudes and environments that make it difficult for persons with disabilities to participate fully in society.

The Convention indicates, rather than defines, who are persons with disabilities. Persons with disabilities “include” those persons with long-term physical, mental, intellectual or sensory impairments; in other words, the Convention protects at least those individuals. Implicit in this indication is the understanding that States may broaden the range of persons protected to include, for example, persons with short-term disabilities.

## 4. THE RIGHTS AND PRINCIPLES ENUMERATED IN THE CONVENTION

### 4.1 GENERAL PRINCIPLES

The general principles provide guidance to States and other actors on interpreting and implementing the Convention. The eight general principles are:

- Respect for the inherent dignity, autonomy, including the freedom to make one’s own decisions, and independence of persons;
- Non-discrimination;
- Full and effective participation and inclusion in society;
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- Equality of opportunity;
- Accessibility;
- Equality between men and women; and
- Respect for the evolving capacities of children with disabilities and for the right of children with disabilities to preserve their identities.

### 4.2 RIGHTS

While the civil, cultural, economic, political and social rights specified in the Convention apply to all human beings, the Convention focuses on the actions States must take to ensure that persons with disabilities enjoy these rights on an equal basis with others. The Convention also addresses the specific rights of women and children, areas in which State action is required, such as data collection and raising awareness, and international cooperation.

The explicit rights set out in the Convention are:

- Equality before the law without discrimination
- Right to life, liberty and security of the person
- Equal recognition before the law and legal capacity
- Freedom from torture
- Freedom from exploitation, violence and abuse
- Right to respect physical and mental integrity
- Freedom of movement and nationality
- Right to live in the community
- Freedom of expression and opinion
- Respect for privacy
- Respect for home and the family
- Right to education
- Right to health
- Right to work
- Right to an adequate standard of living
- Right to participate in political and public life
- Right to participate in cultural life

The Convention recognizes that certain people are exposed to discrimination not only on the basis of disability, but also on the basis of sex, age, ethnicity and/or other grounds. Thus, the Convention includes two articles devoted to specific individuals: women with disabilities and children with disabilities.

The Convention sets out specific areas for State action. Establishing a right is not the same thing as ensuring that that right is realized. This is why the Convention obliges States parties to provide the appropriate enabling environment so that persons with disabilities can fully enjoy their rights on an equal basis with others. These provisions relate to:

- Raising awareness: so that persons with and without disabilities understand their rights and responsibilities;
- Accessibility: fundamental to the enjoyment of all rights and to live independently in the community;
- Situations of risk and humanitarian emergencies: a cause of disability that requires specific action by the State to ensure protection;
- Access to justice: essential for persons with disabilities to claim their rights;
- Personal mobility: to promote independence for persons with disabilities;
- Habilitation and rehabilitation: for persons with a disability from birth and people who have acquired a disability, respectively, to enable those persons to attain and maintain maximum independence and ability;
- Statistics and data collection: as a basis for formulating and implementing policies to promote and protect the rights of persons with disabilities.

#### 4.3. MONITORING MECHANISM IN THE CONVENTION

The Convention provides for monitoring at both the national and international levels:

*At the national level*, States parties must appoint one or more focal points within government to handle matters relating to implementation. States parties must also consider establishing

or designating a coordinating body within government to facilitate implementation. Similarly, States parties must maintain, strengthen or establish an independent institution, such as a national human rights institution, to promote, protect and monitor the Convention. (More information on national monitoring is provided in chapter 7.)

*At the international level*, the Convention provides for monitoring through the creation of a committee of independent experts, called the Committee on the Rights of Persons with Disabilities.

The Committee reviews reports submitted periodically by States parties. On the basis of these reports, the Committee works with the States parties concerned and makes concluding observations and recommendations to those States parties.

The Optional Protocol to the Convention, if ratified separately by a State, enables the Committee to undertake two additional forms of monitoring: an *individual communications procedure*, through which the Committee receives communications (complaints) from an individual claiming that the State breached his/her rights under the Convention; and an *inquiry procedure*, through which the Committee investigates gross or systematic violations of the Convention and, with the agreement of the State party concerned, undertakes field missions to deepen the inquiry.

The Convention also provides for a Conference of States parties, which would consider the implementation of the Convention.

### The Committee on the Rights of Persons with Disabilities

The Convention mandates the creation of a Committee on the Rights of Persons with Disabilities when the Convention comes into force. The Committee will examine the periodic reports submitted by States, consider individual communications, conduct inquiries, and formulate general observations and recommendations.

The Committee will initially be composed of 12 independent experts, although that number will rise to 18 after 60 States have ratified the Convention. A Conference of States parties will select the Committee members, who will serve in their personal capacity. Committee members will be chosen on the basis of their competence and experience in the field of human rights and disability, and also in consideration of equitable geographic representation, representation of different forms of civilization and legal systems, gender balance, and participation of experts with disabilities within the Committee.

States should consult with and involve persons with disabilities and their representative organizations when choosing individuals to nominate to the Committee.

### Periodic reporting

Each State party to the Convention must submit to the Committee an initial comprehensive report on measures taken to implement the Convention. Each State must submit its initial report within two years after the Convention enters into force for that State. The initial report should:

- Establish the constitutional, legal and administrative framework for the implementation of the Convention;
- Explain the policies and programmes adopted to implement each of the Convention's provisions; and
- Identify any progress made in the realization of the rights of persons with disabilities as a result of the ratification and implementation of the Convention. Each State party must submit subsequent reports at least every four years or whenever the Committee requests one. Subsequent reports should:
- Respond to the concerns and other issues highlighted by the Committee in its concluding observations in previous reports;

- Indicate progress made in the realization of the rights of persons with disabilities over the reporting period; and
- Highlight any obstacles that the Government and other actors might have faced in implementing the Convention over the reporting period.

The Committee will set guidelines on the content of reports. The first report must be comprehensive, in other words, it must cover the implementation of all the provisions of the Convention. Subsequent reports need not repeat information previously provided. States parties should prepare their reports in an open and transparent manner and should consult with and involve persons with disabilities and their representative organizations.

## 5. OBLIGATIONS OF STATES PARTIES UNDER THE CONVENTION

As affirmed in article 4 of the Convention, a Government that ratifies the Convention agrees to promote and ensure the full realization of all human rights and fundamental freedoms for all persons with disabilities, without discrimination of any kind. The box below details the concrete actions that States must take in order to meet this obligation.

Each State must take measures to realize economic, social and cultural rights progressively, using the greatest amount of available resources to do so. This obligation, commonly referred to as progressive realization, acknowledges that it often takes time to realize many of these rights fully, for example, when social-security or health-care systems must be created or improved.

While progressive realization gives States parties, particularly developing countries, some flexibility in achieving the objectives of the Convention, it does not absolve States parties of the responsibility to protect those rights. For example, a State must not forcibly evict a person with a disability, arbitrarily withdraw social-security protection or fail to introduce and respect the minimum wage.

Unlike economic, social and cultural rights, civil and political rights are not subject to progressive realization. In other words, States must protect and promote these rights immediately.

### 5.1 OBLIGATIONS TO RESPECT, PROTECT AND FULFIL

Implicit in the Convention are three distinct duties of all States parties:

- *The obligation to respect* – States parties must refrain from interfering with the enjoyment of the rights of persons with disabilities. For example, States must not perform medical experiments on persons with disabilities without their consent or exclude a person from school on the basis of a disability.
- *The obligation to protect* – States parties must prevent violations of these rights by third parties. For example, States must require private employers to provide just and favourable working conditions for persons with disabilities, including by providing reasonable accommodation. States must be diligent in protecting persons with disabilities from mistreatment or abuse.
- *The obligation to fulfil* – States parties must take appropriate legislative, administrative, budgetary, judicial and other actions towards the full realization of these rights.

## 6. NATIONAL LEGISLATION AND THE CONVENTION

It is a basic principle of international law that a State party to an international treaty must ensure that its own domestic law and practice are consistent with what is required by the treaty. In some cases, the treaty may give general guidance on the measures to be taken. In others, the treaty includes specific stipulations. The Convention on the Rights of Persons with

Disabilities contains both kinds of provisions. Parliament thus has a critical role in ensuring that the legislative measures required by the Convention are adopted.

Many of the provisions contained in the Convention are similar in either wording or substance to the provisions of other human rights treaties to which a State is a party. It might be useful to examine how those treaties are put into effect in order to determine the steps required to implement the Convention on the Rights of Persons with Disabilities.

## 6.1. INCORPORATING THE CONVENTION INTO DOMESTIC LAW

### The meaning of signing and ratifying

Chapter 4 explains in detail the process and meaning of signing and ratifying the Convention and Optional Protocol. In examining legislative measures to implement the Convention, one should bear in mind that:

- There is no time limit between signing the Convention or Optional Protocol and ratifying either instrument;
- Signing the Convention or Optional Protocol obliges the State to refrain from acts that would defeat the object and purpose of either instrument; and
- Ratifying the Convention or Optional Protocol indicates at least an obligation to be bound by these instruments and to perform such obligations in good faith.

One of the fundamental obligations contained in the Convention is that national law should guarantee the enjoyment of the rights enumerated in the Convention. Members of Parliament should thus consider the best way of giving effect to the rights guaranteed by the Convention in domestic law. The method selected will vary according to the constitutional and legal systems of individual countries:

- In some countries, once it is ratified at the international level, the Convention may automatically form part of national law. In other words, the Convention would be directly enforceable by national courts and other implementing authorities.
- In some other countries, the legislature might have to adopt an act of ratification at the national level. This may have the effect of incorporating the Convention into domestic law. However, even when parliaments ratify the Convention (national ratification), many provisions might still require legislative action before they come into force. This depends, in part, on how specific the Convention's obligations are: the more specific the obligation, the less likely that implementing legislation will be needed.
- In other cases, including many common-law countries, only those provisions of the treaty that are directly incorporated into national law will give rise to enforceable rights and duties.

### Incorporation through constitutional, legislative and regulatory measures

Except in the rare case that the laws in a country already conform fully to the requirements of the Convention, a State party will normally have to amend existing laws or introduce new laws in order to put the Convention into practice.

Ideally, there should be a comprehensive and unequivocal legal statement of the rights of persons with disabilities, and detailed legislation to make those guarantees real in practice. It is critically important that the recognition and protection of the rights of persons with disabilities be enshrined in the supreme law of the country, that is, in the national constitution or in basic laws. This will ensure the highest possible legal protection and recognition.

Doing so might involve introducing disability as one of the grounds on which discrimination is prohibited; or *explicitly protecting* the rights of persons with disabilities in the national constitution, whether as part of a general guarantee of equality, or in the form of specific provisions relating to the rights of persons with disabilities.

Further, parliament may incorporate the entire Convention into domestic law. In this case, it might be useful to include in the relevant law a clear indication that the provisions of the Convention are self-executing, that is, that they are intended to be directly enforceable before domestic courts and tribunals. However, even where the Convention is incorporated into domestic law in its entirety, this will not normally be sufficient to give full effect to its provisions; implementing legislation will usually still be required, including detailed legislation in specific areas, such as a law prohibiting discrimination in employment.

In addition, it will not always be possible or appropriate for the legislature to set out in detail the rules and standards required to ensure equal enjoyment of specific rights by persons with disabilities. The State might have to adopt policy and regulatory initiatives, in addition to legislation, to comply with the many provisions requiring “appropriate measures” to be taken in areas such as physical accessibility to buildings and transport systems or information and communications technologies (article 4 of the Convention). While parliaments might not be enacting these detailed regulations, it might be appropriate to adopt legislation that allows for standards to be set in these areas and to request that those standards be presented to the legislature for information and/or approval.

## 6.2. TYPES OF EQUALITY AND NON-DISCRIMINATION LEGISLATION

The obligation to prohibit all discrimination on the basis of disability and to guarantee equal and effective protection to persons with disabilities (article 5 of the Convention) requires both that the prohibition be included in national laws and, preferably, also in national constitutions, and that detailed legislative provisions covering discrimination in all fields of public and private life be adopted. The exact form that these provisions should take will depend on existing laws and the particular legal system of a State party. Some countries have comprehensive, general anti-discrimination laws covering multiple grounds of prohibited discrimination; others have individual laws dealing with different forms of discrimination, such as those based on sex, age or marital status, or covering discrimination in specific areas, such as in employment.

One option is to enact a disability discrimination law that prohibits discrimination on the ground of disability, in general, but that also provides detailed regulations of specified areas of public and private life.

Another option might be to enact a disability-equality law, similar to the gender-equality laws adopted by some States. Laws of this kind do not limit themselves to prohibiting discrimination, but address a wide range of issues relating to persons with disabilities. For example, in India the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act (1995) sets out a broad policy framework for addressing disability issues, establishes a number of bodies at the national and state level to do this, addresses prevention and early detection of disability, equality in employment and education, including affirmative action, social security, accessible transport and buildings, the recognition of institutions for persons with disabilities, research into disability issues, and other matters.

Even a wide-ranging disability-equality law will probably not address some issues relating to equality for persons with disabilities. Given the need for greater specificity on the issues of social security and social support, workers’ compensation, transport standards, building standards, and others, it might be more appropriate to address these topics in other laws.

Where legislation prohibiting other forms of discrimination already exists, it might be appropriate to amend the existing legislation to incorporate disability as a ground of prohibited discrimination. At a minimum, it is important to ensure that the Convention’s understanding of “disability” and definition of “discrimination on the basis of disability” are fully reflected in a general anti-discrimination law. Where existing legislation applies only to some of the areas covered by the Convention, then new legislation will be required to ensure that protection against discrimination on the ground of disability applies to all areas. It might also be appropriate to assign responsibility for monitoring and enforcing the law under the new legislation to existing institutions provided that persons with disabilities are or become involved as members of those institutions and that the institutions have sufficient expertise in disability issues.



## 7. THE CONTENT OF LEGISLATIVE MEASURE

### 7.1. CRITICAL ELEMENTS

There are a number of critical elements that are needed in implementing legislation, whether it takes the form of one or more separate laws. The legislation should:

- Refer explicitly to the Convention and to the Convention's acknowledgement that the concept of disability is still evolving, and to the notions of "discrimination on the ground of disability, "reasonable accommodation" and other important terms defined in the Convention;
- Prohibit discrimination on the ground of disability in all areas covered by the Convention;
- Identify duty-bearers, including different levels of government and non-State actors;
- Confer rights on individuals and groups to: Raise allegations of discrimination on the ground of disability; Have those claims investigated; and Have access to appropriate remedies;
- Provide for independent agencies to: Hear allegations of systematic discrimination and individual cases; Investigate and report on those allegations; and Seek systematic remedies and change through appropriate legal and other channels.

### 7.2. LINKING IMPLEMENTING LEGISLATION TO THE CONVENTION

Implementing legislation should include the terms of the Convention or a specific reference to them, in order to indicate clearly that the laws should be interpreted in accordance with the letter and spirit of the Convention. The Convention is based on an understanding that disability results from the interaction between a person and his/her environment, and that disability is not something that resides in the individual as the result of some impairment. This understanding has important implications for legislation to implement the Convention, particularly in identifying the obstacles that hinder the full realization of the rights of persons with disabilities and in determining appropriate remedies. Parliamentarians might wish to consult with experts on disability issues, including persons with disabilities and their representative organizations, to update their understanding of the nature and forms of disability and the ways in which social barriers to participation can be removed.

### 7.3. TYPES OF DISABILITY TO BE ADDRESSED IN LEGISLATION

The Convention provides a non-exhaustive list of disabilities to be addressed by legislation, in other words, it sets a minimum. The Convention describes persons with disabilities as including "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

This definition does not exhaust the categories of disabilities that fall under the protection of the Convention; other types of disability, such as short-term disabilities, could be covered by the Convention and thus could be covered by the laws of individual States parties, especially given the social context of disability. Since article 4(4) underlines the fact that the Convention is not intended to undermine or replace higher standards of protection of the rights of persons with disabilities under national law, it is open to a State to adopt a wider definition. A State is not required to limit its own definition to the categories mentioned under article 2 of the Convention.

### 7.4. "REASONABLE ACCOMMODATION" AS A CORNERSTONE OF LEGISLATION

The Convention stipulates that a failure to afford a person "reasonable accommodation" amounts to discrimination on the basis of disability. Consequently, any legislative

definition of discrimination should include the denial of reasonable accommodation as an act of discrimination. Specific reference should be made to the definition of “reasonable accommodation” that appears in article 2 of the Convention.

“Reasonable accommodation” is also known as duty to accommodate; reasonable adjustment, adaptation or measures; or effective or suitable modifications. To afford a person “reasonable accommodation” means, for example, making adaptations to the organization of a work environment, and educational establishment, a health care facility or transport service in order to remove the barriers that prevent a person with a disability from participating in an activity or receiving services on an equal basis with others. In the case of employment, this might involve physical changes to premises, acquiring or modifying equipment, providing a reader or interpreter or appropriate training or supervision, adapting testing or assessment procedures, altering standard working hours, or allocating some of the duties of a position to another person.

In some countries, laws may also require disability-aware procurement strategies, under which public agencies may be required to give preference to equipment that is fully accessible or based on the principle of inclusive design, or to service providers who employ specified percentages of persons with disabilities in their labour force.

While accommodation of the particular needs of persons with disabilities is required under the Convention, the requirement is one of reasonable accommodation. If the accommodation required would impose a disproportionate or undue burden on the person or entity expected to provide it, then a failure to do so would not constitute discrimination. In a number of countries, legislation sets out the factors that should be taken into account when assessing whether the accommodation requested amounts to a disproportionate burden. These include the practicability of the changes required, the cost involved, the nature, size and resources of the entity involved, the availability of other financial support, occupational health and safety implications, and the impact on the operations of the entity.

## 7.5. SPECIAL MEASURES

Legislation should not be limited to prohibiting discrimination, but might also require the State and private actors to take positive measures. Article 5 of the Convention recognizes that in order to ensure equality with others, it may sometimes be necessary to provide special support for particular individuals or for persons with particular types of disabilities. This may take two forms:

**Ongoing or permanent measures.** These are special measures that will be ongoing or possibly permanent. For example, in order to ensure that persons with disabilities are as mobile as others, Governments might provide a travel subsidy for disabled persons to enable them to use taxis.

**Temporary special measures.** These are measures that are adopted to redress the past disadvantage of persons with disabilities, but which may be intended to operate only for a period of time. For example, a Government might set targets or quotas for the employment of persons with disabilities with the goal of removing the quotas once the targets have been achieved. Both ongoing and temporary special measures are permissible under the Convention and do not constitute discrimination as defined by the Convention. Indeed, both types of special measures might be necessary in order to achieve equality and therefore a State party will be obliged to adopt a range of special measures across different areas of social life.

Sometimes, when special measures of this kind are adopted to redress the historical and continuing disadvantage suffered by members of a group, the measures are challenged by persons who do not belong to that group on the ground that they are discriminatory. Parliaments must ensure that any constitutional or legislative guarantee of equality makes it clear that special measures mentioned in the Convention are lawful under national law and are not subject to challenge under other equality guarantees by persons who do not have disabilities but who claim that their exclusion is a violation of their equal rights.

Parliaments also have a special role in raising awareness, in the wider community, of the need for special measures and their benefit to society as a whole. Laws might also require

government departments and even private corporations to report annually on the steps they have taken to promote the rights of persons with disabilities. Reporting requirements might cover a range of issues, including: the steps taken to ensure that the rights of persons with disabilities are being guaranteed in practice; success in raising the percentage of employees who are persons with disabilities; or success in improving services to customers with disabilities who might have special needs.

## 7.6. DISCRIMINATION BY STATE AUTHORITIES, PRIVATE PERSONS AND CORPORATIONS

It is a central component of the Convention that persons with disabilities should be protected against discrimination by both public and private actors. Therefore, an anti-discrimination law or other legislative measures that prohibit discrimination and mandate equal treatment should apply to private individuals, bodies or corporations, as well as to public officials and bodies. The Convention also obliges States to regulate the private sector.

## 7.7. SPECIFIC AREAS FOR LEGISLATIVE REFORM

The Convention specifies a number of areas that require legislative guarantees or protection. Article 12 (1) of the Convention reaffirms the right of persons with disabilities to recognition as persons before the law, and article 12 (2) recognizes that persons with disabilities have the right to use their legal capacities as others do. Article 12 (3) underlines the need for measures to support the exercise of that capacity, while article 12 (4) calls for the establishment of safeguards to ensure there is no abuse of that support.

Since denying legal capacity to persons with disabilities has led to egregious violations of their rights, any law-reform process should address this issue as a matter of priority. Parliaments should examine existing law to determine if there are any formal limitations on the capacity of persons with disabilities and if the provisions of the law and practice conform to the Convention. Parliaments should also consider whether, despite formal guarantees of respecting the legal capacity of persons with disabilities, legal capacity is respected in practice. The Convention specifically requires States to take appropriate measures to ensure that persons with disabilities who need assistance in exercising that capacity receive it.

The Convention also contains a number of guarantees concerning areas where the rights of persons with disabilities have been and continue to be denied. These include the right to liberty and security of the person (article 14) and the rights to freedom from torture and freedom from exploitation, violence and abuse within and outside the home. A State should carefully review its laws and their operation, particularly in areas such as deprivation of liberty of persons with disabilities, including those with intellectual and mental disabilities. For example, States should note the Convention's requirements on independent living within the community instead of forced institutionalization or forced medical interventions, and should ensure that there are laws and procedures to monitor the operation of this legislation, investigates cases of abuse and impose punitive measures, as necessary (article 16)

## 8. FROM PROVISIONS TO PRACTICE: IMPLEMENTING THE CONVENTION

Legislation alone will not ensure that persons with disabilities can enjoy their human rights. States will need to formulate effective policies and programmes that will transform the provisions of the Convention into practices that will have a real impact on the lives of persons with disabilities.

For persons with disabilities, as for all persons, the denial of one right can lead to the denial of other rights and opportunities throughout their lives. To illustrate this point, five provisions of the Convention are highlighted below. The relationship between habilitation and rehabilitation (article 26), accessibility (article 9), education (article 24), work (article 27) and legal capacity (article 12) is clearly demonstrated. This is not to suggest, however, that these five areas should be prioritized over the other provisions of the Convention. On the contrary, since rights are interrelated, States should strive to implement separate provisions of the Convention concurrently.

## 8.1. HABILITATION AND REHABILITATION

How does a child, born blind, learn to live as an active member of society? How does a young man who sustains severe spinal injuries in an accident and loses the ability to walk adapt to his new circumstances? How does a mother who lost her legs to a landmine continue to work and manage her family? Habilitation and rehabilitation (article 26) are the crucial first steps to ensuring that persons with disabilities are able to lead independent lives (article 19), are mobile in society (article 20) and are able to reach their full potential. Through these processes, persons with disabilities acquire and develop skills that will enable them to work and earn an income, make sound decisions, contribute to society and exercise all the other rights detailed in the Convention. Habilitation involves learning skills that will enable a person to function in society. These kinds of programmes usually target children born with disabilities. Rehabilitation means restoring capacity and ability. This generally applies to an adult who has to readapt to society after acquiring a disability. Habilitation and rehabilitation are usually time-limited processes that are tailored to the individual. They involve setting goals to be achieved with the coordinated support of professionals and possibly the participation of family members and close friends. Habilitation and rehabilitation may include medical, psychological, social and vocational support. Without benefit of these interventions, persons with disabilities will probably not be able to realize the rights to accessibility, education and work.

## 8.2. ACCESSIBILITY

In every society, there are innumerable obstacles and barriers—from stairs that cannot be climbed to signs that cannot be read—that prevent persons with disabilities from living full lives. Accessibility (article 9) involves providing equal access to facilities and services in the community for all members of society, including persons with disabilities. It is a guiding principle of the Convention (article 4) and is relevant to all areas of implementation. Although some of the provisions for accessibility in the Convention may be costly to implement in the short term, there are a number of low-cost, low-tech solutions that would have immediate impact. For example, providing access to information can be relatively inexpensive and will improve the lives of persons with disabilities enormously, whether in reading a price tag, entering a hall to participate in a meeting, understanding a bus schedule or browsing web-sites. Television is recognized as an essential source of information and a vehicle for accessing cultural and sporting events. Parliamentarians, in cooperation with the media industry, can work to make television accessible to deaf individuals and elderly persons by providing closed-captioning or subtitles. These measures have already been adopted in more than 30 countries around the world.

Similarly, the Internet provides a crucial link to education, employment opportunities, news and health-care information, and is a channel for civic engagement and social networking. Individuals who cannot access the Internet are denied a certain degree of involvement in society. When websites are designed and developed according to accessibility guidelines, all users have equal access to the information available through the Internet.

Although several countries now require that at least the Government's website be accessible to persons with disabilities, most of the world's web sites remain inaccessible (see box on previous page). Access to information is also essential during emergencies. Recent disasters around the world have demonstrated that persons with disabilities do not receive the same level of support as everyone else during these catastrophes. The Convention calls upon States to develop measures for emergency services (article 9 (1) (b)). Text messaging, for example, has quickly become one of the preferred methods for communicating for deaf persons. However, emergency services in most countries cannot communicate via text messaging because of incompatible communication protocols.

In most countries, there are no laws on providing information in accessible formats, such as Braille, audio formats or sign language, or to make web-sites accessible.

Often, even where there is legislation, those laws have not been translated into actual services. The Convention asks Governments to introduce adequate legislation and means to ensure that persons with disabilities can access information that directly affects their daily lives (article 9 (1) (a) and (2) (g)).

### 8.3 EDUCATION

There are many potential barriers to education for persons with disabilities, especially in developing countries. These include:

- Poverty
- Overcrowded schools
- Lack of trained teachers
- Lack of reasonable accommodation and support for students with disabilities
- Inaccessible facilities
- Inaccessible curricula
- Poor or inaccessible transport
- Social stigma and lack of familiarity with the school environment

Current estimates suggest that the school enrolment rates of children with disabilities in developing countries are as low as 1 to 3 per cent; therefore, approximately 98 per cent of children with disabilities do not go to school and are illiterate. As long as such a large number of children with disabilities do not attend school, the millennium development goal of achieving universal primary education will remain elusive. However, research shows that children, including those with significant disabilities, who are included in regular education are more likely to finish school, go onto post-secondary education and training, get jobs, earn good incomes and become active members of their communities. The Convention covers many aspects of education at different stages of life (article 24). Its priority is to encourage children with disabilities to attend school at all levels (article 24 (2) (a)). The Convention asserts that the best way to do this is to focus on the best interests of the child (article 24 (2) (b)).

The Convention also addresses the education who are uneducated or under-educated due to a lack of opportunity or access when they were children. It also recognizes the importance of learning over one's lifetime (article 24 (5)), including for those adults who acquire disabilities and, therefore, want or need further education to support their ability to work, including vocational training and university-degree programmes. The approach to education promoted by the Convention is based on a growing body of evidence that shows that inclusive education not only provides the best educational environment, including for children with intellectual disabilities, but also helps to break down barriers and challenge stereotypes. This approach helps to create a society that readily accepts and embraces disability, instead of fearing it. When children with and without disabilities grow up together and learn, side by side, in the same school, they develop a greater understanding and respect for each other.

The transition from a school system relying on specialized education to an inclusive system needs to be carefully planned and implemented to protect the needs and best interests of the child. Support from parents, community leaders and teachers is a prerequisite. To be inclusive, the general education system should:

- Provide suitable equipment and teaching materials for persons with disabilities;
- Adopt teaching methods and curricula that embrace the needs of all children and students, including those with disabilities, and promote acceptance of diversity;
- Train all teachers to teach in an inclusive classroom and encourage them to support each other;
- Provide a range of support that meets the diverse needs of all students, including students without disabilities, to the greatest extent possible; and
- Facilitate the learning of Braille and sign language so that children who are blind, deaf or deaf-blind can have access to education and can communicate.

## 8.4. THE COST OF INCLUSIVE EDUCATION

Inclusion is often (mis)conceived as prohibitively expensive, impractical, unsustainable or a strictly disability-specific issue. However, not all positive measures are costly. Several countries have already developed cost-effective programmes to promote inclusiveness with limited resources. States should use available resources, focus on achieving clear goals, and ensure sustainability of education funding in the short, medium and long term. Cutting funding to an inclusive education system has dramatic adverse effects not only for individuals, but also for the policy of inclusion, in general.

Inclusive educational settings are generally less expensive than segregated systems. This finding is consistent with the notion that a single, integrated educational system tends to be cheaper than two separate ones. A single system lowers management and administration costs. Transport, too, is less expensive, since segregated settings usually involve individuals from a larger geographical area. Experience has shown that as many as 80 to 90 per cent of children with specific education needs, including children with intellectual disabilities, can easily be integrated into regular schools and classrooms, as long as there is basic support for their inclusion.

## 8.5. WORK AND EMPLOYMENT

Employment (article 27) provides many opportunities for social participation, from economic independence, to family formation, to a sense of contributing to the national economy. But in every society, persons with disabilities have not been fully integrated into the labour market. Most are either unemployed or have been dissuaded from actively seeking work. Among those who are working, many are underemployed, paid below minimum wage, and work below their capabilities. This lack of economic participation has a significant impact on the lives of persons with disabilities, as they are then unable to earn an adequate standard of living (article 28) and to live independently in the community (article 19).

In all regions of the world there is a sizeable gap between the working conditions and employment trends of persons with disabilities and those without a disability. All too often, persons with disabilities are dependent upon begging, charity and welfare, rather than upon meaningful employment, for their livelihoods. Employers often resist hiring persons with disabilities, or simply discard their job applications, believing they will be unable to accomplish their tasks and/or that it would be too expensive to hire them. This attitude is rooted in fear and stereotyping, and focuses more on the disability than on the abilities of the individual. Empirical evidence, however, indicates that persons with disabilities have high performance ratings and job-retention rates, and better attendance records than their non-disabled colleagues. In addition, the cost of accommodating workers with disabilities is often minimal, with most requiring no special accommodation at all. Studies have shown that other benefits accrue to those who employ persons with disabilities, including improved workforce morale and increased customer goodwill.

In developing countries, most workers with disabilities are employed in the informal sector, where labour protection is limited and work is unstable. It is estimated that between half and three quarters of all non-agricultural workers in developing countries are employed in the informal sector. In Africa, the percentage of informal workers ranges from 48 per cent in North Africa to 78 per cent in sub-Saharan Africa. Self-employment outside of agriculture accounts for 60 to 70 per cent of informal work. Women with disabilities are even less likely than men with disabilities to be employed, and they earn less when they are employed.

Many countries do not have legislation to promote and protect the rights of workers with disabilities. This makes it possible to discriminate against persons with disabilities in the workplace, hindering their access to the labour market. Their absence in the economy is also rooted in the lack of education and training opportunities available to persons with disabilities in their younger years.

Implementation of the Convention's provisions on work and employment will directly affect the approximately 470 million men and women of working age who have disabilities. The Convention enumerates States' obligations to ensure the legal right of persons with disabilities to earn a living through work that they voluntarily choose or accept, and to prohibit discrimination based on disability in all forms of employment (article 27 (1)). While promoting



the opening of labour markets for persons with disabilities, the Convention also recognizes the importance of self-employment, which is particularly relevant in developing countries [article 27 (1) (f)]. The Convention also provides for reasonable accommodation [article 27 (1) (i)] and promotes policies and programmes, including affirmative action, that encourage employers to recruit persons with disabilities [article 27 (1) (h)].

Although employers are often thought of as private-sector entities, in many countries, particularly developing countries, the Government is the employer of choice and the largest employer. Since the Convention requires Governments to make appropriate reasonable accommodations to hire more job-seekers with disabilities at all levels, the Government can serve as a model for private-sector employers.

Many countries have some type of employment quota for persons with disabilities, at least for positions in the public sector. These quotas range between 2 and 7 per cent, but compliance rates are generally low, between 50 and 70 per cent. Quotas normally apply to medium to large firms and noncompliant enterprises are usually fined. While such fines have not improved compliance rates, they do provide additional funds that are often spent on employment-related programmes for persons with disabilities. States parties could benefit from the creation of bridge programmes for people making the transition from social-welfare schemes to the open labour market. The Convention's provisions on work and employment cover persons with disabilities in all stages of employment, including those seeking employment, those advancing in employment, and those who acquire a disability during employment and who wish to retain their jobs. The right to exercise labour and trade union rights is also promoted in the Convention [article 27 (1) (c)]. States are also legally obligated to ensure that persons with disabilities are not held in slavery or servitude and are protected on an equal basis with others from forced or compulsory labour [article 27 (2)].

In practical terms, States must ensure that persons with disabilities apply for jobs alongside persons without disabilities, that they are protected from discrimination, and that they have the same rights as others in the workplace and equal opportunities for career advancement. Governments, workers' and trade unions, employers, and representatives of persons with disabilities can work together to ensure the social and economic integration of persons with disabilities. Recommended actions will vary according to the level of economic development within the country.

The Convention also recognizes that for many persons with disabilities in developing countries, self-employment or microbusiness may be the first, and perhaps only, option. States parties to the Convention are legally obligated to promote such opportunities. While Governments will need to promote employment of persons with disabilities in the formal sector, they will also be required to include persons with disabilities in microcredit and microfinance development schemes. These schemes have been very successful in many regions of the world, but have often forgotten to include, or deliberately excluded, persons with disabilities as potential beneficiaries.

## 8.6. LEGAL CAPACITY AND SUPPORTED DECISION-MAKING

Imagine having your capacity to make decisions, sign contracts, vote, defend your rights in court or choose medical treatments taken away simply because you have a disability. For many persons with disabilities, this is a fact of life, and the consequences can be grave. When individuals lack the legal capacity to act, they are not only robbed of their right to equal recognition before the law, they are also robbed of their ability to defend and enjoy other human rights. Guardians and tutors acting on behalf of persons with disabilities sometimes fail to act in the interests of the individual they are representing; worse, they sometimes abuse their positions of authority, violating the rights of others.

Article 12 of the Convention recognizes that persons with disabilities have legal capacity on an equal basis with others. In other words, an individual cannot lose his/her legal capacity to act simply because of a disability. (However, legal capacity can still be lost in situations that apply to everyone, such as if someone is convicted of a crime.) The Convention recognizes that some persons with disabilities require assistance to exercise this capacity, so States must do what they can to support those individuals and introduce safeguards against abuse of that support. Support could take the form of one trusted person or a network of people; it might be necessary occasionally or all the time. With supported decision-making, the



presumption is always in favour of the person with a disability who will be affected by the decision. The individual is the decision maker; the support person(s) explain(s) the issues, when necessary, and interpret(s) the signs and preferences of the individual.

Even when an individual with a disability requires total support, the support person(s) should enable the individual to exercise his/her legal capacity to the greatest extent possible, according to the wishes of the individual. This distinguishes supported decision-making from substituted decision-making, such as advance directives and legal mentors/friends, where the guardian or tutor has court-authorized power to make decisions on behalf of the individual without necessarily having to demonstrate that those decisions are in the individual's best interests or according to his/her wishes. Paragraph 4 of article 12 calls for safeguards to be put in place to protect against abuse of these support mechanisms. Supported decision-making can take many forms. Those assisting a person may communicate the individual's intentions to others or help him/her understand the choices at hand. They may help others to realize that a person with significant disabilities is also a person with a history, interests and aims in life, and is someone capable of exercising his/her legal capacity. While some good models of support networks exist, there is generally no clear policy framework; guardianship laws and practice still dominate. It is sometimes difficult to designate support networks, particularly when an individual cannot identify a trusted person or people. In addition, people in institutional settings are often denied support, even when it is available. Establishing comprehensive support networks requires effort and financial commitment, although existing models of guardianship can be equally costly. Supported decision-making should thus be seen as a redistribution of existing resources, not an additional expense.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 1,30****Subject****2.4.24.** Rights of persons belonging to minorities**Lecturer:**Rafael Valencia Candalija  
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## SUMMARY OF THE TOPIC

Currently, voices are being raised urging States to meet their obligation of respecting and guaranteeing the rights of persons belonging to particular collectives with some traits that differentiate them from others, whether for reasons of language, ethnicity or religion. Their situation is still deficient in relation to the rights of the majority.

For the last several years, the United Nations has focused its efforts to achieving effective protection of minority rights, mainly by approving international normative standards. This is readily seen in the proclamation of declarations such as the one adopted in 1992, or the Comment from the working group in 2005 that arose in order to develop it. This is not to forget the texts from all the Comments and Recommendations from the watchdog organs of the applicable human rights treaties that will be cited throughout this topic.

The topic studies what the main international texts are for protection of minority rights. It also offers an analysis of the contents of these rights and the mechanisms available to the members of minorities to enforce them.

## GENERAL AND SPECIFIC COMPETENCIES

In general for all three modules of the HRBE Training Programme, and in keeping with the main principles of the action plan for developing the Worldwide Programme for education in human rights approved by the United Nations (General Assembly 2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participant professors will be able to recognise the pedagogical potential of the general and specific competencies described below to achieve meaningful learning about human rights and will know how to incorporate them into their syllabuses in an integrative approach oriented at effective application of the knowledge acquired.

The following general and specific skills are included **in this topic**:

## GENERAL:

- **Appreciate diversity and multiculturalism:** understand and accept social and cultural diversity as an enriching personal and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** to be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

## SPECIFIC:

- Suitably identify, interpret and apply the international, regional and national norms on cultural rights applicable to the different assumptions posed in their respective disciplines and professional areas.
- Identify the specific obligations of respect, protection and realisation of minority rights and the minimum normative content needed for their realisation and for questioning their fulfilment in a particular situation.
- Identify, analyse, argument and evaluate the critical deviations and gaps in the capability and responsibility of the minority rights-holders as well as the obligations that hinder the action or transformation of a particular situation in which those rights are being violated.
- Contrast and evaluate situations, practices, legislation, local and national policies in accordance with the legal instruments on minority rights ratified in your country, and suggest and plan out some efficient alternatives.
- Identify and apply the international and regional protection mechanisms for minority rights.
- Seek out, select and analyse information from a variety of sources (legal, social, financial, etc.). Plan and document this task appropriately.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### International standards

- [Universal Declaration of Human Rights 1948](#)
- [International Covenant on Civil and Political Rights 1966: art. 25 and 27.](#)
- [Convention on the Rights of the Child: art. 30.](#)
- [Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992.](#)
- Marrakesh Declaration on the Rights of Religious Minorities in Predominantly Muslim Majority Communities, 25th-27th January 2016.

[Commentary of The Working Group on Minorities To The United Nations Declaration On The Rights Of Persons Belonging To National Or Ethnic, Religious And Linguistic Minorities, 2005 \(UN Doc. E/CN.4/Sub.2/AC.5/2005/2\).](#)

## Human Rights Committee:

- [General Comment N° 23: The rights of minorities \(Art. 27\), \(1994\), UN Doc. CCPR/C/21/Rev.1/Add.5.](#)
- [General Comment N° 18 : Non-discrimination, \(1989\).](#)

[Main page Minorities](#)

[Former Working Group on Minorities](#)

[Forum on Minority Issues](#)

[Special Rapporteur on minority issues](#)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

[CERD: Guidelines for the early warning and urgent action procedures. \(2007\)](#)

Guidance Note of the Secretary-General, [On Racial Discrimination and Protection of Minorities](#), 2013.

Office of the United Nations High Commissioner for Human Rights (OHCHR), [Minority Rights: International Standards and Guidance for Implementation](#), New York and Geneva, 2010.

OHCHR, [Compilation of United Nations manuals, guides, training material and other tools on minority issues](#)

OHCHR, [Forum on minority issues](#). Compilation of Recommendations of the First Four Sessions 2008 to 2011.

OHCHR, [Promoting and Protecting Minority Rights: A Guide for Advocates](#), New York and Geneva, 2012.

United Nations Development Program (PNUD), ["Marginalized minorities in development programming"](#). May 2010.

## LEARNING PROCESS RESULTS

At the end of the topic, the student must be able to:

- Understand the concept of minority: its similarities and differences with other collectives (migrants, refugees, indigenous peoples, etc.)
- Know what are the main international legal texts of the United Nations on this subject and the protection mechanisms for the rights of members of minorities.
- Identify the area of responsibility of the States with respect to potential situations of infringement of the positive and negative obligations regarding the rights of members of minorities.
- Identify the main obstacles that current exist to the protection of minority rights.
- Be able to counter argumentation that justifies restrictions on minority rights.
- Analyse the situation of minority rights in cases in which we find the subjects are especially vulnerable.

## METHODOLOGY

We include as suggestions the following:

Methodology:	Teaching tools
Expository method	Reading texts and/or viewing audio-visual material
Problem-solving	Carry out the activity described
Group discussions	/Forum and writing the final document

## DESIGNING A SYLLABUS OF LEARNING ACTIVITIES

1. Study the content of the topic.
2. Read the wording of the Rights and their corresponding articles.
3. Choose potential situations in which it seems to you that discrimination occurs.
4. For each one, justify why the violation of the minority's rights occurs.
5. What international norm is your argumentation based on?
6. Presentation to the group of the different situations chosen by the group members. Debate in regard to how often such violations take place, and the steps that can be taken to prevent and eliminate them.
7. Write a final document that features the main results of the learning activity, insisting on the ways formulated for prevention and elimination of potential violations and infringements of minority rights.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Assessment criteria
Activity 1: Individual work	40 minutes	
Activity 2: Presentation	10 minutes of presentation per student	
Activity 3 Debate	20 minutes	
Activity 4 Writing a final document	15 minutes approx.	*Proposals for action will be given special consideration.
	1,30h	

## SUBJECT 2.4.:

# 2.4.24. RIGHTS OF PERSONS BELONGING TO MINORITIES

### 1. INTRODUCTION<sup>678</sup>

Efforts by non-dominant groups to preserve their cultural, religious or ethnic differences emerged with the creation of nation States in the eighteenth and nineteenth centuries. The recognition and protection of minority rights under international law began with the League of Nations through the adoption of several “minority treaties”. When the United Nations was set up in 1945 to replace the League of Nations, it, too, gradually developed a number of norms, procedures and mechanisms concerned with minorities.

In particular, the 1966 International Covenant on Civil and Political Rights and the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereinafter: United Nations Minorities Declaration) recognize and protect the rights of persons belonging to minorities. In practice, however, these rights are far from being realized.

### 2. DELIMITING THE CONCEPT OF MINORITIES

Adopted by consensus in 1992, the United Nations Minorities Declaration in its article 1 refers to minorities as based on national or ethnic, cultural, religious and linguistic identity, and provides that States should protect their existence. There is no internationally agreed definition as to which groups constitute minorities. It is often stressed that the existence of a minority is a question of fact and that any definition must include both objective factors (such as the existence of a shared ethnicity, language or religion) and subjective factors (including that individuals must identify themselves as members of a minority).

All States have one or more minority groups within their national territories, characterized by their own national, ethnic, linguistic or religious identity, which differs from that of the majority population. According to a definition offered in 1977 by Francesco Capotorti, Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, a minority is:

*A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members—being nationals of the State—possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*<sup>679</sup>

In addition to objective criteria, which appeal to the non-dominant position of minorities, it has been argued that the use of subjective criteria, such as the will on the part of the members of the groups in question to preserve their own characteristics and the wish of the individuals concerned to be considered part of that group, combined with certain specific objective requirements, such as those listed in the Capotorti definition, should be taken into

678. This topic was written up reproducing some of the content of the document “Minority Rights: International Standards and Guidance for Implementation”. Office of the High Commissioner for Human Rights, United Nations, New York and Geneva, 2010.

679. E/CN.4/Sub.2/384/Rev.1, par. 568.

account. It is now commonly accepted that recognition of minority status is not solely for the State to decide, but should be based on both objective and subjective criteria.

As regards the scope of the concept of minority, section 5.1 of General Comment No. 23 from 1994 on the rights of minorities points out that “the terms used in article 27 indicate that the persons designed to be protected are those who belong to a group and who share in common a culture, a religion and/or a language. Those terms also indicate that the individuals designed to be protected need not be citizens of the State party. In this regard, the obligations deriving from article 2(1) are also relevant, since a State party is required under that article to ensure that the rights protected under the Covenant are available to all individuals within its territory and subject to its jurisdiction, except rights which are expressly made to apply to citizens, for example, political rights under article 25. A State party may not, therefore, restrict the rights under article 27 to its citizens alone”. Moreover, section 5.2 notes that “just as they need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights”.

The above becomes very helpful, especially today, when the rights are in question of persons considered as “non-citizens” by certain states. This also extends to collectives such as the stateless and, primarily, refugees.

The members of minorities are found in a different situation than that of the members of indigenous peoples, given that “while indigenous peoples can claim minority rights under international law, there are United Nations mandates and mechanisms dedicated specifically to protecting their rights. (...) In practical terms, a number of connections and commonalities exist between indigenous peoples and national, ethnic, linguistic and religious minorities. Both groups are usually in a non-dominant position in the society in which they live and their cultures, languages or religious beliefs may be different from the majority or the dominant groups. Both indigenous peoples and minorities commonly wish to retain and promote their identity. Situations can be found on the ground where an indigenous group could find itself in a minority-like situation and, equally, some minorities have strong and long-standing attachments to their lands and territories as do indigenous peoples. Minorities, however, do not necessarily have the long ancestral, traditional and spiritual attachment and connections to their lands and territories that are usually associated with self-identification as indigenous peoples ».

### 3. NORMATIVE CONTENT OF THE RIGHTS OF MEMBERS OF MINORITIES

Article 27 of the International Covenant on Civil and Political Rights states that “in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”. Thus, we can see that the rights conferred by the Covenant on members of minorities revolve around three different elements: respect for the **right to access culture, the religious feelings of the members of minorities and their own language** as their preferred way for communicating with other members of their group.

This is recognised in section 6.1 of General Comment No. 23 (1994) on the rights of minorities when it stresses that “although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party”.

The General Comment also makes a few clarifications, especially on differentiating between linguistic rights and rights emanating from free speech. Specifically, section 5.3 recalls that “the right of individuals belonging to a linguistic minority to use their language among themselves, in private or in public, is distinct from other language rights protected under



the Covenant. In particular, it should be distinguished from the general right to freedom of expression protected under article 19. The latter right is available to all persons, irrespective of whether they belong to minorities or not. Further, the right protected under article 27 should be distinguished from the particular right which article 14(3)(f) of the Covenant confers on accused persons to interpretation where they cannot understand or speak the language used in the courts. Article 14(3)(f) does not, in any other circumstances, confer on accused persons the right to use or speak the language of their choice in court proceedings”.

## 4. NORMATIVE CONTENT OF THE RIGHTS OF MEMBERS OF MINORITIES

In 1992 the General Assembly adopted the United Nations Minorities Declaration by consensus (resolution 47/135). It is the main reference document for minority rights. It grants to persons belonging to minorities:

- Protection, by States, of their existence and their national or ethnic, cultural, religious and linguistic identity (art. 1);
- The right to enjoy their own culture, to profess and practise their own religion, and to use their own language in private and in public (art. 2 (1));
- The right to participate effectively in cultural, religious, social, economic and public life (art. 2 (2));
- The right to participate effectively in decisions which affect them on the national and regional levels (art. 2 (3));
- The right to establish and maintain their own associations (art. 2 (4));
- The right to establish and maintain peaceful contacts with other members of their group and with persons belonging to other minorities, both within their own country and across State borders (art. 2 (5)); and
- The freedom to exercise their rights, individually as well as in community with other members of their group, without discrimination (art. 3).

The Declaration is not limited to listing negative freedoms that only generate the obligation to respect by means of abstentions in the actions of the State or of third parties. Rather, the rights of minorities also engender positive obligations to protect and specially to guarantee their real and effective exercise, taking measures, giving them opportunities and creating favourable conditions for them to:

- Ensure that they may exercise fully and effectively all their human rights and fundamental freedoms without any discrimination and in full equality before the law (art. 4 (1));
- Create favourable conditions to enable them to express their characteristics and to develop their culture, language, religion, traditions and customs (art. 4 (2));
- Allow them adequate opportunities to learn their mother tongue or to have instruction in their mother tongue (art. 4 (3));
- Encourage knowledge of the history, traditions, language and culture of minorities existing within their territory and ensure that members of such minorities have adequate opportunities to gain knowledge of the society as a whole (art. 4 (4));
- Allow their participation in economic progress and development (art. 4 (5));
- Claim their legitimate interests in planning and executing national policies and programmes, as well as international aid and cooperation programmes (art. 5).

In 2005, the Working Group on Minorities adopted a commentary intended to guide the understanding and application of the United Nations Minorities Declaration. This comment

in regard to article 27 of the International Covenant on Civil and Political Rights affirms that the article protects the rights of persons belonging to minorities to their national, ethnic, religious or linguistic identity, or a combination thereof, and to preserve the characteristics which they wish to maintain and develop. Although it refers to the rights of minorities in those States in which they exist, its applicability is not subject to official recognition of a minority by a State. States that have ratified the Covenant are obliged to ensure that all individuals under their jurisdiction enjoy their rights; this may require specific action to correct inequalities to which minorities are subjected.

Similarly, the Human Rights Committee's general comment No. 23 (1994) stated that "this article establishes and recognizes a right which is conferred on individuals belonging to minority groups and which is distinct from, and additional to, all the other rights which, as individuals in common with everyone else, they are already entitled to enjoy under the Covenant." The right under article 27 is an autonomous one within the Covenant. The interpretation of its scope of application by the Human Rights Committee has had the effect of ensuring recognition of the existence of diverse groups within a State and of the fact that decisions on such recognition are not the province of the State alone, and that positive measures by States may be "necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group."

**The International Covenant on Economic, Social and Cultural Rights** mentions explicitly in article 2 (2) that "the States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The reference to this Covenant becomes necessary due to the approval of **General Comment No. 14 (2000) of the Committee on Economic, Social and Cultural Rights on the right to the highest attainable standard of health**, which states that health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, including ethnic minorities. Furthermore, all health facilities, goods and services must be culturally appropriate, for instance respectful of the culture of minorities. "States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including [...] minorities, to preventive, curative and palliative health services".

Furthermore, it should be highlighted that Article 1 of the **International Convention on the Elimination of All Forms of Racial Discrimination** defines discrimination 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, cultural or any other field of public life."

Article 30 of the **Convention on the Rights of the Child** provides that "in those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language".

The **Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law**, adopted by General Assembly resolution 60/147 of 16 December 2005, states that "restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred. Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property." This principle could be broadly interpreted to include the right to have one's status as indigenous person or person belonging to a minority restored, in particular where this is provided for under national legislation and if such status is lost as a consequence of displacement.

## 5. RIGHTS-HOLDERS

In the liberal conception of human rights, the only holders of these rights are individuals. Even though some rights are exercised as members of a community, these rights do not belong to groups, they are not rights the group can claim and exercise against the individual. However, the liberal conception, which may have broad consensus in matters of civil and political rights, has become quite controversial in the case of cultural rights and even in the rights of minorities.

For this reason, we have deemed it best to look again at General Comment No. 23, from the year 1994, especially to point out that, as regards the rights-holders of the rights of minorities, it gives greater detail not only on the individual but also on the group. Section 6.2 notes that “although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. Accordingly, positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practice their religion, in community with the other members of the group”.

Despite the recognitions and attempts mainly carried out by organs of the United Nations to bestow universality on different human rights, there still exist today certain groups that feature a set of circumstances that seriously hinder their members from effectively exercising those rights. The members of minorities are one of those groups, and among the minorities we can furthermore identify certain particularly vulnerable subjects. Even though neither the United Nations Declaration on minorities from 1992 nor General Comment No. 23 expressly mention it, there are especially vulnerable groups whose protection requires taking some special measures. These involve:

**5.1. The members of religious minorities**, on whom the Document asks a series of questions eminently related to enjoyment of the right to religious freedom, performing acts of worship and religious practices, building places of worship, recognition of the right to education, etc, not to mention the allusion to advocacy of inter-religious dialogue. One must also recall that one of the latest United Nations documents on human rights protection looks precisely into the situation of Islam in the Declaration of Marrakesh, from January 2016, on the situation of religious minorities in predominantly Muslim communities. That Declaration pursues the drive and promotion of the spirit from the old Charter of Medina. As can be drawn from the text of that Charter, its rules “contained a set of principles on constitutional contractual citizenship, such as freedom of movement, property, solidarity and mutual defence, as well as justice and equality under the law.

The objectives of the Charter of Medina constitute an adequate framework for the constitutions of countries with Muslim majorities, and the United Nations Charter and related documents, the Universal Declaration on Human Rights, are in harmony with the Charter of Medina”.

**5.2. Women belonging to minorities.** Discrimination against women remains a persistent and universal problem. However, some women’s problems are compounded by their uniquely disadvantaged position in society as members of national, racial, ethnic, religious or linguistic minorities. Women and girls from disadvantaged minority groups experience multiple and intersectional forms of discrimination based on both their minority status and their gender. Such multidimensional discrimination may make them particularly vulnerable to violations of their rights in public and private life, including in some cases violence and sexual assault both outside and within their communities. They may also be subjected to traditional harmful practices, such as female genital mutilation.

Women belonging to minorities often find themselves marginalized and face exclusion within their own communities and in the wider society alike. They have limited opportunities for education and for political participation and lack a political voice, decent work and income-generating opportunities, social and financial capital, and basic social services. Women are also frequently discriminated against with regard to ownership and inheritance of property—an area where minorities and indigenous peoples already face discrimination.

**5.3. Children belonging to minorities** The Convention on the Rights of the Child is the most comprehensive instrument on this matter, recognizing civil, cultural, economic, political and social rights. The application of the norms set forth in the Convention is anchored in four major principles: non-discrimination; the best interests of the child; the rights to life, survival and development; and respect for the views of the child. The Convention applies to everyone equally and specifies that children belonging to ethnic, religious or linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language (art. 30). The Convention also lists situations in which States are obliged to take measures to protect children's interests, for instance, protecting them from physical or mental harm and neglect; special consideration of children in conflict with the law; the right of children with disabilities to special treatment; the right to birth registration and to acquire a nationality; the right of refugee children to receive appropriate protection and humanitarian assistance; education and care; health care for all children; free and compulsory primary education; protection from economic exploitation; protection from all forms of abuse and exploitation and prohibition of the recruitment of children under the age of 15 into the armed forces.

In its General Comment No. 6 (2005), the Committee on the Rights of the Child noted:

*State obligations under the Convention apply to each child within the State's territory and to all children subject to its jurisdiction (art. 2). These State obligations cannot be arbitrarily and unilaterally curtailed either by excluding zones or areas from a State's territory or by defining particular zones or areas as not, or only partly, under the jurisdiction of the State. Moreover, State obligations under the Convention apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory. Therefore, the enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children—including asylum-seeking, refugee and migrant children—irrespective of their nationality, immigration status or statelessness.*

This is of particular relevance to children belonging to minorities who may be stateless or lack registration documents, which can make them more vulnerable to abuse, trafficking and other forms of exploitation. Stateless children may be denied the full enjoyment of their rights under the Convention owing to discriminatory access to education, social and health services.

## 6. INTERNATIONAL HUMAN RIGHTS DEFENCE MECHANISMS AVAILABLE TO FACE THE PROBLEMS REGARDING MINORITIES

As regards the foreseen mechanisms, the Document on the rights of minorities makes a difference between the organs created under human rights treaties, special procedures on human rights and the mechanisms from the Human Rights Council. We may also cite other mechanisms such as the ones from institutions such as the ILO and UNESCO (which we will not spend further time on here as they may be developed more fully elsewhere in the study of other specific rights).

First, as regards the organs created under human rights treaties, the Document stresses that “to ensure that the rights contained in international human rights conventions are realized, committees have been established to monitor the progress made by States parties in fulfilling their obligations. Those of particular relevance to minority rights are:

- The Human Rights Committee, which oversees the implementation of the International Covenant on Civil and Political Rights (see also chap. III, sect. A above, in particular regarding its article 27);
- The Committee on Economic, Social and Cultural Rights, which oversees the implementation of the International Covenant on Economic, Social and Cultural Rights;

- The Committee on the Elimination of Racial Discrimination, which oversees the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination;
- The Committee on the Rights of the Child, which oversees the implementation of the Convention on the Rights of the Child;
- The Committee on the Elimination of Discrimination against Women, which oversees the implementation of the Convention on the Elimination of All Forms of Discrimination against Women;
- The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, which oversees the implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and
- The Committee on the Rights of Persons with Disabilities.

By ratifying these conventions, States parties undertake to submit periodic reports to the respective committees outlining the legislative, judicial, policy and other measures they have taken to ensure the enjoyment of, inter alia, the minority-specific rights contained in these instruments. On the basis of the information the committees receive, they can pursue a dialogue with the reporting States parties. Once a State party's report has been considered, a committee issues "concluding observations", which may state that violations of the rights of minorities have taken place, urge the State party to desist from any further infringements of the rights in question or call on it to adopt measures to improve the situation. United Nations staff members with responsibilities in countries where minorities face particular issues can contact the secretariat preparing the sessions of the various committees studying that country.

Secondly, as we have mentioned, there exist a set of **special procedures on human rights** matters, a generic name coined by the Human Rights Council itself and that have been created to face situations in specific countries or specific thematic questions all over the world.

The first of these special procedures was the designation of the *United Nations Independent Expert on minority issues*. The mandate was established, inter alia, to promote the implementation of the United Nations Minorities Declaration, to identify best practices and opportunities for technical cooperation by OHCHR, to engage in consultation and dialogue with Governments regarding minority issues in their countries, and to take into account the views of non-governmental organizations (NGOs)

Information on the specific situation of a particular group or individual as well as on the general situation of minorities in a country or region can be sent to the Independent Expert through OHCHR. Based on information received from a variety of sources, the Independent Expert can raise issues directly with Governments. The Independent Expert sends urgent appeals or letters of allegation, usually together with other special procedure mandate-holders. The Independent Expert undertakes country visits at the invitation of Governments to further constructive consultation, observe relevant programmes and policies, register concerns, and identify areas for cooperation. In addition, the Independent Expert engages in work on thematic priorities, including producing thematic reports and convening seminars and consultations.

The mandate of the Special Rapporteur on minority issues was established in resolution 2005/79 the Commission on Human Rights on 21 April 2005. The mandate was subsequently renewed by the Human Rights Council in its resolutions 7/6 of 27 March 2008, 16/6 of 24 March 2011 and 25/5 of 28 March 2014.

In resolution 25/5 the Human Rights Council extended the mandate as Special Rapporteur on minority issues for a period of three years and requests the mandate holder:

- (a) To promote the implementation of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, including

through consultations with Governments, taking into account existing international standards and national legislation concerning minorities;

- (b) To examine ways and means of overcoming existing obstacles to the full and effective realization of the rights of persons belonging to minorities;
- (c) To identify best practices and possibilities for technical cooperation with the Office of the High Commissioner, at the request of Governments;
- (d) To apply a gender perspective in his/her work;
- (e) To cooperate and coordinate closely, while avoiding duplication, with existing relevant United Nations bodies, mandates and mechanisms and with regional organizations;
- (f) To take into account the views of and cooperate closely with nongovernmental organizations on matters pertaining to his/her mandate;
- (g) To guide the work of the Forum on Minority Issues, prepare its annual meetings, to report on its thematic recommendations and to make recommendations for future thematic subjects, as decided by the Human Rights Council in its resolution 19/23;
- (h) To submit an annual report on his/her activities to the Human Rights Council and to the General Assembly, including recommendations for effective strategies for the better implementation of the rights of persons belonging to national or ethnic, religious and linguistic minorities.

The second procedure is the **Forum on Minority Issues**, established in 2007, by resolution 6/15 the Human Rights Council, to provide a platform for promoting dialogue and cooperation on issues pertaining to persons belonging to national or ethnic, religious and linguistic minorities. The Forum provides thematic contributions and expertise to the work of the Independent Expert on minority issues; identifies and analyses best practices, challenges, opportunities and initiatives for the further implementation of the United Nations Minorities Declaration. The Independent Expert on minority issues guides the work of the Forum, prepares its annual meetings and includes the thematic recommendations of the Forum in his/her report. The Forum is also expected to contribute to the efforts of the High Commissioner for Human Rights to improve cooperation among United Nations mechanisms, bodies and specialized agencies, funds and programmes on activities related to the promotion and protection of the rights of persons belonging to minorities, including at the regional level.

Moreover, **other special procedures** should not be forgotten, promoted by the United Nations High Commissioner, who provides secretariat support to several other special procedures with mandates to examine, monitor, advise and publicly report on human rights situations. Those with responsibility for specific countries or territories are known as “country mandates”; those working on specific major human rights concerns worldwide are known as “thematic mandates”. These mechanisms technical cooperation and engage in general promotional activities. Most mandate-holders receive information on specific allegations of human rights violations and send urgent appeals or letters of allegation to Governments asking for clarification. Upon invitation, they also undertake country visits.

In addition to the Independent Expert on minority issues, other mandate holders responsible for civil, cultural, economic, political and social rights are relevant to the situation of minorities, and many receive information about violations of the rights of minorities related to their particular human rights focus and expertise. Particularly relevant are the mandates on: extrajudicial, summary or arbitrary executions; adequate housing as a component of the right to an adequate standard of living; extreme poverty; the right to food; freedom of opinion and expression; freedom of religion or belief; the right to health; the right to education; the situation of human rights defenders; internally displaced persons; contemporary forms of racism, racial discrimination, xenophobia and related intolerance; torture and other cruel, inhuman or degrading treatment or punishment; trafficking in persons; and violence against women, its causes and consequences. There are also new mandates that can be of particular interest for minorities, notably the Independent Expert in the field of cultural rights.



Lastly, as regards the mechanisms of the Human Rights Council, we make special mention of the Universal Period Review. In 2006, the General Assembly adopted resolution 60/251 and decided that the Human Rights Council should undertake a universal periodic review (UPR) of the fulfilment by each State of its human rights obligations and commitments. All United Nations Member States will be reviewed in this way every four years. The review is based on three reports: one by the State itself and two by OHCHR, namely a compilation of United Nations information (from reports of treaty bodies, special procedures and other relevant official United Nations documents) and a summary of stakeholders' input (from NGOs, NHRIs, academic institutions and regional organizations). For the preparation of these three documents, which may include information on the human rights situation of persons belonging to minorities, United Nations entities can: (i) advise States on how to prepare their reports in a consultative manner; (ii) send submissions to OHCHR and/or draw attention to their own publications for OHCHR review, to be considered for the compilation of United Nations information reports; and (iii) disseminate information to stakeholders, including NGOs, for the preparation of their input.



## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60**

**Subject**

**2.4.25. The Rights of Migrants**

**Lecturer:**

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## SUMMARY OF THE TOPIC

The purpose of this topic is to provide learners with critical and analytical knowledge and understanding of the human rights of migrants, as well as to provide them with the basic tools necessary to design relevant educational material on the rights of migrants in the Maghreb region.

In particular, this topic will:

1. Look at the nature and the framework of migrants' protection in international law;
2. Identify the holders of rights and the relevant states' obligations under international law; and
3. Consider the current challenges related to the protection of migrants in the Maghreb region.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course the participating teachers must be capable of recognising the educational potential of the *general and specific competencies* described below to achieve significant learning in human rights, in addition to including these competencies in their teaching plans with a unifying approach and oriented towards the effective application of the knowledge acquired.

The following general and specific skills are included **in this topic**:

## GENERAL:

1. **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
2. **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
3. **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
4. **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
5. **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
6. **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

## SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.
- To identify and apply international and regional human rights protection mechanisms.
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.
- To embed a human-rights based approach in specific educational activities and curricula of the Maghreb Universities partnering on this project

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### Relevant international human rights law:

- [Universal Declaration on Human Rights \(UDHR\)](#), 1948

International Convention on the Elimination of All Forms of Racial Discrimination	21 Dec 1965
International Covenant on Civil and Political Rights	16 Dec 1966
International Covenant on Economic, Social and Cultural Rights	16 Dec 1966
Convention on the Elimination of All Forms of Discrimination against Women	18 Dec 1979
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	10 Dec 1984
Convention on the Rights of the Child	20 Nov 1989
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	18 Dec 1990
International Convention for the Protection of All Persons from Enforced Disappearance	20 Dec 2006
Convention on the Rights of Persons with Disabilities	13 Dec 2006

### Relevant international law for the protection of migrant workers:

- ILO Instruments
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), 1990

### Relevant international criminal law:

- UN Convention on Transnational Organised Crime, 2000
- Palermo Protocols to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and Protocol against the Smuggling of Migrants by Land, Sea and Air, 2000.

### Relevant international law on Statelessness:

- Convention on the Reduction of Statelessness
- Convention relating to the Status of stateless persons

**Relevant international maritime law:**

- Convention on the Law of the Sea
- FAL Convention
- International Convention for the Safety of Life at Sea

**Open access internet resources for key documents on Migration:**

- EUROPEAN COMMISSION, [Asylum and Migration Glossary 3.0 a tool for better comparability produced by the European Migration Network](#), October 2014
- EUROPEAN COMMISSION, [EU Immigration Portal](#)
- IOM, [Glossary on Migration](#).
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OHCHR, [Behind closed doors: protecting and promoting the human rights of migrant domestic workers in an irregular situation](#), Geneva and New York, 2015, available at

OHCHR, [Human Rights and Human Trafficking](#), Fact sheet n°. 36.

OHCHR, [Recommended principles and guidelines on human rights at international borders](#)

OHCHR, [Situation of migrants in transit](#) - Report of the Office of the United Nations High Commissioner for Human Rights, 2016 (UN Doc. A/HRC/31/35).

OHCHR, [Technical cooperation and capacity-building to promote and protect the rights of all migrants, including women, children, older persons and persons with disabilities](#), 2016 (UN Doc. A/HRC/31/80).

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PNUD, [Human Development Report 2009. Overcoming barriers: Human mobility and development](#), New York, 2009.

UNHCR, [Refugee Protection and Mixed Migration: The 10-Point Plan in action](#), February 2011.

Yannis Ktistakis, [Protecting migrants under the European convention on Human Rights and the European Social Charter. A handbook for legal practitioners](#), Council of Europe Publishing, Paris, 2013.

## LEARNING PROCESS RESULTS

Having successfully completed the topic, learners should be able to:

- A) Explain the international legislative framework for migrants' protection;
- B) Analyse, interpret and evaluate situations where the protection of migrants is at stake;
- C) Effectively apply the acquired critical and analytical skills to solve practical problems relating to the protection of migrants in their own country or region;
- D) Inform their own teaching practice in light of the acquired knowledge and understanding of the topic.

## SCHEDULING OF LEARNING ACTIVITIES

Methodology	Educational tools
Exposition method	Reading of texts and watching of audiovisual material
Cooperative learning	Forum
Case note	Portfolio
Team project	Portfolio
Individual project	Portfolio

## LEARNING ACTIVITIES

1. **LECTURE:** This activity aims to provide learners with critical and analytical knowledge and understanding of the international legal framework for the protection of international migrants, as well as of their rights and obligations, and the corresponding state's obligations.
  - A) Read the FILE to understand what you can expect from this topic and what you are expected to do to successfully complete it;
  - B) Watch the following interview to Doré (young migrant) and write down your own reflections afterwards. Please open [this link](#)
  - C) Watch the following video on Human Trafficking and write down your own reflections afterwards: Please open the "[Affected for Life](#)" video
  - D) Read and study the exposition of the topic at the end of this FILE; and
  - E) Complete the auto test for a brief self-evaluation.
2. **COLLABORATIVE LEARNING:** This activity requires learners to reflect on State's compliance with the obligations set out in the UN Convention on Migrant Workers' Rights, and illustrate specific examples of measures that have been taken by those States in their region who are parties to the Convention following the "[Concluding observations of the Committee for the protection of the rights of all migrant workers and members of their families](#)".

- Read the “Concluding observations of the Committee for the protection of the rights of all migrant workers and members of their families” addressed either to Algeria (2010) or Morocco (2013);
  - Post on the forum any relevant example, that you can identify through adequate research, of concrete measures that have been taken by the State in question following the “Concluding observations of the Committee for the protection of the rights of all migrant workers and members of their families”;
  - If your State of origin is not party to the Convention, discuss on the forum the current debate at national level regarding your own country’s obligations to comply with international standards on the protection of migrants, and what steps are being taken to meet those standards.
3. **CASE NOTE:** This activity requires learners to identify, analyse and evaluate a situation where the protection of migrants is at stake, as well as to develop their own critique of the judgment and/or the area of law relating to the protection of international migrants.
- Read the decision of the European Court of Human Rights in *Khlaifia v. Italie* (Requête no 16483/12) on the use of summary procedures to return tunisian migrants
  - Write a case note following the guidance below.

### What is a case note? / Writing a case note

A case note provides a brief analysis of a case (usually one that is important/significant in some way), identifying and examining the key elements of the decision, as well as placing the case in its wider legal and social context.

You are required to do the following:

- Set out the relevant facts – keep it short, sticking to the important facts only;
  - Identify the key legal issues arising from the facts;
  - Analyse the judgment, with a focus on the majority and the dissenting opinions;
  - Evaluate the decision, considering, for example, the validity and strength of the reasoning or the impact this decision may have on this area of law or society more generally.
4. **TEAM PROJECT:** This activity requires learners to work in pairs and chose one of the following movies to design a training material for their students according to the discipline or degree that they teach. In particular, each team will have to discuss which relevant issues stand out in the film, what kind of exercise and/or violation of relevant rights can be seen in the film, and how they can use the film to design a training material for their students.

• *Ghosts, 2007, 1hour36min.:*

Ai Qin (Ai Qin Lin) is a young woman living in Fuzhou, China. With no work and no prospects, Ai Qin leaves her family behind and pays \$ 5,000 for smuggling in the UK. There, she finds a meagre job in a meat packing plant that is endowed almost entirely by migrant workers. Looking to supplement his income, Ai Qin becomes a hull selector on Morecambe Bay, paving the way for the tragic real-life events that took place in 2004 when 23 migrant workers lost their lives.

• *Fear eats the soul, 1974, 1hour34min.:*

Emmi Kurowski (Brigitte Mira), a housekeeper, is alone in her old age. Her husband died years ago, and her adult children offer little company. One night, she goes to a bar frequented by Arab immigrants and befriends middle-aged mechanic Ali (El Hedi Ben Salem). Their relationship quickly develops into something more, and Emmi’s family and neighbours criticize their spontaneous marriage. Soon Emmi and Ali are forced to face their own insecurities about their future.

- *The visitor, 2009, 1hour44min.:*

When Professor Walter Vale (Richard Jenkins) goes to New York for a conference, he is stunned to find illegal immigrants Tarek (Haaz Sleiman) and Zainab (Danai Gurira) living in his apartment. It emerges that he was praised to them by a scammer, and Vale feels sorry enough for them that he invites them to stay. They hear well until Tarek is accused of jumping a subway turnstile and lands in a detention centre. He may be deported, and Vale does everything he can to prevent it.

- *Nuovomondo, 2007, 1hour58min.:*

Salvatore (Vincenzo Amato), a villager from Sicily, decides to leave his native country to emigrate to America with his two sons, Angelo (Francesco Casisa) and Pietro (Filippo Pucillo). They and their traveling companions (Charlotte Gainsbourg, Federica de Cola) are faced with a difficult journey to what they believe is a land of milk and honey.

- *It's a free world, 2007, 1hour36min.:*

After being dismissed from her job, Angie teams with her friend to find a job for immigrants.

- *Lorna's Silence, 2008, 1hour 45min.:*

Lorna (Arta Dobroshi), an Albanian young woman living in Belgium, hopes to open a café with her boyfriend, a traveling worker who visits when he can. She marries Claudy, a local junkie, to guarantee legal residence and collaborates with Fabio (Fabrizio Rongione), a low-tax taxi driver who organizes a considerable gain to make him marry a Russian mafia. Lorna wants to divorce Claudy; But Fabio wants to overdose him. She knows nothing of the threatening underworld in which she will be entangled.

- *La promesse, 1996, 1hour 30min.:*

Roger (Olivier Gourmet) uses his 15-year-old son, Igor (Jérémy Renier), to help traffic, house and ruthlessly exploit illegal immigrants in Belgium. When African immigrant Amidou (Rasmane Ouedraogo) falls from a scaffold, Igor finds him before dying and promises that he will take care of his wife and the baby. Forced by his father to cover death, Igor finds it hard to choose between loyalty to his unworthy parents and keep his promise to the man to die.

- *The undocumented, 2013, 1hour 28min.:*

Migrant workers without papers in Arizona attempt to return their remains to Mexico

5. **INDIVIDUAL PROJECT:** This activity requires learners to develop a topic on one of the aspects of the protection of refugees and/or IDPs in the Maghreb region to be included in the teaching program of their specialty, using the Service-Learning methodology.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1 Lecture	8 hours	Self-test
Activity 2 Collaborative Learning	8 hours	Forum
Activity 3 Case note	8 hours	Portfolio
Activity 4 Team Project	12 hours	Portfolio
Activity 5 Individual Project	24 hours	Portfolio



## SELF-ASSESSMENT: 5 QUESTIONS FOR SELF-ASSESSMENT OF KNOWLEDGE ACQUISITION

- 1) People who enter a country, usually in search of employment, without the necessary documents and permits are:
  - a) Refugees;
  - b) Irregular/Undocumented migrants;
  - c) Displaced persons;
  - d) Asylum seekers.
  
- 2) The following Countries in your region are parties to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families:
  - a) Algeria and Tunisia;
  - b) Morocco and Tunisia;
  - c) Algeria and Morocco;
  - d) Algeria, Morocco, and Tunisia.
  
- 3) Art. 37(b) of the Convention on the Rights of the Child (CRC) establishes that detention:
  - a) Must only be used as a last resort;
  - b) Musts only be used for the shortest period of time possible;
  - c) Must have a proper justification;
  - d) All of them.
  
- 4) The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)
  - a) Is the body of independent experts that monitors implementation of the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families;
  - b) Is a Thematic Special Procedure of the Human Rights Council;
  - c) None of them;
  - d) Both of them.
  
- 5) The element that differentiates smuggling of migrants and trafficking of humans is the following:
  - a) the consent;
  - b) the transnationality;
  - c) the exploitation;
  - d) all of them.

## SELF-ASSESSMENT

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Question	Key Answer
Question 1	b
Question 2	c
Question 3	d
Question 4	a
Question 5	d

## SUBJECT 2.4.:

# 2.4.25. THE RIGHTS OF MIGRANTS

## 1. MIGRATION TERMINOLOGY

### 1.1 MIGRANT/MIGRATION

At the international level, no universally accepted definition for “migrant” exists. The term **migrant** can be understood as *“any person who lives temporarily or permanently in a country where he or she was not born, and has acquired some significant social ties to this country.”*<sup>1</sup> However, this may be a too narrow definition when considering that, according to some states’ policies, a person can be considered as a migrant even when s/he is born in the country.

The UN Convention on the Rights of Migrants workers and members of their families (1990) defines a migrant worker as a *“person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.”* From this a broader definition of migrants follows:

*“The term ‘migrant’ in article 1.1 (a) should be understood as covering all cases where the decision to migrate is taken freely by the individual concerned, for reasons of ‘personal convenience’ and without intervention of an external compelling factor.”*

This definition indicates that migrant does not refer to refugees, displaced or others forced or compelled to leave their homes. Migrants are people who make choices about when to leave and where to go, even though these choices are sometimes extremely constrained. Indeed, some scholars make a distinction between voluntary and involuntary migration. While certain refugee movements face neither external obstacles to free movement nor is impelled by urgent needs and a lack of alternative means of satisfying them in the country of present residence, others may blend into the extreme of relocation entirely uncontrolled by the people on the move.

The Special Rapporteur on the human rights of migrants of the UN Council on Human Rights has proposed that the following persons should be considered as migrants:

- (a) Persons who are outside the territory of the State of which they are nationals or citizens, are not subject to its legal protection and are in the territory of another State;
- (b) Persons who do not enjoy the general legal recognition of rights which is inherent in the granting by the host State of the status of refugee, naturalised person or of similar status;
- (c) Persons who do not enjoy either general legal protection of their fundamental rights by virtue of diplomatic agreements, visas or other agreements.

This broad definition of migrants reflects the current difficulty in distinguishing between migrants who leave their countries because of political persecution, conflicts, economic problems, environmental degradation or a combination of these reasons and those who do so in search of conditions of survival or well-being that does not exist in their place of origin. It also attempts to define migrant population in a way that takes new situations into consideration.

Turning to the concept of migration, it is the crossing of the boundary of a political or administrative unit for a certain minimum period of time. It includes the movement of refugees, displaced persons, uprooted people as well as economic migrants. Internal migration refers to a move from one area (a province, district or municipality) to another

within one country. International migration is a territorial relocation of people between nation-states. Two forms of relocation can be excluded from this broad definition: first, a territorial movement which does not lead to any change in ties of social membership and therefore remains largely inconsequential both for the individual and for the society at the points of origin and destination, such as tourism; second, a relocation in which the individuals or the groups concerned are purely passive objects rather than active agents of the movement, such as organised transfer of refugees from states of origins to a safe haven.

The dominant forms of migration can be distinguished according to the motives (economic, family reunion, refugees) or legal status (irregular migration, controlled emigration/immigration, free emigration/immigration) of those concerned. Most countries distinguish between a number of categories in their migration policies and statistics. The variations existing between countries indicate that there are no objective definitions of migration. What follows is a more common categorisation of international migrants:

- **Temporary labour migrants** (also known as **guest workers** or **overseas contract workers**): people who migrate for a limited period of time in order to take up employment and send money home.
- **Highly skilled and business migrants**: people with qualifications as managers, executives, professionals, technicians or similar, who move within the internal labour markets of trans-national corporations and international organisations, or who seek employment through international labour markets for scarce skills. Many countries welcome such migrants and have special 'skilled and business migration' programmes to encourage them to come.
- **Irregular migrants (or undocumented migrants)**: people who enter a country, usually in search of employment, without the necessary documents and permits.
- **Forced migration**: in a broader sense, this includes not only refugees and asylum seekers but also people forced to move due to external factors, such as environmental catastrophes or development projects. This form of migration has similar characteristics to displacement.
- **Family members (or family reunion / family reunification migrants)**: people sharing family ties joining people who have already entered an immigration country under one of the above mentioned categories. Many countries recognise in principle the right to family reunion for legal migrants. Other countries, especially those with contract labour systems, deny the right to family reunion.
- **Return migrants**: people who return to their countries of origin after a period in another country.

Migration is an important factor in the erosion of traditional boundaries between languages, cultures, ethnic group, and nation-states. Even those who do not migrate are affected by movements of people in or out of their communities, and by the resulting changes. Migration is not a single act of crossing a border, but rather a lifelong process that affects all aspects of the lives of those involved.

This topic will not specifically address the rights of refugees and displaced persons, as they are the object of a different and complementary topic which is also part of this module. Therefore, if learners are specifically interested in relevant humanitarian law and international refugee law, they are invited to look at the topic on the rights of refugees and internally displaced persons.

[Relevant figures on International Migration](#)

## 2. OVERVIEW OF THE INTERNATIONAL LEGAL FRAMEWORK GOVERNING MIGRATION

### 2.1 MAIN SOURCES AND INSTRUMENTS OF INTERNATIONAL MIGRATION LAW

#### i. Relevant international human rights law:

All persons, by virtue of their humanity, have human rights. Human rights are migrants' rights. Therefore, human rights instruments are applicable to migrants. Human rights instruments make some distinction between nationals and non-nationals, regular and irregular migrants. There are few exceptions to the general principle of equal treatment of nationals and non-nationals (i.e. right to vote).

- Universal Declaration on Human Rights (UDHR), 1948
- International Convention on the Elimination of all forms of Racial Discrimination (ICERD), 1965
- International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966
- International Covenant on Civil and Political Rights (ICCPR), 1966
- Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), 1979
- Convention against Torture (CAT), 1984
- Convention on the Rights of the Child (CRC), 1989
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), 1990
- Convention on the Rights of Persons with Disabilities (CRPD), 2006
- International Convention for the Protection of All Persons from Enforced Disappearance, 2006

#### ii. Relevant international law for the protection of migrant workers:

All international labour standards, unless otherwise stated, are applicable to all migrant workers. Those standards include those set out in the eight ILO conventions on fundamental rights identified in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. They apply to all migrant workers, irrespective of their migration status.

The UN Convention on Migrant Workers' Rights is the most comprehensive international treaty in the field of migration and human rights. Adopted in 1990 and entered into force in 2003, it sets a standard in terms of access to human rights for migrants. However, it suffers from a marked indifference: only forty-eight states have ratified it and no major immigration country has done so. This highlights how migrants remain forgotten in terms of access to rights. Even though their labour is essential in the world economy, the non-economic aspect of migration – and especially migrants' rights – still remain quite a neglected dimension of globalisation.

- ILO Instruments
- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), 1990

#### iii. Relevant international criminal law:

The first global legally binding instruments with an agreed definition on trafficking in persons and smuggling of migrants. The intention behind these definitions is to facilitate convergence in national approaches regarding the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking and

smuggling cases. An additional objective of both Protocols is to protect and assist the victims of trafficking in persons as well as the smuggled migrants with full respect for their human rights.

- UN Convention on Transnational Organised Crime, 2000
- Palermo Protocols to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and Protocol against the Smuggling of Migrants by Land, Sea and Air, 2000.

#### iv. Relevant international maritime law:

It is an umbrella term that refers to the UN Convention on the Law of the Sea, 1982, as well as the many instruments adopted under the auspices of the International Maritime Organization (IMO), which include a number that are of particular relevance to the rights of migrants, such as the International Convention for the Safety of Life at Sea, 1974, and the International Convention on Maritime Search and Rescue, 1979. This field is also closely connected to the many international labour standards adopted by ILO relating to the rights and working conditions of seafarers, many of which have now been consolidated in the Maritime Labour Convention, 2006, which entered into force on 20 August 2013.

- Convention on the Law of the Sea
- FAL Convention
- International Convention for the Safety of Life at Sea

### 3. STATES COMPETENCES AND RESPONSIBILITIES

States have the following competences relating to migration:

- Nationality
- Admission of non-nationals
- Residence
- Detention
- Expulsion of non-nationals
- State Security/Border Control

The UN International Convention on the Rights of Migrant's workers and members of their families (ICRMW) is very clear that states have the right to control their borders, including the establishment of criteria governing admission of migrant workers and members of their families. The ICRMW strikes a balance between the sovereign power of States Parties to control their borders and to regulate the entry and stay of migrant workers and their families, on the one hand, and protection for the rights, under Part III of ICRMW, of all migrant workers and their families, including those in an irregular situation, on the other. This balance is reflected in Article 79 of ICRMW:

*"Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention."*

Moreover, states are under no legal obligation to regularize the irregular status of migrant workers. Article 35 of ICRMW clarifies that while Part III protects the rights of all migrant workers and their families, irrespective of their migration status, it cannot be interpreted as implying the regularization of irregular situations, or as conferring any right to such regularization, for migrant workers or their families. While States Parties have no obligation to regularize the situation of migrant workers or their families, they are required, whenever faced with irregular situations, to take appropriate measures to ensure they do not

persist (Article 69(1)). They should also consider the possibility of regularizing the situation of such persons in each individual case, in accordance with applicable national legislation and bilateral or multilateral agreements, considering the circumstances of their entry, the duration of their stay and other relevant considerations, in particular those relating to their family situation (Article 69(2)).

States have the obligation to manage the migration process:

- in compliance with human rights principles.
- in compliance with international commitments of states.

### Derogations and limitations of rights by States

The obligation of the state to defend its security is an essential feature of state sovereignty. The state has power to derogate from certain rights (=suspension) in the case of public emergency which threatens the life of the nation.

Moreover, limitations of rights can be allowed under the following conditions:

- Non-discriminatory application;
- Limited time;
- Prescribed by law + proportionate.

### States Cooperation on Migration

**Under Part VI of ICRMW**, all States Parties, including states of origin, have the obligation to cooperate in promoting sound, equitable, humane and lawful conditions for international migration (Article 64(1)). States of origin also have an obligation to address irregular migration in cooperation with states of transit and states of employment. The Committee on Migrant Workers, a body of independent experts that monitors the implementation of ICRMW by its States Parties, routinely enquires about the measures taken by States Parties to prevent irregular migration by their nationals, including through multilateral and bilateral agreements, policies and programmes aimed at enhancing regular migration channels and steps to address the root causes of irregular migration, such as violence, insecurity and poverty.

## 4. MIGRANTS RIGHTS AND OBLIGATIONS

Quite often, for migrants it is extremely difficult to access and effectively enjoy their rights because of:

- Lack of knowledge of their rights and of the relevant procedures;
- Language barriers;
- Cultural differences;
- Fear to be reported to the authorities, if irregular migrants;
- Target of discrimination and racial hatred.

**A) GENERAL HUMAN RIGHTS THAT APPLY TO MIGRANTS AND THAT CANNOT BE DEROGATED ARE THE FOLLOWING:**

- Right to life
- Prohibition of genocide
- Prohibition of slavery / slave trade
- Prohibition of torture



- Prohibition against arbitrary detention
- Prohibitions against racial and gender discrimination
- Right to self-determination
- Right to humane treatment as a detainee
- Prohibition against retroactive penal measures
- Right to equality before the law
- Principle of non-refoulement
- Right to freedom of thought and religion

## B) INTERNATIONAL NORMS OF SPECIAL RELEVANCE TO MIGRANTS ARE THE FOLLOWING:

- Freedom of Movement (UDHR, art. 13; ICCPR, Art.12; ICRMW, Art. 8; CRC, Art. 10)
  - Right to leave any country & right to enter one's own country
- Guarantees surrounding the expulsion (ICCPR, Art. 13; ICRMW, Art. 22 and 56; CAT, Art. 3)
- Protection against discrimination (ICCPR, art. 2)
- Protection against arbitrary detention (ICCPR, Art. 9; ICRMW, Art. 16, 17(3))
- Protection of the family (ICESCR, Art.10(1); ICCPR, Art. 17 and 23; ICRMW, Art. 14 and 44; CRC, Art. 10(1), 7 and 16)
  - Family reunification & rights of the child
- The right to health (ICESCR, Art. 12)

## C) MIGRANTS' OBLIGATIONS

Under Article **34 of ICRMW**, migrants also have a duty to comply with the laws and regulations of the states of transit and destination as well as respect the cultural identity of the inhabitants of the states of transit and destination. The obligation to comply with the laws and regulations of the state of employment or any state of transit comprises a duty to refrain from any hostile act directed against national security, public order or the rights and freedoms of others.

## D) VULNERABLE GROUPS

Some people are more in need of protection against violations of their human rights; therefore, they require a different focus. Assessing vulnerabilities and providing protection to vulnerable groups are human rights obligation of the States.

- Women, Children, Elderly
- Victims of torture or gender based violence (victims of human trafficking, LGBTI)
- Persons with mental and/or physical disabilities
- Unaccompanied minors
- Persons seeking refuge from war and/or persecution
- Irregular migrants; Migrants in detention.

### Unaccompanied Minors

The principal instrument safeguarding the rights of children in international law, including migrant children, is the Convention on the Rights of the Child (CRC), adopted by the UN General Assembly on 20 November 1989 (resolution 44/25). As of 12 August 2015, it has

gained virtually universal ratification (195 States Parties). The Convention requires States Parties to “undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the [CRC]” (Article 4). They are also to be guided, in all their actions concerning children, by the following overarching principles:

- Non-discrimination (Article 2);
- The “best interests of the child” as the primary consideration in all actions concerning children (Article 3);
- The inherent right to life of every child and the obligation to ensure to the maximum extent possible the survival and development of the child (Article 6); and
- The right of the child to freely express his or her views in all matters affecting him or her and to have them taken into account (Article 12 and General Comment No. 5 (2003): General measures of implementation of the CRC).

Articles 34 to 36 on exploitation must be read in conjunction with special protection and assistance obligations to be provided according to Article 20 of the Convention on the Rights of the Child (CRC) in order to ensure that unaccompanied and separated children are shielded from trafficking, and from sexual and other forms of exploitation, abuse and violence.

States are required to create the underlying legal framework and take necessary measures to secure proper representation of unaccompanied or separated child’s best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State in compliance with the Convention and other international obligations. The guardian should be consulted and informed regarding all actions taken in relation to the child.

A specifically relevant provision is Art. 37(b) which establishes that detention must only be used as a:

- Last resort
- For the shortest period of time possible
- Have proper justification

The article sets out conditions for any arrest, detention or imprisonment of the child.

### **Migrants women**

Migrants women are often more at risk of being victims of exploitation, in the forms of forced labour, sexual exploitation and other forms of violence. They more often accept dangerous working conditions and lower wages, under the lawful minimums. Therefore, there is a need of advocating for women’s rights so that they are empowered to take informed decisions and that they are protected in all stages of migration.

The General Human Rights Instruments, such as the ICCPR and ICESCR, are valid for women, and the CEDAW is particularly relevant (articles 2, 5, 7, and 10). In order to ensure that migration “presents new opportunities for [women] and ... a means for their economic empowerment through wider participation”, as CEDAW recommends, and enhance the important contributions they make to development in both destination and origin countries, more gender-sensitive migration policies, including policies on labour migration, need to be adopted. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families also highlighted the gender perspective in its General Comment No. 1 on migrant domestic workers. Over the years, a number of international organizations have developed important tools for governments and other stakeholders to assist them in this task.

## Migrants in detention

In a number of countries, migrants – including members of their families – are subject to detention much more readily than are nationals, sometimes under abusive conditions. Undocumented migrants in particular are often arrested, detained and expelled without being able to defend themselves in accordance with due process.

The right of everyone, including migrants, to liberty and security of person, and the protection from arbitrary arrest and detention are spelled out in Articles 9 and 10 of ICCPR, which also outline the applicable guarantees with regard to detention and trial. Many of these rights are reiterated in regional human rights instruments. Given the particular situation of migrant workers, and particularly those in an irregular situation, Article 16 of ICRMW is more specific.

The UN Committee on Migrant Workers has underscored the importance of this provision with regard to the arrest and detention of migrant workers in an irregular situation and members of their families. The Special Procedures mandates of the UN Human Rights Council have also raised concerns about the detention of migrants, including those in an irregular situation. The Working Group on Arbitrary Detention has discussed the detention of migrants on several occasions; for example, see Report of the Working Group on Arbitrary Detention, UN doc. A/HRC/10/21 (16 February 2009), paras. 65 – 68. 127. In his 2012 report to the UN Human Rights Council, the Special Rapporteur on the human rights of migrants also focused on the detention of migrants in an irregular situation, putting forward a number of comprehensive and detailed conclusions and recommendations to UN Member States.

## 5. PROTECTION MECHANISMS

Ratification of international human rights instruments is insufficient in itself to guarantee their effective application at the national level. For this reason, the international human rights standards system has a formal review process to assist States Parties in effectively implementing their commitments. Governments are expected to submit regular reports on the national measures they have taken to implement the conventions to which they are party and difficulties they may have encountered. These reports are reviewed by independent committees of experts. The general purposes of the system are to encourage application of the standards, ensure their consistent interpretation internationally and identify areas where states may experience difficulties or have gaps in implementation. For this last purpose, international advisory services and technical cooperation can be obtained to support appropriate implementation of these conventions.

### A) UN TREATY-BASED PROCEDURE

Under Article 72, ICRMW application is monitored by the Committee on the Protection of the Rights of all Migrant Workers and Members of their Families, known more commonly as the Committee on Migrant Workers. The Committee consists of 14 independent experts who serve in their personal capacity. States Parties are obliged to submit an initial report within one year following ICRMW's entry into force for the State Party concerned and to report thereafter every five years on the steps they have taken to implement it. They should also indicate the difficulties encountered in implementing ICRMW and provide information on migration data, such as migration flows and the number of migrant workers in the country. After examining the reports, the Committee adopts concluding observations, which are transmitted to the State Party concerned. The Committee has also started to issue general comments, the first of which was adopted at its 13th Session in December 2010, concerning migrant domestic workers, providing guidance on ICRMW's application to this group of migrant workers, who are particularly vulnerable to abuse and exploitation. A second general comment on the rights of migrant workers in an irregular situation and members of their families was adopted by the Committee at its 18th Session, in April 2013. The Committee's concluding observations to States Parties, the general comments as well as the initial and periodic reports of States Parties, [are available](#).

Once 10 States Parties have accepted the procedure, in accordance with Article 77, the Committee will also be able to consider individual complaints or communications from individuals claiming that their rights under the ICRMW have been violated.

## B) UN CHARTER-BASED PROCEDURE

The UN Charter-based system of human rights protection includes the following principal mechanisms, which have undergone revision since the establishment of the new Human Rights Council to replace the Commission on Human Rights in 2006:

- The possibility of bringing complaints under the confidential 5/1 procedure “to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances” (Human Rights Council (HRC) Res. 5/1 of 18 June 2007 – formerly the 1503 procedure under ECOSOC Res. 1503 (XLVIII) (1970));
- Special Procedures of the Human Rights Council, designating a rapporteur, working group or Special Representative of the UN Secretary-General to consider violations of human rights relating to a specific country situation or thematic issue in all parts of the world; and
- Universal periodic review (UPR), a state-driven process under the auspices of the Human Rights Council, which ensures that the human rights obligations of all 193 UN Member States are subject to scrutiny. These UN Charter-based mechanisms are important for migrants because they are applicable to all UN Member States, whether they have ratified any of the international human rights treaties, including any specific instrument protecting migrants. The last two mechanisms are particularly relevant to ensuring that the rights of all migrants are adequately protected.

One very relevant thematic mandate is that of the **Special Rapporteur on the human rights of migrants** who:

- Is responsible for requesting and receiving information from migrants and members of their families;
- Issues recommendations to prevent and correct such violations;
- Promotes the effective application of relevant IML instruments;
- Recommends policies;
- Reports to the HRC about the global state of protection of migrants’ human rights;
- Conducts country visits upon the invitation of the Government.

## C) REGIONAL INSTRUMENTS

The African Union (AU) at the level of the Heads of State Executive Council adopted a broad strategic Migration Policy Framework for Africa in 2006. An entire chapter of this document provides guidelines for the adoption of conventions and specific measures to protect the human rights of migrants across the continent, and the first chapter is devoted to labour migration. The Framework urges a comprehensive approach to regulatory and administrative measures to ensure safe, orderly and productive migration. The 2013 Youth and Women Employment Pact for Africa includes promotion of regional and sub-regional labour mobility and calls for an AU and Regional Economic Communities Labour Migration Plan. In response, the AU Commission, together with ILO, IOM and the UN Economic Commission for Africa (UNECA), have developed a regional programme on Labour Migration Governance for Development and Integration in Africa.

## 6. CURRENT CHALLENGES

### A) MIXED MIGRATION FLOWS

Migrants and refugees increasingly make use of the same routes and means of transport to get to an overseas destination. If people composing these mixed flows are unable to enter a particular state legally, they often employ the services of human smugglers and traffickers and embark on dangerous sea or land voyages, which many do not survive. States regard such movements as a threat to their sovereignty and security. It has become imperative for the international community to address this phenomenon in a more coherent and comprehensive manner.

Despite increased demand for labour at all skill levels in many high- and middle-income countries, including in the South – South context, and notwithstanding the large pool of people prepared to move abroad to seek decent work, regular travel across international borders has become increasingly restricted to the highly skilled or economically privileged. Restricting visas and obligating airline and maritime transporters to check passports and visas before departure from a country of origin are common forms of action. With some exceptions, such as some of the Gulf State destinations, regular channels of labour migration for low- and middle-skilled workers are few. Where the demand for labour and skills overwhelms the restrictions on regular migration, people smugglers and traffickers are prepared to supply the difference. While smugglers merely provide an illegal service to the migrant, such as assistance in crossing an international border, the trafficker seeks to exploit the person beyond the migratory process to make continued profits. But this distinction can become blurred, as smuggling can evolve into trafficking. Trafficked persons often end up involuntarily in “sweatshops”, on isolated plantations or in brothels. They are usually channelled into the informal economy, out of sight of regulators and deprived of any protection and thus unable to productively contribute to the economy and social welfare of the host country

### B) TRAFFICKING OF HUMAN BEINGS

Trafficking of human beings can take place within the borders of one State or may have a transnational character. Human trafficking is a violation of human rights. Trafficking in human beings is a vicious phenomenon often associated with and leading to forced labour situations affecting migrant workers. The adoption in Palermo, Italy in 2000 of the UN Convention against Transnational Organized Crime and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children [hereinafter “Palermo Trafficking Protocol”] focused increased attention on the phenomenon. It also provided for specific legal standards to prevent and combat trafficking, protect victims, and promote cooperation among states to achieve these objectives. The Palermo Trafficking Protocol provides a definition of trafficking in Article 3(a):

*“Trafficking in persons” shall mean (a) the recruitment, transportation, transfer, harbouring or receipt of persons, (b) by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, (c) for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. “*

As regards the issue of victim consent, Article 3(b) adds that the consent of the victim shall be irrelevant where the means set out in Article 3(a) have been used. Article 3(c) of the Protocol stipulates that consent is also irrelevant where the victim is a child (defined in Article 3(d) as any person under 18 years of age), irrespective of the means used.

Part II of the Palermo Protocol also contains important provisions to protect and assist trafficking victims in respect of relevant court and administrative proceedings as well as their physical, psychological and social recovery, including appropriate housing; counselling and information in a language they can understand, in particular as regards their legal rights; medical, psychological and material assistance; employment, education and training opportunities; physical safety; and the possibility of obtaining compensation for damage

suffered (Article 6). There are also provisions on the status to be provided to trafficking victims so that they can remain in a State Party's territory, either temporarily or permanently (Article 7), and on their repatriation to the State Party of their nationality or where they hold permanent residence (Article 8). OHCHR has also issued the Recommended Principles and Guidelines on Human Rights and Human Trafficking, which contain important guidelines on protection and support for trafficked persons (Guideline 6), including child victims of trafficking (Guideline 8).

### C) SMUGGLING OF MIGRANTS

"The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (Art. 3(a), UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000). Smuggling, contrary to trafficking, does not require an element of exploitation, coercion, or violation of human rights. Smuggling of migrants occurs when a person wishing to migrate to another country pays someone else to assist them to illegally cross a border. The relationship between the smuggler and the smuggled person ends upon crossing a border.

### D) A HUMAN-RIGHTS BASED APPROACH TO MIGRATION

The realities of human migration today can make it difficult to neatly separate distinct categories of people, especially due to the cross-cutting nature of the traditional categories of migrants. Migrant workers, refugees, trafficked persons and smuggled migrants can also be persons with disabilities, children, pregnant women, women who have suffered sexual or other forms of gender-based violence, stateless persons, minorities, indigenous persons, persons with HIV/ AIDS, lesbian, gay, bisexual, transgender and intersex persons or victims of torture. Many migrants may be or become vulnerable on more than one ground, and may have suffered abuse of more than one kind.

Accordingly, while the international legal obligations of states may appear to guarantee universal human rights to all human beings subject to their jurisdictions, the reality for many migrants may be very different. An important challenge is thus effective implementation and monitoring of the complex jigsaw of normative standards relevant to migration in order to ensure complementarity and coherence. For this reason, a more holistic approach is currently being advocated by OHCHR, ILO, other relevant agencies and entities within the UN system, IOM and civil society actors. It affirms the human rights of all human beings, including migrants, while at the same time recognizing more specific protection needs as they arise. Recognition of the universality and indivisibility of human rights, in tandem with an appreciation of the growing complexity of international migration, could help forge a new consensus on the issue of migration and human rights.

The basis of such a consensus lies in a human rights-based approach to migration. As distinct from a "human rights framework", which asserts fundamental normative principles and requires states to contemplate a range of measures in order to fulfil their obligations, a human rights-based approach provides practical guidance and concrete tools to this end. A human rights-based approach is normatively based on international human rights and operationally directed to respecting, promoting, fulfilling and protecting human rights.

The underlying feature of a human rights-based approach identifies rights-holders, who have a claim to certain entitlements, and duty-bearers, who are legally bound to respect, protect and fulfil the entitlements associated with those claims. Such an approach works towards strengthening the capacities of rights-holders to make their claims and of duty-bearers to meet their obligations.

A human rights-based approach to migration brings the treatment of migrants as human beings to the forefront of all discussion and programming on migration, guided by the fundamental principles of non-discrimination, empowerment, participation and inclusion, and accountability.



## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60**

**Subject**

**2.4.26.** Rights of Refugees and internally displaced persons

**Lecturer:**

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## SUMMARY OF THE TOPIC

The purpose of this topic is to provide learners with critical and analytical knowledge and understanding of the human rights of refugees and internally displaced persons (IDPs), as well as to provide them with the basic tools necessary to design relevant educational material on the rights of refugees and IDPs in the Maghreb region.

In particular, this topic will:

1. Look at the nature and the framework of refugees and IDPs protection in international law;
2. Identify the holders of rights and the relevant state's obligations under international law; and
3. Consider the current challenges related to the protection of refugees and IDPs in the Maghreb region.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course, participating teachers shall be able to recognise the educational potential of the general and specific skills described below in order to achieve significant learning in human rights. Moreover, these skills shall be included within teaching plans through a unifying approach and directed towards the effective implementation of the knowledge acquired.

The following general and specific skills are included **in this topic**:



## GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations;
- **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively;
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means;
- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to gender, age, religion, social condition, politics and/or ethnicity;
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place;
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

## SPECIFIC:

- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation;
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation;
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.
- To embed a human-rights based approach in specific educational activities and curricula of the Maghreb Universities partners on this project

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### International Standards

The [Guiding Principles on Internal Displacement](#) (E/CN.4/1998/53/Add.2) restate and compile human rights and humanitarian law relevant to internally displaced persons.

- [Guiding Principles in Arabic.](#)
- [Guiding Principles in Spanish.](#)
- [Guiding Principles in French.](#)

### Legal Bases for the Guiding Principles

The [Guiding Principles](#) are based in part on the following instruments:

## Relevant international human rights law

- UN General Assembly, [International Covenant on Civil and Political Rights](#), 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171,
- UN General Assembly, [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#), 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85
- UN General Assembly, [Convention on the Rights of the Child](#), 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

## International legal framework for the protection of refugees:

- UN General Assembly, [Universal Declaration of Human Rights](#), 10 December 1948, 217 A (III)
- UN General Assembly, [Convention Relating to the Status of Refugees](#), 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137
- UN General Assembly, [Protocol Relating to the Status of Refugees](#), 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267
- Organization of African Unity (OAU), [Convention Governing the Specific Aspects of Refugee Problems in Africa](#) ("OAU Convention"), 10 September 1969, 1001 U.N.T.S. 45
- Regional Refugee Instruments & Related, [Cartagena Declaration on Refugees](#), Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984
- UN General Assembly, [Declaration on Territorial Asylum](#), 14 December 1967, A/RES/2312(XXII)
- UN General Assembly, [Statute of the Office of the United Nations High Commissioner for Refugees](#), 14 December 1950, A/RES/428(IV).

## International legal framework for the protection of internally displaced persons (IDPs):

- UN High Commissioner for Refugees (UNHCR), [Guiding Principles on Internal Displacement](#), 22 July 1998, ADM 1.1, PRL 12.1, PR00/98/109
- African Union, [African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa](#) ("Kampala Convention"), 22 October 2009

## International legal framework for the protection of refugees and internally displaced persons (IDPs) in armed conflict:

- [Convention \(IV\) relative to the Protection of Civilian Persons in Time of War](#). Geneva, 12 August 1949
- [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts \(Protocol I\)](#), 8 June 1977
- [Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts \(Protocol II\)](#), 8 June 1977

Some key open access internet resources for documents on refugee and IDP law include the following:

1. [United Nations High Commissioner for Refugees](#)
2. [Special Rapporteur on the Human Rights of Internally Displaced Persons](#)
3. [UN Documents](#)
4. [International Committee of the Red Cross](#)

5. [Refugee Case law Site](#)
6. [Forced Migration Review](#)
7. [Internal Displacement Monitoring Centre](#)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

- [The Brookings Institution-University of Bern Project on Internal Displacement](#): The Brookings - LSE Project on Internal Displacement was created in 1994 to support the mandate of the then Representative of the Secretary-General on internally displaced persons (Francis M. Deng, 1992-2004). In 2010, the new Special Rapporteur on the human rights of internally displaced persons, Dr. Chaloka Beyani, became the co-director of the Project.
- [Internal Displacement Monitoring Center \(IDMC\)](#): The IDMC, established in 1998 by the Norwegian Refugee Council (NRC), is the leading international body monitoring conflict-induced internal displacement worldwide. Since 1998 IDMC has developed a Global IDP Database; a comprehensive clearinghouse of data and analysis on conflict-induced displacement worldwide.
- [Office for the Coordination of Humanitarian Affairs, Inter-Agency Internal Displacement Division](#): The OCHA Inter-Agency IDP Division was established in 2004 (replacing the OCHA IDP Unit, created in 2001) and charged with promoting system-wide improvements in the United Nations' response to the needs of internally displaced persons as well as providing targeted support to specific country situations.
- [African Commission on Human and Peoples' Rights](#): Established by the African Charter on Human and Peoples' Rights which came into force on 21 October 1986 after its adoption in Nairobi (Kenya) in 1981 by the Assembly of Heads of State and Government of the Organization of African Unity (OAU.), the African Commission on Human and Peoples' Rights is charged with ensuring the promotion and protection of Human and Peoples' Rights throughout the African Continent. The Commission has its headquarters in Banjul, Gambia.
- [The Inter-American Commission on Human Rights \(IACHR\)](#): The IACHR is one of two bodies in the inter-American system for the promotion and protection of human rights. The Commission has its headquarters in Washington, D.C. The other human rights body is the Inter-American Court of Human Rights, which is located in San José, Costa Rica.
- [The Office of the United Nations High Commissioner for Refugees \(UNHCR\)](#): UNHCR was established on December 14, 1950 by the United Nations General Assembly. The agency is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another State, with the option to return home voluntarily, integrate locally or to resettle in a third country.
- [The Council of Europe](#): Founded in 1949, the Council of Europe seeks to develop throughout Europe common and democratic principles based on the European Convention on Human Rights and other reference texts on the protection of individuals

Bugnion, F., *The International Committee of the Red Cross and the Protection of War Victims*, MacMillan, 2007.

[Declaration on the Protection of Refugees and Displaced Persons in the Arab World](#), 19 November 1992

Goodwin G., McAdam J, *The Refugee in International Law*, Oxford University Press, 2011.

ICRC, *Internally Displaced Persons and International Humanitarian Law*, 2010.

ISESCO, *Compatibilité des dispositions de la chari'a avec celles des législations internationales relatives aux réfugiés*, 2014.

LEAGUE OF ARAB STATES, [Arab Convention on Regulating Status of Refugees in the Arab Countries](#), 1994 (not ratified)

UNHCR, *Internal Displacement: Responsibility and Action*, 2013.

## LEARNING PROCESS RESULTS

Having successfully completed the topic, learners should be able to:

- A) Understand the international legislative framework for refugee protection;
- B) Analyse, interpret and evaluate situations where the protection of refugees and IDPs is at stake;
- C) Effectively apply the acquired critical and analytical skills to solve practical problems relating to the protection of refugees and IDPs in their own country or region;
- D) Inform their own teaching practice in light of the acquired knowledge and understanding of the topic.

## METHODOLOGY AND EDUCATIONAL TOOLS

- A) Exposition method: Reading of texts and watching of audio-visual material;
- B) Research of relevant resources (bibliography and index cards): Portfolio;
- C) Case study: Forum;
- D) Team project: Portfolio.
- E) Individual project: Portfolio.

## SCHEDULING OF LEARNING ACTIVITIES

1. **LECTURE:** This activity aims to provide learners with critical and analytical knowledge and understanding of the international legal framework for the protection of refugees and IDPs, as well as of their rights and obligations, and the corresponding state's obligations.
  - A) Read the FILE to understand what you can expect from this topic and what you are expected to do to successfully complete it;
  - B) Watch the following interview to Rean (refugee) and write down your own reflections afterwards.

Please open this link <http://www.unhcr.org/pages/4b7409436.html> and click on clip no. 1 in French language.

- C) Read and study the exposition of the topic at the end of this FILE; and
- D) Complete the auto-test for a brief self-evaluation.

**2. BIBLIOGRAPHY AND INDEX CARDS:** This activity requires learners to look for, choose and analyse information from a variety of relevant sources.

A) Learners will have to search for and compile a list of compulsory bibliographical resources on the rights of refugees and IDPs in their own country including, as a minimum:

- the relevant international and regional instruments for the protection of refugees and internally displaced persons ratified by their own country;
- any relevant national legislation on the protection of refugees and IDPs (if present);
- any relevant national policy document relating to refugees and IDPs (if present);
- any relevant information regarding the determination of refugee status in their own country; and
- any relevant information regarding UNHCR and/or ICRC operations in their own country.

B) Learners will elaborate an index card for each resource other than those listed under point A above, indicating the author, title, editor, place and date of publication as well as a brief commentary on the content of the resource.

**3. CASE STUDIES:** This activity requires learners to analyse, interpret and evaluate situations where the protection of refugees and IDPs is at stake as well as to apply the acquired critical and analytical skills to solve practical problems relating to the protection of refugees and IDPs in the following two scenarios:

- **Non-refoulement and terrorism:** The applicant, an Egyptian national with political refugee status in Italy but who subsequently became a suspected terrorist, alleges that he was kidnapped and transferred to Egypt and then detained in secret for several months in inhuman conditions. Discuss the issues raised by the right to non-refoulement and post your answer to the forum.
- **IDPS and Refugees in Armed Conflict:** In Ruritania (a fictional country), a protracted and ongoing armed conflict is being fought between the Ruritanian State's Armed Forces (RSAF) and the Liberation Army (LA). The terrain is mountainous and the country has many natural important resources. Three separate scenarios have been reported in the global media:
  - A. In the border zone of San Juan, the fierce fighting up in the hills between the RSAF and the LA moved towards the town of San Juanita (population 10 000). Fearing for their lives, half of the population fled to the capital city. Only 350 of them register with the Ruritanian State as IDPs. The remainder cross the border into neighbouring Arcadia.
  - B. Milena is not a citizen of Ruritania but has lived in the town of El Chavo, Ruritania, for a few months. She is told to leave the town by one of the parties to the conflict.
  - C. A few months later, drastic flooding forces the whole population of El Chavo, Ruritania, to leave their homes and seek refuge elsewhere. Most of the town goes to the capital city to seek help until it is safe to go back but a few cross the border into Arcadia to seek asylum.

You are a legal adviser to Refugee Protection International. Give advice on the following questions and post your answers to the forum. In each case, please identify what further facts you would need in order to make this determination.

- Has international law been broken in any of these scenarios and, if so, by whom?
- Could UNHCR act?

- Might any other agency have a basis for conducting protection/assistance activities?

**4. TEAM PROJECT:** This activity requires learners to work in pairs and choose one of the following movies to design a training material for their students according to the discipline or degree that they teach. In particular, each team will have to discuss which relevant issues stand out in the film, what kind of exercise and/or violation of relevant rights can be seen in the film, and how they can use the film to design a training material for their students.

- *Lost Boys of Sudan, United States, 2003, 1h 27min:*

The Lost Boys of Sudan is the name given to the groups of more than 20,000 boys from the Nuery Dinka ethnic groups who were displaced and/or left orphans during the Second Sudanese Civil War (1983 - 2005). About 2.5 million people were killed and millions were displaced. The name 'lost boys of Sudan' has been used in a familiar way by humanitarian workers in the refugee camps where the boys from Africa lived. The term was relaunched when children fled from the post-independent violence of South Sudan with Sudan in 2011-13.

- *Lilja 4-ever (Lilya forever), Sweden, 2002, 1h 49min:*

Lilja 4-ever is a Swedish-Danish drama from 2002 directed by Lukas Moodysson. Lilja 4-ever is the story of Lilja's downward spiral, role played by Oksana Akinshina, a young girl in the former Soviet Union whose mother abandons to travel to the United States. The story is vaguely based on the real case of Danguolė Rasalaitė and examines the issue of human trafficking and sexual slavery.

- *Dieu s'est lassé de nous (God Grew Tired of Us), France, 2006, 1h 29min:*

Dieu s'est lassé de nous (God Grew Tired of Us) is a documentary about three 'Lost Boys of Sudan', a group of about 25,000 young boys who have fled from the Sudan wars that have been taking place since the 1980s and their experience as they travel to the United States. The film was written and directed by Christopher Dillon Quinn.

- *In This World, United Kingdom 2002, 1h 28min:*

*In This World* is a 2002 British fiction documentary directed by Michael Winterbottom. The film tells the story of two young Afghan refugees, Jamal Udin Torabi and Enayatullah, who leave a refugee camp in Pakistan in search of a better life in London. Since their journey is illegal, it is full of danger and they must use methods like channels, bribes and smugglers to reach their goal.

- *Sierra Leone's Refugee All-stars, United States, 2005, 1h 18min:*

After the civil war that broke out in Sierra Leone in 1991, thousands of people flee to the neighbour country, Guinea. In a refugee camp, guitarist Francis Langba responds to singer Reuben M. Koromay and his wife, Grace, and the three of them start to play together. Over the years, the band evolves and becomes a group of six instruments played also by other refugees. After 2002 peace declaration, the group discovers they can return home, so they decide to go on tour to other camps in this musical documentary.

- *Turtles can fly, United Kingdom, 2004, 1h 38min:*

In a Kurdish refugee camp in 2003, occupants await the US invasion of Iraq, hoping for Saddam's defeat but fearing a violent future. Satellite (Soran Ebrahim) organizes children in work teams for the disarmament and sale of landmines to arms dealers. Satellite falls in love with Agrin (Avaz Latif), who arrives to the camp carrying his brother Hengov (Hireh Feysal Rahman) in her arms and his younger brother Riga (Abdoul Rahman Karim). When the invasion begins, Satellite looks for a satellite dish so that the camp can follow the news about the war.

- *Welcome, United Kingdom,, 2009, 1h 50min:*

Bilal, a Kurdish teenager, has gone all the way to northern France hoping to meet his girlfriend in England. To arrive there, he decides to swim across the English Channel -but he cannot swim. Simon Calmat, a local swimming instructor who is facing his own upcoming

divorce, agrees to train Bilal for his exhausting journey. Both create a solid bond in a short time that unexpectedly helps them.

5. **INDIVIDUAL PROJECT:** This activity requires learners to develop a topic on one of the aspects of the protection of refugees and/or IDPs in the Maghreb region to be included in the teaching program of their specialty, using the Service-Learning methodology. Learners can also make use the bibliographical resources identified in the activity no. 2

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1 Lecture	8 hours	Self-test
Activity 2 Bibliography/ Index cards	8 hours	Portfolio
Activity 3 Case study	8 hours	Forum
Activity 4 Team Project	12 hours	Portfolio
Activity 5 Individual Project	24 hours	Portfolio

## EVALUATION SELF-TEST

Please clarify if the following statements are true or false.

- 1: According to the 1951 Convention relating to the Status of Refugees, a refugee is someone who
  - a) Has a well-founded fear of persecution because of his/her: race; religion; nationality; membership of a particular social group; or political opinion.
  - b) is in his/country of nationality;
  - c) Is unable or unwilling to avail himself of the protection of that country, or to return there, for fear of persecution.
- 2: The principle of *non-refoulement*:
  - a) Is set out in article 33 (1) of the 1951 Refugee Convention;
  - b) Is part of customary international law, meaning that also States who are not party to the 1951 Refugee Convention must respect it?
  - c) Only applies to refugees, but does not apply to asylum seekers.
- 3: Who is responsible for Refugee Status Determination (RSD)?
  - a) States have the primary responsibility for determining the status of asylum seekers;
  - b) UNHCR may do so when States are unable or unwilling;
  - c) Both the States and UNHCR are equally responsible for RSD.



- 4: Internally displaced persons (IDPs)
- a) Are not protected by international human rights law;
  - b) If within a State involved in armed conflict, are protected by international humanitarian law;
  - c) Are specifically protected by the 1998 UN Guiding Principle on Internal Displacement.
- 5: “Persons of concern to UNHCR” are all persons whose protection and assistance needs are of interest to UNHCR. They include:
- a) Persons fleeing conflict or serious disturbances of the public order (i.e. refugees under the OAU Convention and Cartagena Declaration definitions);
  - b) Returnees (i.e. former refugees);
  - c) Stateless persons.

## EVALUATION SELF-TEST

Question	Question Key
Question 1	a) True; b) False; c) True.
Question 2	a) True; b) True; C) False.
Question 3	a) True; b) True; C) False.
Question 4	a) False; b) True; c) True.
Question 5	a) True; b) True; c) True.

## SUBJECT 2.4.:

## 2.4.26. RIGHTS OF REFUGEES AND INTERNALLY DISPLACED PERSONS (IDPS)

### 1. KEY DEFINITIONS<sup>680</sup>

#### 1.1 ASYLUM

“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

#### **Universal Declaration of Human Rights, Art. 14(1)**

As acknowledged in the 1967 UN Declaration on Territorial Asylum, the 1969 Organization of African Union Convention, the 1984 Cartagena Declaration, granting asylum is a humanitarian and apolitical act. The word “asylum” is not defined in international law; but it has become an umbrella term for the protection provided by a country to refugees on its territory. Asylum means, at the very least, basic protection - i.e., no forcible return (refoulement) to the frontiers of territories where the refugee’s life or freedom would be threatened - for a temporary period, with the possibility of staying in the host country until a solution outside that country can be found. In many countries it means much more, incorporating the rights set out in the 1951 Convention and even going far beyond those.

The terms [asylum-seeker](#) and [refugee](#) are often confused: an asylum-seeker is someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated.

#### 1.2 WHO IS A REFUGEE?

The **UN 1951 Convention Relating to the Status of Refugees** is the cornerstone of international refugee law. It defines the term “refugee” and sets minimum standards to qualify for refugee status. According to it, a refugee is someone who

“owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country” (article 1).

The conflicts that accompanied the end of the colonial era in Africa led to a succession of large-scale refugee movements. These population displacements prompted the drafting and adoption of the **Organization of African Unity [OAU] Convention Governing the Specific Aspects of Refugee Problems in Africa**, a regional treaty adopted in 1969, which added to the definition found in the 1951 Convention to include a more objectively based consideration, namely: “Any person compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality”.

680. This topic has been developed on the basis of UNHCR, *Refugee Protection: A Guide to International Refugee Law*, 2001, as well as the information available on the website of the United Nations High Commissioner for Refugees (UNHCR) and of the International Committee of the Red Cross (ICRC).

This means that persons fleeing civil disturbances, widespread violence and war are entitled to claim the status of refugee in States that are parties to this Convention, regardless of whether they have a well-founded fear of persecution.

In 1984, a colloquium of Latin American government representatives and distinguished jurists adopted the **Cartagena Declaration**. Like the OAU Convention, the Declaration adds a more objectively based consideration to the 1951 Convention refugee definition to include: “persons who flee their countries “because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”.

Although the Declaration is not legally binding on States, most Latin American States apply the definition as a matter of practice; some have incorporated the definition into their own national legislation. The Declaration has been endorsed by the Organization of American States (OAS), the UN General Assembly, and UNHCR’s advisory Executive Committee.

### 1.3 WHO ARE INTERNALLY DISPLACED PERSONS?

[1998 UN Guiding Principles on Internal Displacement](#)

#### Scope and Purpose

2. For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.

3. These Principles reflect and are consistent with international human rights law and international humanitarian law.

## 2. RELEVANT LEGAL FRAMEWORKS

### 2.1 INTERNATIONAL REFUGEE LAW

The legal framework that supports the international refugee protection regime was built by States. Through the years, States have affirmed their commitment to protecting refugees by acceding to the UN 1951 Convention relating to the Status of Refugees and the 1967 Protocol. These instruments enumerate the rights and responsibilities of refugees as well as the obligations of States that are parties to both instruments.

#### A) Rights and obligations of Refugees

##### The principle of non-refoulement

The basic refugee’s right to be protected against forcible return, or refoulement, is set out in the **1951 Convention relating to the Status of Refugees**:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Article 33(1).

Refoulement is also prohibited explicitly or through interpretation by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3), the Fourth Geneva Convention of 1949 (Art. 45, para. 4), the International Covenant on Civil and Political Rights (Article 7), the Declaration on the Protection of All Persons from Enforced Disappearance (Article 8), and the Principles on the Effective Prevention and Investigation of Extra Legal, Arbitrary and Summary Executions (Principle 5).

In addition, refoulement is prohibited explicitly or through interpretation in a number of regional human rights instruments, including the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3), the American Convention on Human

Rights (Article 22), the OAU Refugee Convention (Article II), and the Cairo Declaration on the Protection of Refugees and Displaced Persons in the Arab World (Article 2).

It is widely accepted that the prohibition of refoulement is part of customary international law. This means that even States that are not party to the Refugee Convention must respect the principle of non-refoulement. States have an obligation under the Refugee Convention and under customary international law to respect the principle of non-refoulement. When this principle is violated or threatens to be, UNHCR respond by intervening with relevant authorities, and if it deems necessary, will inform the public. In some circumstances, persons facing refoulement may have recourse to relevant human rights mechanisms, such as the Committee against Torture.

Most of the other rights crucial to refugee protection are also the fundamental rights stated in the **1948 Universal Declaration of Human Rights**:

- Right to life, liberty and security of person
- Right to seek and enjoy asylum
- Freedom from torture, or cruel, inhuman or degrading treatment or punishment
- Freedom from slavery or servitude
- Recognition as a person before the law
- Freedom of thought, conscience, and religion
- Freedom from arbitrary arrest and detention
- Freedom from arbitrary interference in privacy, home and family
- Freedom of opinion and expression
- Right to be educated
- Right to participate in the cultural life of a community.

Similarly, economic and social rights apply to refugees as they do to other individuals. Every refugee should have access to medical care. Every adult refugee should have the right to work. No refugee child should be deprived of schooling.

Refugees also have certain obligations. In particular, they should conform to the laws and regulations of their country of asylum and with measures taken by the authorities to maintain public order.

### **B) The responsibilities of States parties to the 1951 Convention and the 1967 Protocol**

As a general principle of international law, every treaty in force is binding upon the parties to it and must be performed in good faith. Countries that have ratified the Refugee Convention are obliged to protect refugees on their territory according to its terms. Among the provisions that States Parties to the Refugee Convention and Protocol must apply are:

1. *Cooperation with UNHCR* - Article 35 of the Refugee Convention and Article II of the 1967 Protocol contain an agreement for States Parties to cooperate with UNHCR in the exercise of its functions and, in particular, to help UNHCR supervise the implementation of the provisions found in those treaties;
2. *Information on National Legislation* - The States Parties to the Refugee Convention agree to inform the UN Secretary General about the laws and regulations they may adopt to ensure the application of the Convention.
3. *Exemption from Reciprocity* - Where, according to a country's law, the granting of a right to an alien is subject to the granting of similar treatment by the alien's country of nationality (reciprocity), this will not apply to refugees. The notion of reciprocity does not apply to refugees since they do not enjoy the protection of their home country.

The **1967 Refugee Protocol** is independent of, though integrally related to, the 1951 Convention. The Protocol lifts the time and geographic limits found in the Convention's refugee definition. Together, the Refugee Convention and Protocol cover three main subjects:

- The basic refugee definition, along with terms for cessation of, and exclusion from, refugee status
- The legal status of refugees in their country of asylum, their rights and obligations, including the right to be protected against forcible return, or *refoulement*, to a territory where their lives or freedom would be threatened
- States' obligations, including cooperating with UNHCR in the exercise of its functions and facilitating its duty of supervising the application of the Convention.

By acceding to the Protocol, States agree to apply most of the articles of the Refugee Convention (Articles 2 through 34) to all persons covered by the Protocol's refugee definition. Yet the vast majority of States have preferred to accede to both the Convention and the Protocol. In doing so, States reaffirm that both treaties are central to the international refugee protection system.

The right to seek asylum requires that individual asylum-seekers have access to fair and efficient procedures for the examination of their claims. In some cases, at the request of the State concerned, UNHCR undertakes refugee status determination (RSD). It is the responsibility of States to identify refugees in order to give effect to their obligations under the Refugee Convention and to prevent *refoulement*.

### C) The role of the United Nations High Commissioner for Refugees (UNHCR)

In the aftermath of World War II, the United Nations General Assembly created the Office of the United Nations High Commissioner for Refugees (UNHCR) with a mandate to protect and find durable solutions for refugees. Its activities are based on a framework of international law and standards that includes the 1948 Universal Declaration of Human Rights and the four Geneva Conventions (1949) on international humanitarian law, as well as an array of international and regional treaties and declarations, both binding and non-binding, that specifically address the needs of refugees.

Protecting refugees is primarily the responsibility of States. Throughout its history, the United Nations High Commissioner for Refugees (UNHCR) has worked closely with governments as partners in refugee protection. In every region of the world, governments have generously granted asylum to refugees and allowed them to remain until conditions were conducive for the refugees to return to their homes in safety and with dignity. Governments have allowed UNHCR to operate on their territories and have provided financial assistance to refugees, both through their own domestic refugee programs and by funding UNHCR's protection and assistance operations.

The persons of Concern to UNHCR are those whose protection and assistance needs are of interest to UNHCR. They include refugees, asylum-seekers, stateless people, some internally displaced people and returnees. An *asylum-seeker* is someone who says he or she is a refugee, but whose claim has not yet been definitively assessed. A *stateless person* is an individual who is not considered as a national by any state under the operation of its law, including a person whose nationality is not established. The consequences can be extremely grave since, without a nationality, a person is unable to exercise a wide range of rights. *Returnees* are individuals who were of concern to UNHCR when outside his/ her country of origin, and who remain so for a limited period (usually two years), after returning to the country of origin. The term also applies to internally displaced people who return to their previous place of residence. National asylum systems, or in some cases, UNHCR under its mandate, decide which claimant qualifies for international protection.

Status determination is key to protection, yet procedures are not specified in the Refugee Convention. A rich body of experience in applying the refugee definition has been accumulated by many countries as well as by UNHCR. However, this is also an area where national legal structures, resources and needs have a great impact. On the international level, UNHCR's Executive Committee has recommended certain minimum requirements for status determination procedures.

Countries, generally with the assistance of the UNHCR, sometimes offer “temporary protection” when their regular asylum systems risk being overwhelmed by a sudden mass influx of people, as happened during the 1990s conflicts in the former Yugoslavia. In such circumstances, people can be rapidly admitted to safe countries, but without any guarantee of permanent stay. Temporary protection can work to the advantage of both governments and asylum-seekers in specific circumstances. But it only complements – and does not substitute for – the wider protection measures, including formal refugee status, offered by the 1951 Refugee Convention.

Refugees are not always able to return safely home or to remain in the country where they received asylum, usually because they would face continued persecution. In such circumstances, UNHCR attempts to resettle them in safe third countries. With voluntary repatriation and local integration, resettlement is one of the three long-term solutions for refugees. Through resettlement, refugees gain legal protection – residency and often eventually citizenship – from governments who agree, on a case-by-case basis, to receive them.

UNHCR’s Executive Committee has expressed concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in a country in search of asylum, pending resolution of their situation. The Committee is of the opinion that, in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to for specific purposes including to verify identity and to determine the elements on which the claim to refugee status or asylum is based. Detaining asylum-seekers is considered lawful and not arbitrary if it complies with national law, the Refugee Convention and international law. Detention must be exercised in a non-discriminatory manner and must be subject to judicial or administrative review to ensure that it continues to be necessary, with the possibility of release when there are no grounds for continued detention. There should be a legislative presumption against detention. Alternatives should be put in place and should be explored first unless there is evidence to suggest that they will not be effective for that particular individual.

## 2.2 IDP LAW

There is no Convention for IDPs equivalent to the 1951 Refugee Convention. Nonetheless, international law protects persons from displacement and once they are displaced, under several bodies of law:

1. IDPs are protected by International Human Rights law;
2. In situations of armed conflict, they are protected by International Humanitarian law;
3. The Guiding Principles on Internal Displacement, which are based on these two bodies of law, provide useful guidance on displacement-specific aspects.

### 1998 UN Guiding Principles on Internal Displacement

#### *General Principles*

##### Principle 1

1. Internally displaced persons shall enjoy, in full equality, the same rights and freedoms under international and domestic law as do other persons in their country. They shall not be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.

##### Principle 4

1. These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic

or social origin, legal or social status, age, disability, property, birth or any other similar criteria.

2. Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of household, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition and to treatment that takes into account their special needs.

*Principles relating to protection from displacement*

Principle 5

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

Principle 6

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
2. The prohibition of arbitrary displacement includes displacement:
  - (a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at or resulting in alteration of the ethnic, religious or racial composition of the affected population;
  - (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
  - (c) In cases of large-scale development projects that are not justified by compelling and overriding public interests;
  - (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and
  - (e) When it is used as a collective punishment.
3. Displacement shall last no longer than required by the circumstances.

*Principles relating to return, resettlement and reintegration*

Principle 28

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

## 2.3 INTERNATIONAL HUMAN RIGHTS LAW

International refugee law and IDP law are part of a larger mosaic of international human rights law and international humanitarian law. Human rights law constitutes the broad framework within which refugee law and IDP law provisions should be seen.



**The International Covenant on Civil and Political Rights** has been interpreted to prohibit return to torture. In addition, nearly all of its provisions apply to non-citizens. Refugees are entitled to two partially overlapping sets of rights: those rights accorded to them as individuals and guaranteed under international human rights standards and national law, and specific rights related to their status as refugees. Two international human rights treaties have a particularly significant role in international refugee law:

- a) **The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** provides for protection from refoulement, or forced return, to situations where there is a substantial risk of torture. The non-refoulement provision of the Convention against Torture is absolute, unlike the non-refoulement provision of the Refugee Convention, which requires that protection be linked to a fear of persecution because of a person's race, religion, nationality, membership of a particular social group, or political opinion. In addition, no exceptions may be made to the Convention against Torture's non-refoulement obligation. Unlike the Refugee Convention, the Convention against Torture does not have any provision excluding perpetrators of particularly serious crimes or other undeserving persons from its protection.
- b) **The Convention on the Rights of the Child**, to which nearly every State in the world is a party, applies to all children without discrimination, including child refugees and asylum-seekers. The Convention specifically stipulates that every child seeking refugee status has a right to protection and humanitarian assistance in the enjoyment of the rights set forth in that Convention and in others to which the State is a party.

Children who are refugees or asylum-seekers receive special attention under the Convention on the Rights of the Child, Article 22, which requires States Parties to take measures to ensure that such children receive appropriate protection and humanitarian assistance.

### **1966 International Covenant on Civil and Political Rights, Article 2(1)**

"Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

#### Substantive Provisions

- a. *Freedom of Movement and Residence*

### **1966 International Covenant on Civil and Political Rights**

Article 12:

- 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

- b. *Protection of Privacy*

### **1966 International Covenant on Civil and Political Rights**

Article 17(1):

- 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation....

## 2.4 INTERNATIONAL HUMANITARIAN LAW (IHL)

Refugees and IDPs, if they find themselves in a State involved in armed conflict, are also protected by international humanitarian law. The general provisions of IHL protect civilian refugees in States involved in armed conflict, but they also receive special protection under the Fourth Geneva Convention and Additional Protocol I. This additional protection recognizes the vulnerability of refugees as aliens in the hands of a party to a conflict.

Under IHL, people are protected from and during displacement as civilians, provided they do not take a direct part in hostilities. IHL plays an important part in preventing displacement in the first place as it prohibits the displacement of people except if it is necessary for imperative military reasons or the protection of the civilians themselves. A widespread or systematic policy of displacement of civilians without such justification constitutes a crime against humanity. Several rules of IHL protect the civilian population and their violation often constitutes a root cause of displacement. For instance, attacks by parties to an armed conflict on civilians and civilian objects are forbidden, as are indiscriminate methods of warfare that may have an adverse impact on civilians. Other rules whose respect will prevent displacement include the prohibition of acts that threaten the civilian population's ability to survive such as destruction, without valid military reason, of crops, health facilities, water and power supplies or dwellings. Collective punishment of civilian populations is also outlawed under IHL.

IHL guarantees access for relief and humanitarian organizations to refugees and IDPs in situations of armed conflict. Parties to a conflict must facilitate the supply of relief materials such as medicines, food, blankets and tents. Regrettably these rules have been ignored in many recent conflicts putting both refugee populations and IDPs in danger. The International Committee of the Red Cross (ICRC) has consistently called on States and non-State armed groups to respect and ensure respect for international law and the basic principles of humanity when dealing with civilians. Only through respect of the rules of armed conflict can refugee flows and internal displacement be prevented; similarly, if people have to leave their homes, they can only be protected if IHL is complied with.

### A) LAW OF INTERNATIONAL ARMED CONFLICT

#### **IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.**

Article 2 - Scope:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

#### **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.**

Article 1 – General Principles and scope of application:

3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.

#### **Protected Persons in the 1949 Geneva Conventions**

#### **IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.**

#### Article 4 – Definition of protected persons:

Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. The provisions of Part II are, however, wider in application, as defined in Article 13. ...

#### Article 5 – Derogations:

Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.

Where in occupied territory an individual protected person is detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, such person shall, in those cases where absolute military security so requires, be regarded as having forfeited rights of communication under the present Convention.

In each case, such persons shall nevertheless be treated with humanity, and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.

#### Aliens in the territory of a party to the conflict:

#### Article 45 – Transfer to another Power:

- [1] Protected persons shall not be transferred to a Power which is not a party to the Convention.
- [2] This provision shall in no way constitute an obstacle to the repatriation of protected persons or to their return to their country of residence after the cessation of hostilities.
- [3] Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody. Nevertheless, if that Power fails to carry out the provisions of the present Convention in any important respect, the Power by which the protected persons were transferred shall, upon being so notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the protected persons. Such request must be complied with.
- [4] In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs
- [5] The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

## Occupied territories:

### Article 49 - Deportations, transfers, evacuations:

- [1] Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.
- [2] Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.
- [3] The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.
- [4] The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.
- [5] The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.
- [6] The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

## Civilians and the Civilian Population

### III Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949.

#### Article 4 – Prisoners of war:

- 1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces
- 2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- 3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- 4) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

## Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

Article 50 – Definition of civilians and civilian population:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

Article 51 – Protection of the civilian population:

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

### B) LAW OF NON-INTERNATIONAL ARMED CONFLICT

#### Common Article 3 of the 1949 Geneva Conventions

#### IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949.

Article 3 – Conflicts not of an international character:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, 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 murder 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 judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples...

#### Implementation of the 1977 Protocol II

#### Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

## Article 1. Material field of application:

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

## Rules of the 1977 Protocol II

### Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

#### Article 17. Prohibition of forced movements of civilians:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

## C) THE ROLE OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

In every case where internally displaced persons are exposed to violence related to conflict or disturbances, the ICRC would consider it as its duty to be actively involved, in accordance with its mandate and capacities, and to the extent that the relevant authorities or the security conditions allow. In geographical terms, this involvement may well go beyond the zones where active hostilities take place, so that the ICRC addresses protection problems affecting internally displaced persons, and indeed any other civilians, whatever part of the country they may be in.

The ICRC's criterion for involvement is that of being present and active primarily in specific situations. As a neutral intermediary in the event of armed conflict or unrest, the ICRC seeks to bring protection and assistance to the victims of international and non-international armed conflict and internal disturbances and tension. In these situations, it seeks to give priority to those in most urgent need, in accordance with the principle of impartiality. In this respect, the ICRC considers an internally displaced person to be first and foremost a civilian, who as such is protected by international humanitarian law.

All too often, the internally displaced suffer extreme deprivation, threatening their very possibility of survival, and all too often they are exposed to considerable danger, both during flight and while in displacement. Accordingly, the death toll among internally displaced persons has often reached extreme proportions, particularly among physically weaker persons such as children, the elderly or pregnant women. Hardships experienced by those left behind or by host communities compound the problem. Given their precarious situation, internally displaced persons affected by armed conflict — who constitute one of the main categories of the displaced and who in many cases are also in the most life-threatening situation — would often constitute a primary target group for ICRC activities.

## SUBJECT 2.4.:

## ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 60****Subject****2.4.27.** International Humanitarian Law**Lecturer:**

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## SUMMARY OF THE TOPIC

International humanitarian law applied in the context of armed conflicts. It regulates the conduct of hostilities and protects victims of armed conflicts. It applies to all types of international or non-international armed conflicts, regardless of their legitimation and the reasons for which the parties resort to force.

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course, participating teachers shall be able to recognise the educational potential of the general and specific skills described below in order to achieve significant learning in human rights. Moreover, these skills shall be included within teaching plans through a unifying approach and directed towards the effective implementation of the knowledge acquired.

The following general and specific skills are included in this topic:

## GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.



- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- To adequately identify, interpret and apply international, regional and national regulations on human rights applicable to the different scenarios proposed in their respective disciplines and professional spheres.
- To precisely define and distinguish who the holders of rights are and who the holders of obligations are in relation to each human right in a specific situation.
- To identify the specific obligations of respect, protection and fulfilment of each human right and the minimum normative content necessary for their fulfilment and to question their fulfilment in a specific situation.
- To identify, analyse, argument and evaluate the critical deviations and the capacity and responsibility gaps of the holders of rights and obligations that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislations, local and national policies according to the legal human rights instruments ratified by their country; in addition to proposing and planning efficient alternatives.
- To identify and apply international and regional human rights protection mechanisms.
- To look for, choose and analyse information from a variety of sources (legal, social, economic, etc.). To adequately plan and document this task.

## BIBLIOGRAPHY AND OTHER COMPULSORY TEACHING RESOURCES

### International humanitarian law texts and treaties

The [Geneva Conventions and their Additional Protocols](#) form the core of international humanitarian law, which regulates the conduct of armed conflict and seeks to limit its effects. They protect people not taking part in hostilities and those who are no longer doing so.

- First Geneva Convention, 1949
- Second Geneva Convention, 1949
- Third Geneva Convention, 1949
- Fourth Geneva Convention, 1949
- Protocol I additional to the Geneva Conventions, 1977
- Protocol II additional to the Geneva Conventions, 1977
- Protocol III additional to the Geneva Conventions, 2005

Map of States party to the Geneva Conventions

- The Hague Convention of 1954 for the protection of cultural elements? in the event of armed conflicts and its two Protocols
- the Convention relating to the Status of Refugees and Stateless Persons
- the Biological Weapons Convention
- the Convention on Certain Conventional Weapons of 1980 and its five Protocols
- the 1993 Convention on Chemical Weapons
- the 1997 Ottawa Convention on Anti-Personnel Mines
- the Optional Protocol of 2000 to the Convention on the Rights of the Child, on the involvement of children in armed conflict.
- The 2008 Convention on Cluster Munitions

### See the list of key texts and treaties of international humanitarian law

See the [Customary IHL database](#):

- Responsibility and reparation
- Individual responsibility
- War crimes

#### [International criminal courts](#)

Since World War II, the international community has striven to create a system of international courts to complement national courts in order to try crimes of genocide, war crimes and crimes against humanity. This system is structured around the creation of ad hoc tribunals and other international tribunals set up after a conflict and the International Criminal Court.

#### [International Criminal Court](#)

- [Rome statute of the International Criminal Court 1998](#)
- [International Criminal Court, elements of crimes, 2002](#)
- [International Criminal Court, rules of procedure and evidence, 2002](#)

[Cour internationale de justice, 27 juin 1986, Affaires des activités militaires et paramilitaires au Nicaragua et contre celui-ci, VII - point 5](#)

#### Ad hoc tribunals – Overview

International tribunals have long enabled States and others to settle disputes. However, it was the Nuremberg trials after World War II that marked the beginning of ad hoc tribunals that could try individuals accused of the core international crimes: genocide, war crimes and crimes against humanity.

- [International Criminal Tribunal for the former Yugoslavia](#)

[Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, 15 July 1999, Prosecutor vs. Dusko Tadic, §131 et seq.](#)

- [International Criminal Tribunal for Rwanda](#)
- [Special Court for Sierra Leone](#)

#### [IHL and other legal regimes – Overview](#)

IHL and other legal regimes are complementary in armed conflicts. They are, however, distinct and separate, especially “jus in bello” (or IHL), which regulates the way war is conducted and “jus ad bellum,” which covers the reasons for war. Human rights and refugee law can overlap with

- [Refugee law](#)

## Protected persons - Introduction

International humanitarian law protects a wide range of people and objects during armed conflict. The Geneva Conventions and their Additional Protocols protect the sick, wounded and shipwrecked not taking part in hostilities, prisoners of war and other detained persons, as well as civilians and civilian objects.

- [Children](#)
- [Civilians](#)
- [Missing persons](#)
- [Prisoners of war and detainees](#)
- [Refugees and displaced persons](#)
- [Women](#)
- [Wounded, sick and shipwrecked](#)

## **Training resources on key documents**

[National implementation of international humanitarian law: Ratification kits \(«La mise en œuvre nationale du Droit international humanitaire. Un manuel» in French\)](#)

[Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities: Collection of Treaties and Other Instruments \(«Droit international régissant la conduite des hostilités: collection des Conventions de La Haye et de certains autres traités» in French\)](#). This publication includes a number of treaties that have been adopted since its last update in 1996. This volume is a collection of treaties regulating the conduct of hostilities. This body of law is of particular importance in alleviating the effects of armed conflict in that it regulates and limits the choice of methods and means of warfare used by the parties to the conflict.

[International humanitarian law and the challenges of contemporary armed conflicts](#)

[Contemporary challenges for IHL](#)

[Inter-Parliamentary Union \(IPU\) and International Committee of the Red Cross \(ICRC\), International Humanitarian Law. Handbook for Parliamentarians N° 25, Geneva, 2016.](#)

The International Committee Of The Red Cross, [International Humanitarian Law: Answers to your Questions](#)

The International Committee Of The Red Cross, How does law protect in war?

Volume I: outline of International Humanitarian Law

[Volume II: cases and documents](#)

[Volume III: cases and documents](#)

[Teaching outlines](#)

## **IHL (International Humanitarian Law) databases**

- [National Implementation Database](#)

It contains laws and case law that implement IHL treaties and other related international instruments and illustrates possible approaches to incorporating IHL in national legal and administrative frameworks.

- [Treaty database and States Party](#)

## **Articles, studies, broadcasts/publications (Internet):**

- [Trial Watch \(Track Impunity Always\)](#)
- [Crimes of war project \(in English\)](#)
- <http://www.theguardian.com/commentisfree/2014/jul/20/israelis-die-defend-british-media>

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## LEARNING OUTCOMES

After successfully completing the topic, students must be able to:

- A. Explain the international legislative framework for the protection of refugees;
- B. Analyse, interpret and evaluate situations where the protection of refugees and internally displaced persons is at risk;
- C. Effectively apply the critical and analytical skills acquired to resolve practical problems relating to the protection of refugees and internally displaced persons in their own countries or regions;
- D. Update their own teaching practice in the light of the knowledge acquired and their understanding of the topic.
- E. Understand the implementation of international humanitarian law in Algeria;
- F. Understand the implementation of international humanitarian law.

## METHODOLOGY

- A) Method of presentation: Reading of texts and/or viewing of audiovisual material;
- B) Collaborative learning: Forum;
- C) Summary of a case study: Portfolio;
- D) Team project: Portfolio;
- E) Individual project: Portfolio.

## PROGRAMMING OF LEARNING ACTIVITIES

Detailed description of activities to be developed by the student, individually or in a group, specifying the expected results and, where appropriate, the evaluation criteria.

## TIMETABLE OF ACTIVITIES IN THE SUBJECT

Identification of the activity	Estimated work time	Assessment criteria
Activity 1 Reading	8 hours	Self-test
Activity 2 References/bibliographical records	8 hours	Portfolio
Activity 3 Case study	8 hours	Forum
Activity 4 Team project	12 hours	Portfolio
Activity 5 Individual project	24 hours	Portfolio



## SUBJECT 2.4.:

# 2.4.27. INTERNATIONAL HUMANITARIAN LAW

### 1. GENERAL QUESTIONS<sup>681</sup>

#### 1.1 WHAT IS INTERNATIONAL HUMANITARIAN LAW?

International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.

International humanitarian law is part of international law, which is the body of rules governing relations between States. International law is contained in agreements between States – treaties or conventions –, in customary rules, which consist of State practise considered by them as legally binding, and in general principles.

International humanitarian law applies to armed conflicts. It does not regulate whether a State may actually use force; this is governed by an important, but distinct, part of international law set out in the United Nations Charter.

#### 1.2. WHAT ARE THE ORIGINS OF IHL?

Warfare has always been subject to certain principles and customs. It may be said therefore that IHL has its roots in the rules of ancient civilizations and religions.

Universal codification of IHL began in the nineteenth century, notably through the adoption of the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field and the 1868 Declaration of Saint Petersburg, which prohibited the use of certain projectiles in wartime. Since then, States have agreed to and codified a series of practical rules to keep pace with evolving means and methods of warfare and the related humanitarian consequences. These rules strike a careful balance between humanitarian concerns and the military requirements of States and non-State parties to armed conflict. They address a broad range of issues, including: protection for wounded and sick soldiers; treatment of prisoners of war and other persons detained in connection with an armed conflict; protection for the civilian population and civilian objects, such as cultural property; and restrictions on the use of certain weapons and methods of warfare (see next section).

Over time, the number of States adhering to these rules has grown, securing virtually universal acceptance for the core treaties of IHL.

#### 1.3. WHAT ARE THE TREATY-BASED SOURCES OF IHL?

The four Geneva Conventions of 1949 (GC I, II, III and IV), which have been universally ratified, constitute the core treaties of IHL. The Conventions have been supplemented by Additional Protocols I and II of 1977 (AP I and AP II) relating to the protection of victims of international and non-international armed conflict respectively.

681. This section has been prepared using information available on the ICRC website. [What is international humanitarian law?](#), Advisory Service on International Humanitarian Law, Geneva, 2004.

Other international treaties prohibit the use of certain weapons and military tactics, and protect certain categories of person and object from the effects of hostilities. These treaties include:

- the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols of 1954 and 1999
- the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction
- the 1976 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques
- the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW) and its five Protocols of 1980 (I, II and III), 1995 (IV), and 2003 (V)
- the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
- the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (APMBC)
- the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict

Many provisions of the treaties mentioned above are now thought to reflect customary IHL and are, consequently, binding on all States and all parties to a conflict.

#### 1.4. WHEN DOES IHL APPLY?

IHL applies only to situations of armed conflict. It does not cover internal tensions or disturbances such as isolated acts of violence that do not reach the threshold of an armed conflict.

In addition, IHL distinguishes between international and non-international armed conflict. International armed conflicts are those in which one or more States resort to the use of armed force against another State. International armed conflicts are governed by the four Geneva Conventions and Additional Protocol I.

Non-international armed conflicts are restricted to the territory of a single State and involve either governmental armed forces fighting one or more non-State armed groups, or such groups fighting each other. The rules applicable to non-international armed conflict have a more limited scope than those governing international armed conflict. These rules are set out in Article 3 common to the four Geneva Conventions and in AP II.

The distinction between international and non-international conflict is not always clear-cut. In recent years, conflicts have arisen that contain elements of both. A case-by-case approach is therefore recommended to determine which normative framework is applicable.

#### 1.5. WHAT ARE THE OBLIGATIONS FOR PARTIES TO THE CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW?

The Geneva Conventions and its Additional Protocols require signatory states to adopt a number of measures to implement the rules of IHL, in both peacetime and wartime. Sanctions at national and international level allow them to punish serious violations of international humanitarian law.

In peacetime, states that are signatories of the Geneva Conventions and Additional Protocols have an obligation to ensure the dissemination of IHL and training of military personnel in particular.

In wartime, they have the obligation to designate a protective power, a state entrusted with ensuring that States in conflict fulfil their obligations regarding IHL. They should also give ICRC delegates access to the whole of an occupied territory.

- Any attack on civilians or civilian objects is prohibited. The parties to the conflict must distinguish “military targets” from civilians or civilian property at all times.
- Any attack against military objectives is prohibited if it is likely to inflict excessive losses on the civilian population or disproportionate damage to civilian equipment or the environment. As part of their attacks, the parties to the conflict are required to take all possible precautions to protect the civilian population and civilian property.
- The use of civilians as human shields is prohibited.
- Any abuse of the emblems of the Geneva Conventions is prohibited.
- Weapons that cause unnecessary suffering or serious damage to the environment are prohibited (biological or chemical weapons, anti-personnel mines, incendiary weapons, cluster munitions).

## 1.6. WHAT IS COVERED BY INTERNATIONAL HUMANITARIAN LAW?

IHL covers two domains:

- the protection of people who are not, or are no longer, participating in hostilities;
- restrictions in means of waging war, mainly weapons, and to war methods, such as certain military tactics.

## 1.7. WHAT IS THE “PROTECTION”?

IHL protects people who are not participating in hostilities, such as civilians, medical staff or religious clerics. It also protects those who have ceased taking part in hostilities, such as wounded or ill combatants, shipwreck survivors, as well as prisoners of war.

These persons have the right to their life and the right to respect for their physical and moral integrity, and they benefit from judicial guarantees.

They must, in all circumstances, be protected and treated humanely, without any prejudice. In particular, it is forbidden to kill or hurt an adversary who has surrendered or has ceased fighting. The wounded and sick must be gathered and treated by their captors. Medical personnel and equipment, hospitals and ambulances must be protected.

Detailed regulations also govern the detention conditions for prisoners of war, and the treatment given to civilians who are under the authority of the opposing party, which includes in particular their treatment, the provision of medical care, and the right to exchange news with their family.

Moreover, IHL envisages certain distinctive signs that can be employed to identify the protected people, goods and places. It is mainly about emblems of the Red Cross and the Red Crescent, as well as distinctive signs of specific to cultural property and civil defence.

## 1.8. WHAT DOES INTERNATIONAL HUMANITARIAN LAW PROTECT?

### a) People:

- persons not participating in hostilities: civilians, humanitarian workers, medical staff and religious clerics, journalists ...
- persons no longer participating in hostilities: wounded combatants, shipwreck survivors, sick persons and prisoners of war.

IHL grants women and children additional protection that takes into account their specific needs.

**b) Certain property:**

property to which international law grants protection against attacks or other hostile acts (destruction, retaliation, capture, confiscation, etc.). For example: civil and cultural property, health units and means of transport, ...

**1.9. WHAT ARE THE RESTRICTIONS ON WEAPONS AND MILITARY TACTICS?**

Among the means and methods forbidden by IHL are military means and methods which:

- do not differentiate between combatants and civilians to spare the civilian population, individual civilians and civilian property;
- cause unnecessary suffering;
- cause serious and lasting damage to the environment.

As a result, IHL has banned the use of many weapons, including exploding bullets, biological and chemical weapons, blinding laser weapons and land mines.

**1.10. IS IHL REALLY APPLIED?**

Unfortunately, there are countless examples of violations of IHL. Increasingly, the victims of war are civilians. However, there are important cases where IHL has been able to effect positive change, by protecting civilians, prisoners of war, the sick and wounded, as well as by limiting the use of inhumane weapons. To the extent that IHL is applied during periods of extreme violence, its respect continuously poses serious difficulties. Nevertheless, it is more important than ever to look after its effective implementation.

**1.11. HOW CAN WE BETTER IMPLEMENT INTERNATIONAL HUMANITARIAN LAW?**

Measures must be taken to ensure IHL is respected. Nations have the obligation to teach the rules of IHL to their armed forces and to the general public. They have to warn about and, if necessary, suppress all violations of this law.

In order to do this, countries notably have to pass legislation that punishes the most serious violations of the Geneva Conventions and their additional Protocols, now considered to be war crimes. A law assuring the protection of the emblems of the Red Cross and the Red Crescent should also be adopted.

Measures have also been taken on the international front. Two courts were created to punish acts considered war crimes committed in the recent conflicts of the former Yugoslavia as well as Rwanda. Furthermore, an international criminal court, intended to deal with war crimes, was created by the Statute of Rome and adopted in 1998.

Whether through governments, organizations, or as individuals, we can all contribute to the effective implementation of International Humanitarian Law.

**1.12. IHL AND OTHER LEGAL REGIMES**

International humanitarian law and other legal regimes are complementary in armed conflicts. They are, however, distinct and separate, especially “jus in bello” (or IHL), which regulates the way war is conducted and “jus ad bellum”, which covers the reasons for war. Human rights and refugee law can overlap with IHL.

Both international humanitarian law and human rights law aim to protect the life, health and dignity of human beings. Whereas IHL applies only in times of armed conflict, human rights law applies at all times, in peace and in war.

States are required to take action to ensure respect for and application of both bodies of law. There are certain conditions under which some human rights can be suspended by a State if it faces a serious public threat. States cannot, however, suspend what are called hard-core human rights that are regarded as fundamental.

There are no provisions under IHL that allow a States to waive its application. IHL must be respected in all circumstances.

International refugee law protects and assists people who have crossed an international frontier. It is complementary to human rights law, and if the refugees are in an area of armed conflict, to IHL as well.

IHL is based on the 1949 Geneva Conventions and their Additional Protocols, the Hague Conventions and a series of treaties covering the means and methods of warfare, particularly weapons. The ICRC has a mandate of guardianship under the Geneva Conventions to promote respect and application of IHL.

Human rights law has been developed through a variety of international instruments. Those include the 1948 Universal Declaration of Human Rights, the 1966 Covenant on Economic, Social and Cultural Rights and the 1966 Covenant on Civil and Political Rights. Implementation mechanisms were established both at universal and regional levels.

Refugee law has its origins in the 1951 Convention Relating to the Status of Refugees. International supervision is the responsibility of the Office of the United Nations High Commissioner for Refugees (UNHCR).

IHL (*jus in bello*) is also distinct from the law establishing the prohibition of the use of force between States and defining exceptions to this principle (*jus ad bellum*). *Jus ad bellum* is governed by the UN Charter and implemented through UN mechanisms.

The obligation on States to respect and ensure respect for IHL is unaffected by arguments about the justification or prevention of armed conflict covered by *jus ad bellum*.

## 2. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW<sup>682</sup>

### A) THE PRINCIPLE OF HUMANITY

It imposes IHL as a pragmatic right at the heart of the conflict to reconcile military and human needs.

### B) THE PRINCIPLE OF DISTINCTION

It requires the belligerents to make a distinction at all times between the civilian population and the combatants, and between civilian objects and military objectives.

Ex: Prohibition of starvation as a method of warfare (Article 54§1, PA I), prohibition of forced displacement (Article 51§7, PA I). The prohibition of indiscriminate attacks stems from the principle of distinction. Weapons or methods that cannot distinguish between civilian and military targets cannot be used.

Ex: Indiscriminate aerial or ground bombardment. Non-discriminating weapons: anti-personnel mines, chemical, bacteriological or incendiary weapons (phosphate bombs, etc.).

682. Available at: <http://www.croix-rouge.fr/La-Croix-Rouge/Droit-International-Humanitaire/5-principes-fondamentaux>.

### C) THE PRECAUTIONARY PRINCIPLE

It occurs when a military operation must be continued while there are risks for civilians. It requires that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects” (Art. 57 AP I).

Ex: Avoid placing military objectives in populated areas (barracks in full residential areas, weapon stockpiles near schools, etc.), protection of the population.

### D) THE PRINCIPLE OF PROPORTIONALITY

If, after taking all the necessary precautions (see above), the neutralization or destruction of the enemy’s military advantage is likely to result in civilian casualties and damage, these military operations must be carried out to avoid causing loss or damage to persons and civilian objects “which would be excessive in relation to the concrete and direct military advantage anticipated” (Article 51 §5b, AP I).

### E) THE PRINCIPLE OF PROHIBITION OF SUPERFLUOUS INJURY AND UNNECESSARY SUFFERING

That is, causing unnecessary damage or suffering to achieve military goals and weaken the adversary (Article 35 AP I). This prohibition also applies to methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

Ex: The use of lasers that can cause permanent blindness was prohibited because the weakening of the opponent would entail disproportionate traumatic consequences; “Dum-dum” bullets; mustard gas ...

### F) LOYALTY IN THE CONDUCT OF HOSTILITIES

Perfidy is prohibited by IHL texts (Art. 37 AP I). “Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international humanitarian law with the intent to betray that confidence shall constitute perfidy”.

Ex: Emblem abuse is the use of one of the protective emblems recognized by the CG in order to deceive the enemy (transporting troops or weapons in vehicles bearing the Red Cross emblem).

## 3. NATIONAL IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

At the level of *jus ad bellum*, the authors of armed conflict, those who have the right to resort to armed force, are:

- States:
  - the military, as soon as the government orders it
  - Civilians who defend their state. Distinction between riflemen who repel an invasion and resistance fighters who resist occupation.
- National liberation movements:
  - Anti- and post-colonial movements, and anti-apartheid
  - Guerrillas

## 4. VIOLATIONS OF IHL

The International Criminal Court defines 4 major violations of International Humanitarian Law (IHL)<sup>683</sup>:

### 4.1. THE CRIME OF GENOCIDE

Murder, rape, torture ... committed with intent to destroy, in whole or in part, a national, racial, ethnic or religious groups.

Rome Statute of the International Criminal Court art. 6: « For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, 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) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group. ».

### 4.2. CRIMES AGAINST HUMANITY

A serious crime, particularly because of the number of victims it can cause, it is committed as part of a systematic attack, following a concerted plan, by a State or an organized group, aware that the act committed is part of this general policy to attack the civilian population.

Rome Statute of the International Criminal Court, Article 7: "1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;

683. See Article 9 of the Rome Statute of the International Criminal Court: Elements of crimes.



- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

- (a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
- (b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
- (c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- (d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
- (e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, **inherent in or incidental to, lawful sanctions**;
- (f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- (g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- (h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- (i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

#### 4.3. WAR CRIMES

Serious violations of international humanitarian law committed during an international or non-international armed conflict.

For the purpose of this Statute, 'war crimes' means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (i) Wilful killing;
  - (ii) Torture or inhuman treatment, including biological experiments;
  - (iii) Wilfully causing great suffering, or serious injury to body or health;
  - (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
  - (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
  - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
  - (vii) Unlawful deportation or transfer or unlawful confinement;
  - (viii) Taking of hostages.
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
  - (ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
  - (iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
  - (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
  - (v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
  - (vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
  - (vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
  - (viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
  - (ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
  - (x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;

- (xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- (xii) Declaring that no quarter will be given;
- (xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- (xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- (xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
- (xvi) Pillaging a town or place, even when taken by assault;
- (xvii) Employing poison or poisoned weapons;
- (xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- (xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
- (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
- (xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- (xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions; 8 Rome Statute of the International Criminal Court
- (xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- (xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- (xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- (xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.

#### 4.4. THE CRIMES OF AGGRESSION

According to Article 8 bis of the Rome Statute of the International Criminal Court:

1. For the purpose of this Statute, "**crime of aggression**" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

2. For the purpose of paragraph 1, “**act of aggression**” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
  - (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
  - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
  - (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
  - (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
  - (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
  - (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

## 5. THE PUNISHMENT OF OFFENCES

Suppressing serious violations of IHL is part of the obligations of signatory States.

At national level, the Geneva Conventions and Protocol I require States to punish those responsible for violations of IHL, to search for and detain persons accused of committing serious violations of IHL before their own courts. The [Rome] Statute of the International Criminal Court also recalls that it is the “duty of every State to exercise its criminal jurisdiction over those responsible for such international crimes”.

At international level, international criminal justice is implemented through:

- International criminal tribunals (Nuremberg, Tokyo, former Yugoslavia, Rwanda, Sierra Leone ...) which have limited jurisdiction in time and space.
- The International Criminal Court (Rome Statute, 2002), a permanent and independent court with jurisdiction to try crimes of genocide, crimes against humanity, war crimes and crimes of aggression committed after 1 July 2002.

## 6. THE USE OF FORCE IN LAW ENFORCEMENT OPERATIONS<sup>684</sup>

States often face situations in which their officials have to use force to maintain or restore public security, law and order in armed conflicts or situations of violence that do not meet the threshold of applicability of international humanitarian law (IHL). Force in law enforcement operations can be used by persons who exercise State powers, including in particular police and military forces; such use of force is mainly governed by international human rights law and domestic law. The use of force in law enforcement operations has to be strictly regulated by States. Notably, States must ensure that national legislation is brought into conformity with their international obligations and sanction their officials if they have used force in an excessive or otherwise arbitrary way.

### 6.1. WHAT IS THE USE OF FORCE?

When conducting operations to maintain or restore public security, law and order – namely law enforcement operations – State officials can resort to a variety of measures, including, under stringent conditions, the use of force. The term “use of force” is often defined under national law. However, it is generally understood as any physical constraint imposed on a person, ranging from physical restraint by hand or with a restraining device to use of firearms or other weapons. Force may be used only if other means remain ineffective or without any promise of achieving the intended result. This is an important consideration when resorting to the use of lethal or potentially lethal force in order to respect the right to life.

### 6.2. WHICH LEGAL REGIMES GOVERN THE USE OF FORCE IN LAW ENFORCEMENT OPERATIONS?

The use of force in law enforcement operations is mainly governed by international human rights law, which is applicable at all times (in peacetime as well as during armed conflicts), and by domestic law, as well as, in armed conflicts, by a few IHL provisions.

#### *International human rights law*

The most relevant right as regards the use of force in law enforcement operations is the right to life<sup>685</sup>. This right cannot be derogated from<sup>686</sup>.

In most human rights treaties, what is prohibited is a deprivation of life that is “arbitrary”, meaning not in compliance with international rules and standards pertaining to the right to life, or with domestic law. This implies that there are circumstances under which the use of lethal or potentially lethal force by State officials is authorized. The European Convention on Human Rights is the only human rights treaty that mentions in an exhaustive way the circumstances under which the use of force can result in a deprivation of life without violating the right to life: when absolutely necessary (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection (Art. 2).

Depending on the circumstances, other rights and prohibitions might be affected as a consequence of the use of force against persons, for instance, the right to freedom of expression and the right to peaceful assembly.

684. Available: <https://www.icrc.org/en/document/use-force-law-enforcement-operations>

685. 1 Universal Declaration of Human Rights, Art. 3; International Covenant on Civil and Political Rights, Art. 6; American Convention on Human Rights, Art. 4; European Convention on Human Rights, Art. 2; African Charter on Human and Peoples' Rights, Art. 4; Arab Charter on Human Rights, Art. 5.

686. The only exception is the European Convention on Human Rights, in which the right to life is considered as non-derogable “except in respect of deaths resulting from lawful acts of war” (Art. 15(2)). So far, this provision has had no real impact in practice since no European State has ever derogated from the right to life and the European Court of Human Rights has never resorted to this exception *proprio motu*.

The UN Code of Conduct for Law Enforcement Officials (CCLEO) of 1979 and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUFF) of 1990 provide further guidance on the use of force in law enforcement operations. According to BPUFF, “exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles” (Principle 8).

Even if constituting soft law standards, these instruments have been widely used by different human rights bodies to determine if the use of force was arbitrary in a particular case.

#### *International humanitarian law*

Law enforcement operations are also carried out during armed conflict, outside or alongside the conduct of hostilities<sup>687</sup>. While the rules governing the conduct of hostilities do not apply to such operations, IHL does contain a few provisions on the use of force in law enforcement operations:

- Article 43 of The Hague Convention IV of 1907 provides that the Occupying Power “shall take all [...] measures [...] to restore, and ensure [...] public order and safety [...]”.
- In the same vein, Article 42 of the Geneva Convention III relative to the Treatment of Prisoners of War of 1949 establishes that the use of weapons against those “who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.”

#### *Domestic law*

In accordance with the principle of legality (see below), provisions on the use of force in law enforcement operations are also to be found in domestic legal orders. These can take a variety of forms within the domestic legal and administrative framework related to security (e.g. laws, military and police manuals, rules of engagement, standard operating procedures), provided they respect international obligations and standards.

### 6.3. WHICH PRINCIPLES AND REQUIREMENTS GOVERN THE USE OF FORCE IN LAW ENFORCEMENT OPERATIONS?

The following principles and requirements govern the use of force in law enforcement operations:

- **Legality** (BPUFF, Principle 1). States must adopt and implement rules and regulations on the use of force by their officials. The legal and administrative framework must regulate all circumstances surrounding the use of force (who, when and how).
- **Necessity** (CCLEO, Art. 3). “Law enforcement officials may use force only when strictly necessary [...]” The use of force in law enforcement operations has to be an exceptional measure of last resort in order to pursue a legitimate aim. Only the lowest amount of force necessary may be applied. Whenever possible, there must be a differentiated use of force (e.g. verbal warning, show force, “less-than-lethal” force, lethal force).
- **Proportionality** (BPUFF, Principle 5(a)). The degree of force used and the potential harm it can cause must be strictly proportionate to the seriousness of the offence and the legitimate objective to be achieved.
- **Precaution** (obligations pertaining to the planning and control phase of operations). Law enforcement operations have to be carefully planned in order to avoid, as

687. For a better understanding of the interplay between the conduct of hostilities and law enforcement paradigms during armed conflict, see the ICRC report of the 2013 expert meeting on this topic, available at: <http://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>.

much as possible, the use of force and to minimize the risk to bystanders (BPUFF, Principle 3). State officials shall endeavour, to the greatest extent possible, to limit damage and injury, and respect and preserve human life (BPUFF, Principle 5(b)). Training, weapons and equipment must be given accordingly (BPUFF, Principle 2).

- **Accountability** (BPUFF, Principles 7, 22-24). Use of force that causes death or injury must be reported promptly. Any excessive or otherwise arbitrary use of force has to be properly investigated and, when required, punished as a criminal offence and/or incur disciplinary measures depending on the seriousness of the case. Both superior officers and State Officials under their command can be held responsible.

The Inter-American and European Courts of Human Rights and the United Nations (UN) Human Rights Committee have notably developed an extensive jurisprudence fleshing out all these principles and requirements.

Principles of (military) necessity, proportionality and precaution also exist in the rules governing the conduct of hostilities under IHL, but they have distinct meanings and operate differently.

#### 6.4. IN WHICH SITUATIONS CAN FIREARMS AND OTHER FORMS OF LETHAL OR POTENTIALLY LETHAL FORCE BE USED IN LAW ENFORCEMENT OPERATIONS?

According to Principle 9 of the BPUFF, resorting to firearms is authorized exclusively in the following situations, and only when less extreme means are insufficient to achieve these objectives:

- Self-defence or defence of others against the imminent threat of death or serious injury;
- Prevention of the perpetration of a particularly serious crime involving a grave threat to life;
- Arrest of a person presenting a danger of perpetrating such a crime and resisting authority, or prevention of his or her escape. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

According to the BPUFF (Principles 14 and 16), the use of firearms while policing unlawful and violent assemblies and controlling persons in custody or detention is also limited to the above-mentioned situations. Although the BPUFF principles refer only to use of firearms, Principle 9 is regularly mentioned in international case-law relating to arbitrary deprivation of life, and the use of other forms of lethal or potentially lethal force should be similarly limited.

Whether a use of force constitutes lethal or potentially lethal force does not only depend on the weapon used. The outcome of the use of any weapon will depend on a combination of factors, in particular the technical characteristics of the weapon (its mechanism of injury) and the context of its use. The context includes the manner and circumstances in which the weapon is used and the particular vulnerabilities of the victim(s).

A weapon described as “less-than-lethal” or “less lethal” can kill in a particular circumstance (e.g. a plastic bullet at close range, or riot control agents in enclosed spaces) in the same way that a weapon described as “lethal” can have a non-fatal outcome.

#### 6.5. WHAT DO STATES NEED TO DO AT THE NATIONAL LEVEL TO ENSURE THAT THE USE OF FORCE IN LAW ENFORCEMENT OPERATIONS RESPECTS INTERNATIONAL RULES AND STANDARDS?

In order to respect international rules and standards governing law enforcement operations, States must take specific measures before and after the use of force:



*Preventive measures before resorting to the use of force*

- Enactment of a legal and administrative framework on the use of force consistent with international rules and standards (BPUFF, Principle 1).
- Selection, training and capacity-building of State officials in accordance with international rules and standards, including teaching of police ethics, human rights and alternatives to the use of force (BPUFF, Principles 19-21).
- Provision of State officials with adequate equipment, including weapons and ammunition, as well as self-defensive equipment and alternative weapons to firearms to ensure a differentiated use of force (BPUFF, Principle 2).

*After the use of force*

- Provision of medical and psychological assistance to injured or affected persons, including State officials (BPUFF, Principle 5(c)). Assistance must primarily be given according to needs, taking into account vulnerable groups such as children and women, among others.
- Notification of the relatives of the injured or affected persons (BPUFF, Principle 5(d)).
- Provision for a system of reporting on the use of firearms (BPUFF, Principle 11(f)).
- Effective reporting and investigation of any use of force resulting in death or injury (BPUFF, Principles 22-24). To be effective, these investigations must be conducted promptly and in an independent and impartial manner, and must involve the participation of the victims and/or their next of kin. They also have a right to remedy and reparation. • Review of training programmes and operational procedures in the light of particular incidents (BPUFF, Principle 20).

## SUBJECT 2.4.:

# ANALYSIS OF SPECIFIC RIGHTS AND FREEDOMS

**Hours: 50**

**Subject**

**2.4.28.** Right to development

**Lecturer:**

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## SUMMARY OF THE TOPIC

The world has experienced and continues to experience unprecedented economic growth and technological evolution, but still faces problems such as poverty, exclusion, malnutrition, unemployment, social conflict and armed conflict, leading to the displacement of the population. To address this situation, the international community has used the concept of development to determine both the actions that should be undertaken and the goals that should be fulfilled. However, the concept of development has proven to be ambiguous, difficult to interpret and defined in different ways. At first, the focus was put on its economic dimension, expressed in terms of growth. This initial approach was later replaced by a new approach that takes the human dimension of development into account. This new approach provides the basis for international awareness that human rights of the first and second generations can only be effective and specific if they are associated with a development process. This represents the origin of a new human right, known as the right to development and enshrined by the United Nations Declaration on the Right to Development. The Declaration defines development as *"a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals."* To achieve this, the right to development must be recognized and enshrined to enable all individuals and peoples to act on and benefit from a social, economic, cultural and political development that allows them to live with dignity and improve their well-being. The United Nations has introduced several measures to contribute to development, particularly the Millennium Development Goals (MDGs), which have just concluded at the end of 2015 to be succeeded by a new set of goals called Sustainable Development Goals (SDGs).

## GENERAL AND SPECIFIC COMPETENCIES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course, participating teachers shall be able to recognise the educational potential of the general and specific skills described below in order to achieve significant learning in human rights. Moreover, these skills shall

be included within teaching plans through a unifying approach and directed towards the effective implementation of the knowledge acquired.

The following general and specific skills are included **in this topic**:

#### GENERAL:

1. **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
2. **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
3. **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
4. **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- Understanding the concept of development and its evolution
- Researching the content of the Declaration on the Right to Development
- Knowledge of the foundations of the right to development
- Understanding how the right to development can contribute to the other human rights
- Identifying and analysing situations that showcase (or not) the right to development
- Knowledge of which are the rights that make up the right to development
- Knowledge of the content and implementation of the Millennium Development Goals
- Knowledge of the post-2015 goals

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

### [25th Anniversary of the Declaration on the Right to Development](#)

Transforming our world: the 2030 Agenda for Sustainable Development, 12 August 2015 (UN Doc. A/69/L.85)

Report of the United Nations Inter-Agency and Expert Group on Sustainable Development Goal Indicators, 11 February 2016 (UN Doc. E/CN.3/2016/2/Rev.1)

### [New sustainable development program, built around 17 sustainable development goals](#)

Report of the Secretary-General: The regional and national dimensions of the right to development as a human right; 31 December 1980 (UN Doc. E/CN.4/1421).

Report of the Secretary-General: The Realization of the Right to Development, Global Consultation on the Realization of the Right to Development as a Human Right, 26 September 1990 (UN Doc. E/CN.4/1990/9/Rev.1)

[UNDP](#) (for the reports on human development and the report on the Millennium Development Goals, or MDGs)

Office of the United Nations High Commissioner for Human Rights. (International texts on the protection of human rights and the whole set of documents on the right to development, resolution 41/128, summary of the activity of the working groups on the right to development)

[World Trade Organization](#). (The special provisions reserved to developing countries):

The presentation of the [World Bank's activities](#) regarding development

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## LEARNING PROCESS RESULTS

Upon completion of this topic, the student shall be able to:

- Full understanding of the right to development, particularly of its nature and scope.
- Knowledge of the relationship between the right to development and the other human rights.

- Appraisal of the place of human beings in development and the importance of their involvement.
- Knowledge and distinction between the different constituents of the contents of the right to development.
- Knowledge of the MDGs and the results obtained, as well as the post-2015 action programme.
- Awareness of the challenges to the effectiveness of the right to development in the Maghreb countries with regard to higher education.
- A better selection of the elements that should be included in a course on human rights aimed at undergraduate students.

## METHODOLOGY

Methodology	Educational tools
Reading of the text	Reading and commentary of the provided text on the topic of the right to development, specifically the Declaration on the Right to Development.
Group assignment	Discussion/debate about a subject, a text or audio-visual material.
Individual assignment	Reflection and synthesis assignment on the right to development based on a document or issue presented by the lecturer or selected by the students to further develop and deepen their knowledge on a topic of their choice.
SWOT Analysis	Develop a SWOT analysis of the status of the right to development in the student's own country.
World café	Discussion forum for the exchange of knowledge between participants on the following topics: international cooperation/international solidarity/ international justice/environmental protection/social justice/international peace/weapons/disarmament.
Concept map	Small group assignment to summarize the content based on the concepts development/solidarity/sustainable development.

## SCHEDULE OF LEARNING ACTIVITIES

Detailed description of the activities the students will perform, individually or in groups, specifying the results obtained and, if appropriate, the evaluation criteria.

### 1. Reading of the text

The students must read the provided text in order to become acquainted with its contents and gain a general idea of the content of the right to development, based on the Declaration on the Right to Development and the Declaration on Social Progress and Development. After this reading, the students will be in a position to assimilate the relevance and scope of the right to development and its relationship with other human rights.

## 2. Group assignment:

The students will be split into small groups of two to five participants. Each group will be led by a moderator in charge of guiding the discussion, and a rapporteur will summarize the interventions. Each group will be asked to think about the state of effectiveness of the right to development in the Maghreb countries, and on its prospects for evolution according to each country's specific context. The second topic proposed for group discussion is related to the contribution of international development cooperation in the Maghreb countries and the challenges faced by this cooperation.

## 3. Individual assignment:

The lecturer presents the students with several topics related to the right to development or lets them pick a topic of their choice on which they will carry out a documentary search and conduct an analysis. The result of their work will then be presented to their fellow students.

The individual assignment can also be the presentation of a public or international organization or an association involved in the topic of development, or even the challenges of the right to development in the Maghreb countries, with the goal of analysing the efforts undertaken in order to give certain communities access to development.

## 4. Concept map:

The concept map allows the students to have a visual image of the content of the course on the right to development, with the goal of improving their understanding of the content and help them remember the information in the long-term. Participants must be distributed into groups of 4 or 5 people. Each group has 45 minutes to create a **concept map** (concept tree/conceptual flow diagram) representing the different concepts or topics, or the types of relationships between the different players involved in development.

Example: solidarity/justice/peace/citizenengagement/democracy/international cooperation/environment/future generations. The students may propose other topics.

Once the specified time is up, each group has 10 minutes to present and explain its concept map in a plenary session. All members of the group contribute to the presentation of the concept map.

## 5. World Café:

This method involves organizing the group as if it was a café, following the metaphor that states « the world is a café », to highlight the often invisible importance of dialogue networks and learning through interpersonal relationships. The goal is to:

- Realize how development can have an impact on the effectiveness of civil and socioeconomic rights.
- Acknowledge the reach and scope of the right to development.
- Raise awareness of participants on the topic of development and the barriers that can slow its progress on a local, national and international scale.
- Draw up a list of the main factors that can support the right to development in the specific context of the Maghreb countries.

## 6. The SWOT analysis:

Each participant carries out a SWOT analysis of the status of the right to development in his or her own country in relation to human rights. This analysis should focus on the following elements: Popular participation/Democracy/Environmental protection/Access to education, housing, drinking water, employment/Equitable distribution of income/International peace and security... The analysis should be summarized in a table for each of the areas addressed. The proposed topics are purely indicative, as the students are free to choose other topics. In any case, the analysis must cover a minimum of 6 topics and a maximum of 10.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Reading of the teaching guide on the topic	15 minutes	
Reading of the topic presentation	45 minutes	Self-assessment
Reading of text	2 hours	Summary produced
Group assignment	2 hours 30 min	The result of the group's work
Individual assignment	10 hours	Synthesis report
Concept map	2 hours	Map report
World café (Communication, Legal right, Education, Social work)	2 hours 30 min	Synthesis of the discussion on each discipline
SWOT analysis	10 hours	SWOT report
Synthesis of the topic in a conceptual (Maghreb countries) and sectoral (social right/social work/communication) approach	20 hours	Drafting of a synthesis report/ Final output
Total	50 hours	



## SUBJECT 2.4.:

# 2.4.28. THE RIGHT DEVELOPMENT

## 1. HISTORICAL, POLITICAL AND LEGAL CONTEXT OF THE EMERGENCE OF THE RIGHT TO DEVELOPMENT

The emergence of the right to development came as a consequence of the rise of development as a concept, and the distinction between developed and underdeveloped countries, that is, between development and underdevelopment. In 1949, Harry Truman (1884-1972), the President of the United States, considered assistance to underdeveloped regions as one of his priorities. He set the basis for a new reflection in which the concept of development, not new in itself, was thereafter used alongside its partner concept, “underdevelopment”.

According to this new concept, the world is no longer split between mother countries and their colonies, but rather between “developed” and “underdeveloped” countries. This implies that the countries considered as underdeveloped are meant to develop, thus giving a new meaning to the concept of “development”. This concept does not only imply a final status but also a journey, a process capable of reducing the differences between the developed and underdeveloped parts of the world. But, what kind of development are we talking about here?

Development, as a concept, was originally conceived from a purely economic perspective, prioritizing economic growth, measurable with quantitative indicators, and capable of triggering a transformation of economic, social and demographic structures. This first approach was further reinforced by the theory of Rostow, the American economist and theorist, developed in the early 1960s. During this period, the economic dimension of development was highlighted in order to mark the different debates and reflections on the topic. Yet, after a certain time this first conception attracted criticism, mainly for considering “underdevelopment” as a state of “backwardness”.

Meanwhile, the United States, seeing several countries gain independence, adopted a foreign policy in which development aid was a priority. This indirectly motivated the international community into supporting the development of a number of decolonized countries. These countries, after becoming aware of the scope of their exploitation by the colonial power, established different mechanisms aimed at joining forces and strengthening their solidarity to counter their situation, and proceeded to a political struggle stating their claims and demanding their right to development. They also tried to raise awareness among developed countries in order to achieve an international cooperation supportive of development.

Within the framework of the G-77, developing countries have progressively gained strength and become a force in the UN, defending the interests of the countries concerned in the international sphere.

This new force has created a new “ideology” or “culture” within the UN: the ideology of development, which has become one of the priorities in international relations, and a driving factor in the adoption of certain symbolic resolutions, highlighting a change in the relationship between developed and developing countries.

As an example, we can quote Resolution 1803 of 14 December 1962, on the declaration regarding permanent sovereignty over natural resources, Resolutions 3201 and 3202 of 1 May 1974, on the New Economic Order, and finally Resolution 3281 of 12 December 1974, on the Charter of Economic Rights and Duties of States. All these resolutions were preceded by Resolution 1161 of 26 November 1957, which sowed the seeds for a reflection on the topic of a right to development. This resolution clearly recognized the contribution of a balanced and integrated economic development, which consists of “the promotion and maintenance of peace and security, social progress and better standards of living, and the observance of and respect for human rights”.

This new reality has created an interest in revising international law in order to provide support or even a response to the demands of development aid. The revision will also enable a reform of international relations, hence the interest in a right to development that will point international relationships in a new direction.

The various resolutions introduced a new image of developing countries. They also enshrined the right of peoples to control their reality and their future, along with their ability to manage their own resources and exert their own power. In other words, these resolutions acknowledged the right of peoples to sovereignty and self-determination, which later formed the backbone of the right to development, and acted as vectors to trigger the claims of recently decolonized countries to a right to development.

In 1968, the International Conference on Human Rights held in Tehran pointed out that access to economic, social and cultural rights is an essential condition to enable a complete exercise of civil and political rights, thus illustrating the close relationship between the effectiveness of human rights and economic development. Nevertheless, no mention was made of a right to development until then.

The right to development was first considered as a human right in July 1972 by Keba Mbaye, the first President of the Supreme Court of Senegal, during his statement in the opening session of the third teaching session of the International Institute of Human Rights in Strasbourg, France.

In 1977, the United Nations Commission on Human Rights decided through its resolution 4 of 27 February 1977 to grant a special interest to the analysis of the difficulties hindering the full exercise of economic, social and cultural rights, particularly in developing regions.

Following successive efforts made by the various specialized bodies, and in response to the recommendations and analyses that highlighted the close relationship between human rights and development, the United Nations, in accordance with the provisions of resolution 36 of 11 March 1981, created a task force with the goal of thoroughly considering the relevance and content of a right to development, focusing particularly on:

- The mechanisms and instruments to implement in order to facilitate the full enjoyment of economic, social and cultural rights in the various regions of the world.
- The difficulties hindering the efforts of developing countries to ensure the full exercise of human rights.

As a result of this approach, and taking the existing work as a base, the United Nations General Assembly adopted the Declaration on the Right to Development through Resolution 41/128 at its meeting held on 4 December 1986. This Declaration, made up of 10 articles, was adopted by practically all the member States, with 146 votes in favour, 1 against (the United States of America), and 8 abstentions: Denmark, Finland, Germany, Ireland, Israel, Japan, India, and the United Kingdom.

In this way, an international consensus was expressed in favour of the Declaration, although the situation was heavily marked by the negative attitude of the United States, given its weight in the international scene.

## 2. THE ORIGINS OF THE RIGHT TO DEVELOPMENT AS A HUMAN RIGHT

### 2.1. THE BIRTH OF A CULTURE OF DEVELOPMENT

Following the independence of several countries and the emergence of new States, the internal dynamics and structure of the UN underwent a transformation. This transformation made it possible to re-evaluate the issue of development, which became one of the main priorities on which to focus all the efforts. Hence the realization that international peace cannot be achieved unless the recently decolonized countries reach a satisfactory level of economic and social progress and all the UN member States engage in a real and effective

cooperation. It is worth mentioning that this new culture, defined by law specialists as the “ideology of development”, is in no way a new idea. Its origins lie in three fundamental texts of international law, adopted by the UN member States. These are the Charter of the United Nations, the Universal Declaration of Human Rights, and the International Covenant on Economic, Social and Cultural Rights.

## 2.2. THE ISSUE OF DEVELOPMENT IN THE CHARTER OF THE UNITED NATIONS

Looking at the Charter of the United Nations, signed on 26 June 1945, it can be inferred that it already addresses the issue of the right to development. In fact, paragraph 3 of its Article 1 clearly states that the UN aims “to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion”. The idea of an international right to development is also clearly exposed in Article 55, which states that “with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

To further consolidate this spirit of international development and cooperation, Article 56 stipulates that “all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.” It clearly transpires from both articles that the United Nations highlights the conditions of stability and well-being which allow for the improvement of living standards, as well as the achievement of full employment. Furthermore, both articles enshrine the relationship between development and peace by focusing on the economic and social dimensions of the conditions for development.

Based on this article and as a consequence of the decolonization process of the 1960s, the UN deepened its interest in the issue of development, under added pressure from the developing countries. Thus, development became one of its main strategies for action, resulting in the proclamation of the first Decade of Development in 1960. This was followed by the 1970 Decade for Development, and later by the 1980 and 1990 Decades. These actions were followed by the proclamation of the Millennium Development Goals (MDGs) in September 2000 and, more recently, of the Sustainable Development Goals (SDGs) on 25 September 2015. Besides, in 1965 the United Nations created the United Nations Development Programme (UNDP) to further substantiate its interest in the issue of development. The aim of this programme is to fund development projects. This role has been expanded since the early 1960s to cover research for development. These activities lie at the origin of the concept of human development as represented in a synthetic instrument that measures this type of development: The Human Development Index (HDI).

## 2.3. THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AS A KEY SOURCE OF THE RIGHT TO DEVELOPMENT

Additionally to the Charter of the United Nations which, as we have seen, insisted on the issue of a right to and a culture of development, the 1948 Universal Declaration of Human Rights provides another solid basis for the conception of a right to development. First, the spirit of Article 28 of the Declaration transcends the individual dimension of the right to development to clearly and solidly endow it with a collective and international dimension. This article states that “everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”.

In addition, the right to life proclaimed in Article 3 must not be understood simply as the right to physical existence, but also entails the qualitative aspect of human existence. This aspect should be reflected in a dignified life, showing the value and respect of human beings and allowing for the full development of their personality. This highlights the close relationship between the right to life and the right to development. The latter is considered as a right to expression and even a right to individual fulfilment.

This position in favour of development is also found in Article 22 of the Declaration, which states that the fulfilment of a right to development is to be achieved through the efforts of each country, depending on its resources, and through international cooperation. This Article states that “Everyone, as a member of society, has the right to social security and is entitled to the realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality”. Article 25 of the Declaration also highlights the issue of development and insists on the fact that everyone has the right to an adequate standard of living in order to ensure health and well-being for him- or herself and his or her family.

We can therefore conclude that, through the spirit of the different articles mentioned above, among other articles, the Universal Declaration of Human Rights represents an essential basis for the definition and creation of a right to development.

#### 2.4. THE INTERNATIONAL COVENANTS ON HUMAN RIGHTS ADOPTED IN 1966

The right to life, proclaimed in Article 3 of the Universal Declaration of Human Rights, is dealt with considering its qualitative dimension in Article 11 of the International Covenant on Economic, Social and Cultural Rights, which recognizes “the right of everyone to an adequate standard of living for himself and his family”.

Additionally, paragraph 3 of the preamble to the Covenant implicitly highlights the right to a situation supportive of the fulfilment of human rights, by stating that “in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights”.

Furthermore, Article 2 of the Covenant points out the States’ responsibility in taking action, either individually or through international cooperation, in the creation of a supportive environment for the effective realization of human rights. The Article specifies that “each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

In this way, the International Covenants on civil, political, economic, social and cultural rights, along with the Charter of the United Nations and the Universal Declaration of Human Rights, indirectly acknowledge the close relationship – and even the interdependence – between human rights and development. This interdependence was further clarified in the United Nations Declaration on Social Progress and Development (see Annex 1) issued on 11 December 1969. Article 2 of this declaration states: “Social progress and development shall be founded on respect for the dignity and value of the human person and shall ensure the promotion of human rights and social justice, which requires:

- a) The immediate and final elimination of all forms of inequality, exploitation of peoples and individuals, colonialism and racism, including Nazism and apartheid, and all other policies and ideologies opposed to the purposes and principles of the United Nations;
- b) The recognition and effective implementation of civil and political rights as well as of economic, social and cultural rights without any discrimination.”

### 3. THE ETHICAL BASIS OF THE RIGHT TO DEVELOPMENT

Throughout the evolution of the right to development, questions have been asked about its ethical basis. Like any other right, the right to development requires a definition of the parties concerned, namely, the **holders or beneficiaries** of the right, and the **guarantors or providers** of that right.

Generally speaking, it is an accepted and recognized fact that the holders or beneficiaries of the right to development are the individuals, peoples and States whose living conditions and level of development prevent them from reaching well-being or from having a dignified life. The guarantors of this right, that is, those responsible for providing it are the following:

- Individuals, through citizen engagement, acting both as beneficiaries and active participants in the development process;
- The States, responsible for the preparation of development strategies and the implementation of development-friendly reforms;
- The rich States, which experienced an earlier development;
- The international community.

By defining the two parties concerned, it becomes clear that development as a favourable situation must not be confined to certain peoples. According to the principle of justice and solidarity, all human beings are entitled to reap the fruits of development, so that human dignity can be the same for all. This implies that the right to development is based on justice and solidarity. Furthermore, given its mission to create favourable conditions for all human beings without distinction, it is also based on the principle of human dignity and equal opportunities.

#### 3.1. THE PRINCIPLE OF JUSTICE AND SOLIDARITY

As has been stated in several reports, a fraction of the world's population that generally does not exceed 20% controls more than 80% of the world's wealth, while the remainder of the population, that is, 80%, only has access to the remaining 20%. According to the principle of justice, it is important, or rather necessary, to adequately redistribute global wealth. Consequently, the United Nations Declaration on the Right to Development introduced a sort of "duty of care" regarding the assistance the international community should provide to poor and developing countries. This approach reflects the recognition that poor living conditions and poverty, as indicators of a lack of development, are a collective responsibility. Therefore, their eradication requires collective action, with a deep involvement of the international community, and particularly of the richest countries. In order to realize this solidarity, the Declaration on the Right to Development insists on two key factors:

- Inter-State cooperation.
- International assistance.

Both actions support and consolidate the efforts that every poor and developing State must make in order to overcome the various hurdles to development.

Therefore, without the basic ethical principle of solidarity, it will be difficult to aspire to a certain justice in the redistribution of global wealth. In addition, this redistribution process will make it possible not only to achieve a certain justice but also to ensure equal opportunities, another principle that represents a key ethical foundation of the right to development.

#### 3.2. THE PRINCIPLE OF EQUAL OPPORTUNITIES

The principle of equal opportunities entails that every society must guarantee a decent existence to all its members, allowing them – regardless of their characteristics – to enjoy living conditions that set them above a defined and absolute poverty threshold. According

to the United Nations Declaration on the Right to Development, the respect of this principle must be guaranteed both by the countries and by the international community:

- Each State must adopt measures to fight social injustice and to assess an equitable distribution of national wealth in such a way that no individual or group is excluded.
- The international community must join efforts to allow each country to benefit from development, regardless of its resources.

### 3.3. THE PRINCIPLE OF RESPECT FOR HUMAN DIGNITY

Through its various goals, development seeks to ensure human dignity. Human dignity lies at the core of all human rights. The right to development is therefore a logical response to the following question: what is the purpose of development?

In response to this question, we consider man as the main beneficiary of development. In fact, the right to development is full of humanism, as it seeks to give man an active role in the development process. Man is both the actor and the beneficiary, either individually or as part of a community. This humanistic approach of the right to development has given it the status of a human right per se, whose respect requires the involvement and commitment of each State as well as the international community. Both these players must work in close cooperation, in order to confront the violations and obstacles that hinder the respect of the right to development.

## 4. THE LINKS BETWEEN DEVELOPMENT AND HUMAN RIGHTS

### The links between...

#### Human Development

- The process of improving people's capabilities in order to
- expand their options and
- opportunities so that every person can live a life with respect and dignity

Legal guarantees of human rights are required to prevent threats to freedom and dignity

#### ... and Human Rights

- All individuals have the right to institutions or mechanisms that
- protect them from abuse and deprivation
- ensure their freedom for a dignified life

The exercise of human rights requires strengthening capabilities that can be made possible by development



Following the creation in the early 1960s of the new international dynamic in favour of development, in the late 1970s the UN organized a series of activities aimed at conducting an in-depth analysis of the international dimensions of the right to development as a human right. The purpose was to prove from a global human rights perspective that **development is a part of human rights, bearing in mind that these rights can only be effective if the right economic and social conditions are met.** Yet, on the other hand, these conditions can only exist and be met as a consequence of development. Therefore, development is a necessary context for the effective enjoyment of human rights. In other words, if development is not achieved, this is an obstacle for the realization of human rights.

Human rights and human development share a common vision and purpose to ensure freedom, well-being and dignity to everyone, everywhere. When human development and



human rights make progress together, they reinforce each other, expanding the capabilities of individuals and the protection of their fundamental rights and freedoms.

As a consequence of this new convergence between human rights and development, the scope of the latter has been expanded to include the social and cultural dimension, in addition to the classic economic dimension. In turn, the concept of human rights has also been expanded by integrating political and economic dimensions that are now globally analysed. This has laid the basis for a global convergence of human rights involving an analysis of the global and structural obstacles to the full enjoyment of human rights in the different regions of the world.

In order to better explain the global approach to human rights and to prevent any misinterpretations regarding the link between development and human rights, the United Nations General Assembly adopted Resolution 32/130 on 16 December, which stresses the indivisibility and interdependence of all human rights and fundamental freedoms.

After establishing the link between development and human rights, it was time to give this relationship an international legal value. Thus, the UN Commission on Human Rights states in its resolution 4 (XXXIII) of 4 February 1979 that the right to development is an inalienable right of human beings. In the same year, the United Nations General Assembly granted official recognition to the right to development, stating “that the right to development is a human right and that equality of opportunity for development is as much a prerogative of nations as of individuals within nations”.

Following the official recognition of development as a human right, the dialectical relationship between development and human rights became unquestionable, having been clearly established. Both notions complement and enrich each other:

- Human rights go hand in hand with development.
- Development is a requirement for the applicability of human rights.

By acknowledging the dialectical link between development and human rights, the UN seeks to prevent any eventual justification of human rights violations in the efforts deployed for achieving development, particularly in its economic dimension. These two notions constitute an indivisible whole; they enrich and support each other, and their areas of application are complementary, meaning that their effectiveness must be achieved without prioritizing one over the other. The distinction between the three generations of human rights must never lead to a preference for one of them at the expense of the others. Considering this, it is inadmissible for a country that invests great resources in the fulfilment of economic, social and cultural rights to neglect civil and political rights.

Thus, resorting to the global human rights-based approach and its embodiment in the principles of indivisibility and complementarity in the effective realization of the various types of rights has paved the way for the inclusion of development in the human rights framework. This new approach precludes any tendency to classify or prioritize these rights and clearly confirms that the right to development is a human right whose value is equal to that of all the others.

In conclusion, it can be stated that the recognition of the right to development as a human right opens a new stage in international relations. In this new stage, all peoples and individuals are entitled to enjoy favourable and satisfactory conditions that preserve their dignity and allow them to make progress on the road to development. The right to development is also assessed with regard to the countries that started their development years ago and have made great progress. This development must not be exclusively theirs and it is important for other countries to also benefit from it.



## 5. THE CONSTITUENT ELEMENTS OF THE RIGHT TO DEVELOPMENT

With the birth of the concept of human right generations and the growing interest in inter-State cooperation, the right to development, regarded as a third-generation human right, emerged as a new manifestation of the need for solidarity among the peoples, to the extent that third-generation rights are considered as « solidarity rights » not only between peoples but also between the generations.

As previously analysed, development is closely linked to human rights, given that it implies the respect of these rights and that these rights must be integrated in the development process itself. Therefore, human rights are also composed of the elements of the right to development, which is made up of the following rights:

- The right to food;
- The right to health;
- The right to education, housing, employment;
- The right to popular participation;
- The equal distribution of income;
- The elimination of all social injustice through social and economic reform.

According to Article 9 of the Declaration on the Right to Development, the various elements of this right are indivisible and interdependent, as befits its status of inalienable right.

However, bearing in mind that the right to development summarizes the culture of development that became internationally accepted, it also includes the third-generation rights that express solidarity and cooperation between the peoples. These rights are:

- The right to peace;
- The right to a healthy environment. This right was subsequently recognized through the promotion of the notion of sustainable development. In 1992, the United Nations Conference on Sustainable Development proclaimed for the first time the right to a sustainable development, that is, the right to a development that takes into account not only the needs of the current generations, but also those of future generations.

Additionally, in order to achieve a greater recognition of the right to development as a human right, the United Nations has continued its efforts to complete this process through the adoption of the Declaration on the Right to Development on 4 December 1986, as mentioned earlier. Which are the components of this declaration, and what are the difficulties that hamper its implementation? The following sections focus on answering these questions.

## 6. THE UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT

The Declaration on the Right to Development (DRD) was adopted by the UN General Assembly in Resolution 41/128 of 4 December 1986. This document, containing a preamble and 10 Articles, manifests and summarizes the international awareness regarding the issue of development. This Declaration covers the following issues:

### 6.1. DEFINITION OF THE RIGHT TO DEVELOPMENT

As previously stated, the origins of the official recognition of the right to development as an international right lie in the DRD, which defines the concept of development in its preamble. The Declaration regards development as “a comprehensive economic, social, cultural and

political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in their development and in the fair distribution of benefits resulting therefrom”.

Because of its contents, the Declaration is regarded as the key foundation of the official recognition and formulation of an international right to development. This right is defined in Article 1 of the Declaration as “an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”

The DRD expresses a new approach by providing a global definition of the notion of the right to development, with its associated economic, social, cultural and political dimensions. Its goal is the creation of new strategies in the area of human rights to put an end to the division introduced in 1966 between the two International Covenants on Human Rights regarding civil and political rights on one side and economic, social and cultural rights on the other. The DRD therefore aims to consolidate the indivisibility of human rights, and to prove that it does not make sense to establish a hierarchy between them. With this global definition as a base, the Declaration on the Right to Development breaks away from the purely economic concept of development, thus allowing for the full integration of its issues within human rights.

## 6.2. INDIVIDUAL AND COLLECTIVE DIMENSIONS OF THE RIGHT TO DEVELOPMENT

According to the definition mentioned above, the right to development applies not only to individuals but also to all the peoples, as befits a human right. In other words, it is every human being’s right to benefit individually and collectively from the goods and services produced by the community he or she belongs to, under a fair and equitable protection. However, this collective dimension of the right to development does not have a separate existence. It exists in a complementary and interdependent relationship with the individual dimension, thus highlighting that the right under consideration is simultaneously a right of the individual and a right of the peoples or communities. Having said this, an individual’s right to development can only have value in its collective dimension.

## 6.3. THE ACTORS OF THE RIGHT TO DEVELOPMENT

Whereas Article 1 of the Declaration on the Right to Development clearly defines the concept, along with its individual and collective dimensions, Article 2 defines the actors involved in the right to development. These actors are:

### A. THE HUMAN BEING (THE INDIVIDUAL)

This is the first actor of development but also its main beneficiary, in both its individual and collective dimensions. According to the first point of Article 2, “the human person is the central subject of development and should be the active participant and beneficiary of the right to development.”

### B. THE COMMUNITY:

This actor clearly expresses the collective dimension of the right to development. However, as previously mentioned, the role of the community does not exclude that of the individual, who has a duty towards the people that must serve him or her. In describing the role of the community, point 2 of Article 2 stipulates that “all human beings have a responsibility for development, individually and collectively, taking into account the need for full respect for their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfilment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.”

As transpires from this section of Article 2, the concept of the right to development is based on the balance and interdependence between individual and collective well-being, which enrich and support each other.

### C. THE ROLE OF THE STATE

The realization of the right to development relies heavily on the intervention of States, which hold the responsibility for development as representatives of their peoples. This responsibility of States is clearly defined in point 3 of Article 2, which establishes that “States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.”

The first point of Article 3 also insists on the State’s responsibility, establishing that “States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.”

Through these two statements, the Declaration on the Right to Development clearly defines the capital importance of the role of States in ensuring the protection of human rights and their realization in a social, economic, political and cultural context that supports development.

To further prove the role of the State in the realization of development, articles 3 to 8 of the Declaration on the Right to Development highlight the involvement of the State in the promotion and implementation of development. This must first take place at a national level. According to Article 8, the responsibility of the States in the implementation of development implies a duty of equality and justice towards the individuals, who must have the same chances of enjoying the various services and benefits of the development process. Article 8 states that “States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.”

Point 3 of Article 3 provides further confirmation of the State’s responsibility, by affirming that “States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfil their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.”

### D. THE ROLE OF POPULAR PARTICIPATION IN THE REALIZATION OF THE RIGHT TO DEVELOPMENT

According to the Declaration on the Right to Development, and as can be inferred from various articles, the right to development is a right to popular participation in a context of democracy and social justice. Indeed, all individuals must participate in development by exercising their democratic rights and duties in the various elections and processes that take place in their country, as well as in the decisions directly or indirectly related to their status as citizens.

Popular participation, regardless of the sphere, is also a factor that clears the way for the applicability of all human rights. According to point 2 of Article 8, States should encourage popular participation, as it is “an important factor in development and in the full realization of all human rights.”

Additionally, regarding this participation, the Declaration on the Right to Development devotes particular attention to the involvement of women, given their value as a positive factor for the success of the development process and thus for the democratization of society. In point 1 of Article 8, the Declaration states that “effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicating all social injustices.”

By giving value to popular participation, the Declaration on the Right to Development offers a new vision of human beings: they are not just passive beneficiaries of the right in question, but also actors with the ability to influence the development process. According to the terms of the declaration, individuals are « active participants », and their right to development takes two forms:

- The right to be involved in the development process.
- The right to benefit from development and its associated effects.

Obviously, this involvement in the development process can only take place within a democratic regime, as a vehicle for the people's sovereignty and the expression of the different manifestations of citizenship.

#### 6.4. THE REALIZATION OF THE RIGHT TO DEVELOPMENT THROUGH INTERNATIONAL COOPERATION

According to the terms of the Declaration on the Right to Development, this specific type of right is not only about individuals and States; it also requires international cooperation actions. This cooperation is of capital importance, as the development process also implies actions that express international cooperation strategies, which in turn lead to international development policies. Thus, in point 1 of Article 4, the Declaration states that "States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development."

Development cooperation and support represent another essential principle stated by the Declaration on the Right to Development. As mentioned earlier, the Declaration affirms that the right to development is as much a right of peoples as it is a right of individuals. This right belongs to the third generation of human rights, also known as solidarity rights. As a right based on solidarity, it allows the achievement of these two goals:

- The recognition of civil and political rights as a manifestation of development, in a global approach to all human rights with no distinctions or hierarchies.
- The achievement of the remaining solidarity rights as a response to the principle of indivisibility and interdependence of human rights. The right to development is also based on the principle of shared destiny for all individuals worldwide, with no distinction whatsoever. According to Article 6 of the Declaration, international cooperation and solidarity are key requirements for the realization of the right to development; indeed, "all States should co-operate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all without any distinction as to race, sex, language or religion."
- By highlighting the importance of international cooperation in the realization of the right to development, the Declaration is only recalling a fundamental principle on which the work of the United Nations is based, and which is developed in its Charter; indeed, Article 56 of the Charter stipulates that "all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55."
- Point 2 of Article 3 of the Declaration insists on international cooperation by stating that "the realization of the right to development requires full respect for the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations."

It can therefore be concluded that international cooperation, manifested in the assistance to developing countries, is a fundamental requirement for the effectiveness of the right to development.

#### 6.5. THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

Being fully aware that development cannot occur in a context of war, conflict and military build-up, the Declaration gives relevance to international relations. These must be based on peace and security. This approach is included in Article 7 of the Declaration, which states that "All States should promote the establishment, maintenance and strengthening of international peace and security and, to that end, should do their utmost to achieve general and complete disarmament under effective international control, as well as to ensure that

the resources released by effective disarmament measures are used for comprehensive development, in particular that of the developing countries.”

Thus, in order to achieve the development process in a context of security and good international relations, it is vital to free up the resources assigned to weapons and redirect them to development goals that can, in turn, have a positive influence on the achievement of international peace and stability. It is worth remembering that, since its inception, the UN has strived to achieve international peace and security through actions aimed at the promotion of disarmament, given its influence on development. By adopting measures for disarmament, we effectively pave the way for the investment of resources previously dedicated to producing or purchasing weapons and strengthening defence systems in the fight against the various issues that hamper development, such as poverty, illiteracy or malnutrition.

## 7. THE IMPLEMENTATION OF THE DECLARATION ON THE RIGHT TO DEVELOPMENT

### 7.1. THE MILLENNIUM DEVELOPMENT GOALS (MDGS 2000)

As shown in the previous paragraphs, the UN was already interested in development before the Declaration on the Right to Development. Since the 1960s, development has been one of the main priorities in the various strategies for action of the United Nations. This interest materialized in the announcement of the first Decade for Development in 1960, followed by the Decades of 1970, 1980, and finally 1990. These actions were followed by the United Nations Millennium Declaration with its Millennium Development Goals (MDGs) in September 2000, which spanned the 2000-2015 period, and the declaration on the Sustainable Development Goals (SDGs) of 25 September 2015, covering the following 15-year period (2015-2030). The content of these two declarations, as an example of the implementation of the Declaration on the Right to Development, will be the subject matter of the following sections.

### 7.2. THE MILLENNIUM SUMMIT (6-8 SEPTEMBER 2000)

The Millennium Summit on development, held on 6-8 September 2000 at the United Nations headquarters in New York, is considered as the largest gathering of Heads of State and Government of all time. This Summit ended with the adoption of the Millennium Declaration by the 189 member States.

The eight development goals for the Millennium, known as the Millennium Development Goals (MDGs), were spelled out in this declaration. These goals were designed as a global development plan of action to be met during the 2000-2015 period.



The goals focus on the fight against extreme poverty in all its dimensions.

**a) The content of the goals:**

The following development-oriented goals were set:

1. Eradicate extreme poverty and hunger;
2. Achieve universal primary education;
3. Promote gender equality and empower women;
4. Reduce child mortality;
5. Improve maternal health;
6. Combat VIH/AIDS, malaria and other diseases;
7. Ensure environmental sustainability;
8. Global partnership for development.

**b) The Millennium values**

Beyond the eight development goals agreed upon by the 191 member States of the United Nations for the 2000-2015 period, the Millennium Declaration includes a first part entitled “**Values and Principles**”. Compared to other declarations, this one differs in this first part, which makes it innovative. But, what exactly is the content of this first part?

According to the subjects dealt with, the first part of the Millennium Declaration comprises the following elements:

- A- In the first group of paragraphs, it is mentioned that the Heads of State and Government reaffirm their faith in the Organization and the Charter, as well as “the purposes and principles of the Charter of the United Nations, which have proved timeless and universal.”
- B- In addition to the responsibility towards “their societies”, the States acknowledge their collective responsibility to uphold the principles of human dignity, equality and equity.
- C- An assertion of the will of the States to establish a just and lasting worldwide peace. This will involve:
  - Respect for territorial integrity;
  - Resolution of disputes by peaceful means;
  - Respect for the right to self-determination of peoples as well as human rights and fundamental freedoms.
- D- The recognition by all States that the main goal is that everyone should benefit from globalization, in order to turn it into an advantage and an opportunity for all humankind.
- E- In order for everyone to benefit from globalization, the concerned States enumerate a list of values regarded as the basis of international relations in the 21<sup>st</sup> century.

**c) The content of the values:**

- **Freedom:** This refers to the freedom of men and women to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice, in an environment of democracy and popular participation.
- **Equality:** This refers to the equality of the peoples to benefit from development; the equal rights and opportunities of women and men must also be assured.



- **Solidarity:** This value should be expressed by the multilateral management of global challenges in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice.
- **Tolerance:** Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted.
- **Respect for nature:** This value expresses the need of all States to protect all living species and natural resources, in order to provide for the needs of the future generations.
- **Shared responsibility:** Development and the maintenance of international peace and security are responsibilities to be shared by all nations, which must work and cooperate bilaterally as well as multilaterally.

### 7.3. THE 2005 WORLD SUMMIT

The 2005 World Summit was held in the New York headquarters of the United Nations on 14-16 September and brought together more than 170 Heads of State and Government. In this event, the attending State representatives:

- Affirmed their will to act on several fronts in order to develop their ability to address the important global issues.
- Expressed their commitment to achieve the development goals set forth in the Millennium Declaration during the remaining period (2005-2015) and to combat poverty.
- Declared their commitment to obtain the necessary resources to fund actions capable of achieving the goals and to reduce extreme poverty, a major bane for all countries.

### 7.4. THE 2010 SUMMIT ON THE MILLENNIUM DEVELOPMENT GOALS

This summit, held on 20-22 September 2010, resulted in the adoption of a global plan of action, entitled “Keeping the promise: united to achieve the Millennium Development Goals”. During the summit, a series of initiatives were introduced to combat poverty, hunger and disease.

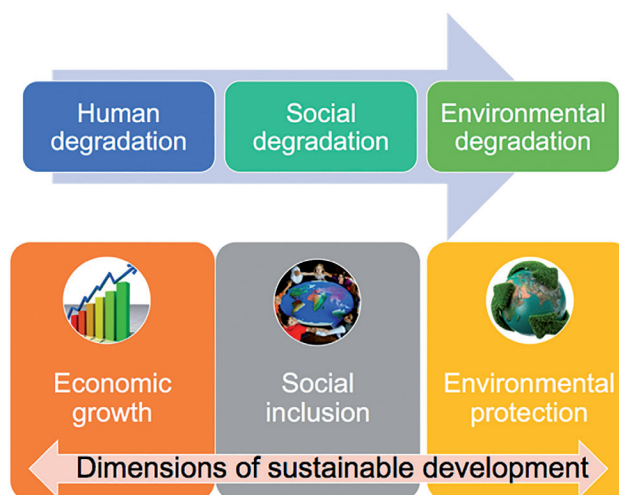
Another area in need of additional efforts is the health of women and children. During this summit, the various Heads of State and Government also established measures for the promotion of the development program beyond 2015.

### 7.5. BEYOND 2015: THE SUSTAINABLE DEVELOPMENT GOALS (SDGS)

Considerable progress has been made in the fulfilment of the Millennium Development Goals, and several achievements have been reached in the accomplishment of specific targets, both at a global level and in individual countries. However, the prospects of achieving all of the goals differ considerably between the different countries and regions. Over one billion people still live in extreme poverty; too many people endure serious deprivations in the areas of health and education, and their progress is hindered by considerable inequalities linked to income, gender, ethnicity, disability, age and geographical location. The continuing global economic crisis and the recent violent conflicts have increased poverty, inequality and exclusion. The loss of biodiversity, the degradation of water, desertification and the increase in the risks linked to climate change threaten to neutralize the progress achieved up to date and undermine any future developments.

At the same time, the world has undergone a dramatic change since the start of the new millennium. New economic powers have emerged, our societies are being reconfigured by new technologies, and new models of human settlements and activities are increasing the pressure on our planet. Inequality is also on the rise, in rich countries as well as poor ones.





A new era demands a new vision and a flexible framework. Sustainable development, enabled by the integration of economic growth, social justice and environmental planning, must become our guiding principle and our operational standard in a global context. This framework can bring together the whole range of human needs and aspirations. It additionally offers a comprehensive model for the mutual reinforcement of approaches to the resolution of global issues. In essence, sustainable development is the way to the future. Because of this, even though the challenge has become more complicated and acquired a larger dimension, it remains unchanged: to keep our promises and meet the aspirations of the peoples of the world and to call for unity in order to make the dream of the Charter and the Millennium Declaration come true.

Human development focuses its efforts on disadvantaged people. Nevertheless, this concept requires the inclusion of a key element: it is increasingly imperative to include the future generations, as they will be faced with the worst consequences of our current activities. The concept of sustainable human development emerges to provide a response to these challenges.

Discussions on the meaning of environmental sustainability are often centred on clarifying whether man-made capital can ever replace natural resources or, in other words, whether human ingenuity will have the ability to mitigate the shortage of resources, as has happened in the past. It is not known whether this will be possible in the future and, given the risk of reaching a catastrophic situation, we feel inclined to protect the basic natural assets and the flow of associated ecosystem services. In addition, this perspective is consistent with the human rights-based approach to development.

## Evolution of the concept of human development

### Human development

Expansion of the freedoms and capabilities of individuals to lead the type of life they value and have reasons to value.  
(UNDP, 1990)

### Sustainable human development

Expansion of the fundamental freedoms (capacity of fulfilling needs) of the current generations as reasonable efforts are made to prevent the risk of seriously compromising the freedoms (capacity of fulfilling needs) of the future generations  
(UNDP, 2011)

A fundamental aspect of this idea is reasoned public deliberation, which is also essential in defining the risks that society is ready to assume. In the strive for sustainability and equity, these two elements do not always need to reinforce each other. In fact, reciprocal concessions will have to be made in many cases. As an example, measures to improve the environment can have negative effects on equity by restricting the economic growth of developing countries.

**The poverty-centred approach makes it possible to examine environmentally-related restrictions in the availability of modern fuels, drinking water and basic sanitation. These basic deprivations, which are already important in themselves, also represent serious human rights violations.** Ending them could increase some of the main capabilities by expanding people's options and boosting human development. In developing countries, at least 6 out of 10 people are affected by one of these three environmental deprivations, and 4 out of 10 are affected by two or more of them. These deprivations are especially serious among the multi-dimensionally poor, as more than 9 out of 10 people are affected by at least one of them. They predominantly overlap: 8 out of 10 poor people in several simultaneous dimensions are affected by two or more, and almost one third (29%) is affected by all three. These environmental deprivations contribute disproportionately to multidimensional poverty, and account for 20% of the Multidimensional Poverty Index (MPI), a percentage that is even higher than the original estimation set at 17%. In most developing nations, the main flaw is the lack of cooking fuel, while water shortage is the most pressing issue in several Arab states.

Following a consultation process on which plan of action to adopt after 2015, a new summit of the United Nations was held in New York on 25-27 September 2015. The summit focused on the adoption of the post-2015 development agenda. It adopted a new series of global goals focused on:

- The eradication of poverty;
- The protection of the planet;
- The guarantee of prosperity for all.



The goals to achieve have been called the Sustainable Development Goals (SDGs) that the States must achieve during the next 15 years (2015-2030). These goals are the following:

- **Goal 1:** End poverty in all its forms everywhere.
- **Goal 2:** End hunger, achieve food security and improved nutrition and promote sustainable agriculture.
- **Goal 3:** Ensure healthy lives and promote well-being for all at all ages.
- **Goal 4:** Ensure inclusive and quality education for all and promote lifelong learning.
- **Goal 5:** Achieve gender equality and empower all women and girls.
- **Goal 6:** Ensure access to water and sanitation for all.
- **Goal 7:** Ensure access to affordable, reliable, sustainable and modern energy for all.
- **Goal 8:** Promote inclusive and sustainable economic growth, employment and decent work for all.
- **Goal 9:** Build resilient infrastructure, promote sustainable industrialization and foster innovation.
- **Goal 10:** Reduce inequality within and among countries.
- **Goal 11:** Make cities inclusive, safe, resilient and sustainable.
- **Goal 12:** Ensure sustainable consumption and production patterns
- **Goal 13:** Take urgent action to combat climate change and its impacts.
- **Goal 14:** Conserve and sustainably use the oceans, seas and marine resources.
- **Goal 15:** Sustainably manage forests, combat desertification, halt and reverse land degradation, halt biodiversity loss.
- **Goal 16:** Promote just, peaceful and inclusive societies.
- **Goal 17:** Revitalize the global partnership for sustainable development.

The 17 Sustainable Development Goals (SDGs), along with the 169 targets, have a broader reach and go beyond the Millennium Development Goals (MDGs) by addressing the fundamental causes of poverty and the universal need for a development that favours all people. These goals encompass the three dimensions of sustainable development: economic growth, social inclusion and environmental protection.

On the basis of the success and momentum of the MDGs, the new global goals cover a broader set of topics with a view to address the issues inherent to inequality, economic growth, access

to decent work, cities and human settlements, industrialization, oceans, ecosystems, energy, climate change, sustainable consumption and production, peace, and justice.

### What are the differences between the Sustainable Development Goals and the Millennium Development Goals?



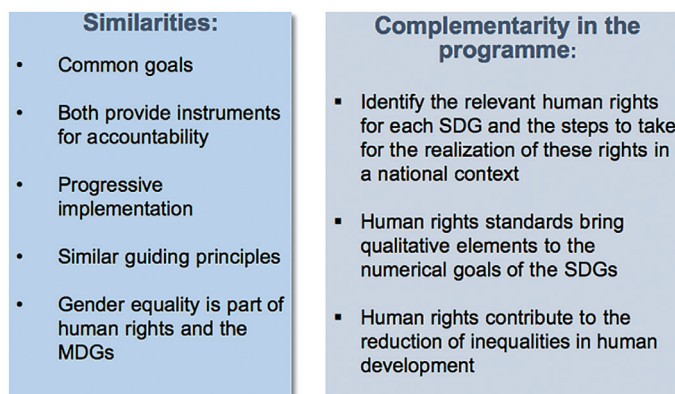
Moreover, these new goals are meant to be universally implemented by all countries, whereas the MDGs were aimed exclusively at developing nations. Nevertheless, they are adaptable to the particular circumstances, requirements and abilities of specific countries and regions.

A key element of the SDGs is the great importance given to the means of implementation — the mobilization of financial resources —, capacity and technology development, data and institutions.

The new goals acknowledge the fact that combating climate change is essential to achieve sustainable development and the eradication of poverty. SDG 13 seeks the adoption of urgent measures to combat climate change and its consequences.

The SDGs and human rights have common and complementary traits. However, the key question is how to operationalize and use both these sources of political orientation in the context of development programmes:

### Human Rights and the SDGs: a two-way relationship



- The SDGs represent an operational framework that provides support for the achievement of the globally agreed development goals. As highlighted in the Millennium Declaration, the realization of human rights is essential for the achievement of these development goals.
- Human rights and the MDGs must not be interpreted as requiring separate and specific programming frameworks and processes.
- On the contrary, it is important to identify which human rights must be realized in each of the SDGs, as well as the measures to adopt for the realization of these rights in the national context.

## 8. MAIN DIFFICULTIES IN THE IMPLEMENTATION OF THE DECLARATION ON THE RIGHT TO DEVELOPMENT

Despite its importance, the right to development seems difficult to implement, particularly regarding the main provisions laid down in the Declaration on the Right to Development. This is due to several reasons, including the following:

- The difficulty in understanding the notion of development, as it is a complex and variable phenomenon that depends on different factors and contexts. Notwithstanding the definition given in the Declaration, the concept of development is still vague and the subject of many a controversy.
- The absence of a defined commitment from member States. Throughout its different articles, the Declaration does not include a control mechanism for the follow-up of the realization of the right to development by States. The fact that the Declaration does not provide for any new mechanisms to secure the commitment of member States means that it is not binding. It is worth remembering that this shortcoming is closely linked to the legal nature of the Declaration, which does not and cannot have force of law, as happens with general principles, general guidelines, recommendations and directives.
- The lack of an international consensus on the Declaration. It was adopted with 146 votes in favour, 8 abstentions, and one vote against; however, given the international importance and weight of the countries that did not vote in favour of the Declaration, its political value is diminished.
- The distance between national resources and wealth on one side and the needs and aspirations of the populations on the other and also between the development levels of the different countries does not contribute to the implementation of the different provisions of the Declaration. In the geographical areas in which poverty, malnutrition and illiteracy still affect a considerable part of the population and where the people struggle to meet their basic needs, it is difficult to give the same attention and value to human rights. Such rights will not be realized unless the basic human rights (i.e. the right to work, housing and education) are fulfilled.
- The culture of prioritizing economic growth still influences the selection of development policies in all countries, which believe that this growth has the ability to create individual and collective well-being. However, although it is true that economic growth is a vehicle for development, it is insufficient on its own.
- The level of debt of poor and developing countries prevents them from speeding up their development process and forces them to channel a sizable proportion of their resources into the repayment of debt. Instead of investing all of their resources into ensuring basic human rights for their populations, they find themselves cornered and forced to settle their debts and their servicing in order to honour their commitments and protect their image on the international scene.

- It is worth recalling that the commitment of countries to repay their debts was one of the reasons that pushed several of them to adopt structural adjustment plans, which in turn indirectly slowed the access of their populations to the full enjoyment of the right to development.
- The weak involvement of rich and developed countries in the realization of the right to development. In fact, the efforts deployed by these countries are still weak, even though they have the sufficient financial and technological capacity to contribute to a more balanced and equitable development of the different peoples.

## 9. CONCLUSION: THE CHALLENGES TO DEVELOPMENT IN THE MAGHREB COUNTRIES

The Maghreb region is known for its particular economic, social, demographic and political context. Despite their common features, each of the countries of this region has its own specific development policies and strategies. Since their independence, these countries have adopted different development models, which have led them to a current situation with different results and challenges.

In fact, judging from the Tunisian experience, we can determine the following: in statutory terms the different human rights are established in several legal texts and various education, health, housing and employment programs have been implemented; yet, the right to development is far from being realized. There is great disparity in access to the different rights and inadequate distribution of wealth between the different regions. This is made worse by poor management of human and material resources, lack of transparency, and the slowness and complexity of the administrative machinery. These factors, among many others, were at the root of the Tunisian Revolution of 14 January 2011, and are still the main source of the social movements that keep emerging in the Tunisian social landscape. It is worth investing a great effort in the implementation of the texts so that all regions and social categories can reap the fruits of development.

The other issue worth addressing concerns the contribution of bilateral and multilateral cooperation, as well as that of international assistance to the Maghreb countries in their efforts to achieve development. In our opinion, these issues merit further reflection and can be the topic of debate and discussion so as to enrich the content of this course.





# MODULO 3 |

Learning-service



**ABDEM**



## SUBJECT 1.:

## DESIGN OF SERVICE-LEARNING PROJECTS

**Hours: 5****Subject 3.1.** Design of service-learning projects**Lecturer:**

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## SUMMARY OF THE TOPIC

Any real-world social intervention involves a prior design process for the action to be undertaken. This enables an initial idea to be developed into a concrete reality, without the need for improvisation, and defines the limits for the intervention and the expected outcomes.

We can differentiate three major junctures in the project cycle: preparation, implementation and finally evaluation. This topic focuses on the first juncture, which involves designing the intervention. It aims to provide guidance to participants in the design of a human rights project, based on service learning methodology, to be developed within the framework of a course or subject from the curriculum, involving teachers from areas of knowledge such as communication, law, education, and social work.

This topic explains the phases of this first juncture, identifying the aspects to be considered before starting work on specific actions. To do this, we need to search for other projects that can serve as inspirations or examples. This does not imply uncritical transposition, but rather understanding experiences that enable us to delimit the possibilities for developing similar ideas within a particular context. Analysing these projects is useful for envisioning a potential action and taking a realistic approach to desired outcomes and available resources. All planning involves decision-making about alternative actions, taking into account the desired outcomes (goals) and the means available (resources).

During the first juncture or preparation of the project, one of the key aspects is to identify each of the actors involved and their roles in the project. Starting from the creation of the project partnership, we will be able to draw up an initial draft from which we can begin to specify aspects of the project to be developed, answering the key questions of what, how much, how and why. The answers to all these questions will enable us to plan the service learning project and the students' learning process for the entire process.

## GENERAL AND SPECIFIC COMPETENCES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly,

2010, p. 8; 2012, pp. 26 and 27), upon completion of the course, participating teachers shall be able to recognise the educational potential of the general and specific skills described below in order to achieve significant learning in human rights. Moreover, these skills shall be included within teaching plans through a unifying approach and directed towards the effective implementation of the knowledge acquired.

The following general and specific skills are included **in this topic**:

#### GENERAL:

- **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Appreciate diversity and multiculturalism:** To understand and accept social and cultural diversity as an enriching and collective component to develop coexistence among people without discrimination due to sex, age, religion, social condition, politics and/or ethnicity.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- To understand the processes of intervention in the social reality linked to the field of knowledge of the degree, through the development of a service-learning project
- To design and orient a service-learning project linked to the defence or promotion of human rights with relation to the field of knowledge
- To evaluate the needs and possible options by means of participative methods to guide an intervention and management strategy aimed at ensuring that the activities carried out are in line with the desired results (results-based participative management models)
- To identify, interpret and act to solve at-risk situations

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

Topic 1 text

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

Belisle, Kristine & Sullivan, Elizabeth (2007) [Human Rights and Service Learning. Lessons, Plans and Projects](#), ed. Amnesty International USA. Links to the pdf document (four files)::

- <http://www.amnestyusa.org/pdfs/HumanRightsAndServiceLearningPt1.pdf>
- <http://www.amnestyusa.org/pdfs/HumanRightsAndServiceLearningPt2.pdf>
- <http://www.amnestyusa.org/pdfs/HumanRightsAndServiceLearningPt3.pdf>
- <http://www.amnestyusa.org/pdfs/HumanRightsAndServiceLearningPt4.pdf>

UNESCO ([Le processus de planification – étape para étape](#)).

## LEARNING OUTCOMES

Having successfully completed the topic, learners should be able to:

- Identify human rights and service learning projects.
- Select at least one project related to the relevant branch of knowledge, which can be applied to a human rights project.
- Differentiate the role of the actors in service learning projects.
- Understand the planning phases for a service learning project.
- Start to design a project on human rights using service learning methodology.

## METHODOLOGY

We include, as a suggestion, the following:

Methodology	Educational tools
Expository method	Reading texts and/or watching audiovisual material
Case studies	Blog/forum
Preparation of projects	Blog/forum/wiki

We will use a combination of expository and cooperative methodology. There will be two videos to watch and several texts to read. These are intended to provide the course participant with an overview of the concept of service learning. Using this first task (exposition) as a starting point, the participant must make two contributions to the forum, which will allow them to set out the main ideas they have extracted from the documents and share their point of view with their fellow students.

## SCHEDULING OF LEARNING ACTIVITIES

A detailed description of the activities to be carried out by the student, either individually or in a group, specifying the expected results and, if applicable, the evaluation criteria.

- The annex includes a list of activities from which a selection can be made.

### ACTIVITIES:

#### 1. Read the teaching guide for the topic (duration: 30 minutes)

Carefully read the topic guide.

#### 2. Search for service learning projects (duration: 1 hour and 30 minutes)

Each participant will search for service learning projects (SLPs) or other projects suitable for development as SLPs, which address human rights-related issues.

The search can include the web pages viewed in the introductory topic on SLP, the Amnesty International material referenced in the supplementary bibliography for this topic or any other resource.

#### 3. Present one of the chosen projects on the forum (duration: 30 minutes)

Each course participant must present one of the projects that they have searched for on the forum, briefly describing and justifying its interest, its connection with the given subject

(communication, law, education or social work) and the feasibility of its implementation as a training project.

#### 4. Read the text for the topic (duration: 1 hour)

Carefully read the content of Topic 1, which explains aspects relating to the design of service learning projects.

#### 5. Complete the activity 'The ABC of SLP' (duration: 1 hour and 30 minutes)

Each participant should complete 'The ABC of SLP', with the aim of starting to specify ideas for the project to be developed during the course.

This activity sheet enables the participant to reflect on outlining the first draft of the idea for the project.

The completed sheet should be submitted via the virtual classroom personal blog within 15 days of the end of the topic.

### TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1: Read the information sheet for Topic 1	30 minutes	--
Activity 2: Search for ALPs	1 hour and 30 minutes	--
Activity 3: Present a project on the forum	30 minutes	Participation in the forum
Activity 4: Read the topic text	1 hour	Self-assessment
Activity 5: ABC of SLP activity sheet	1 hour and 30 minutes	Portfolio

# SUBJECT 1.:

## 3.1. DESIGN OF SERVICE-LEARNING PROJECTS

### 1. INTRODUCTION

Any real-world social intervention involves a prior design process for the action to be undertaken. This enables an initial idea to be developed into a concrete reality, without the need for improvisation, and defines the limits for the intervention and the expected outcomes.

We can differentiate three major junctures in the project cycle: preparation, implementation and finally evaluation. This topic focuses on the first juncture, which involves designing the intervention. It aims to provide guidance to participants in the design of a human rights project, based on service learning methodology, to be developed within the framework of a course or subject from the curriculum, involving teachers from areas of knowledge such as communication, law, education, and social work.

This topic explains the phases of this first juncture, identifying the aspects to be considered before starting work on specific actions. To do this, we need to search for other projects that can serve as inspirations or examples. This does not imply uncritical transposition, but rather understanding experiences that enable us to delimit the possibilities for developing similar ideas within a particular context. Analysing these projects is useful for envisioning a potential action and taking a realistic approach to desired outcomes and available resources. All planning involves decision-making about alternative actions, taking into account the desired outcomes (goals) and the means available (resources).

During the first juncture or preparation of the project, one of the key aspects is to identify each of the actors involved and their roles in the project. Starting from the creation of the project partnership, we will be able to draw up an initial draft from which we can begin to specify aspects of the project to be developed, answering the key questions of what, how much, how and why. The answers to all these questions will enable us to plan the service learning project and the students' learning process for the entire process.



We begin this topic with a comic strip featuring the popular Argentinian character Mafalda, which will help us reflect on our attitude as teachers in the teaching/learning process.

Mafalda says, 'I don't get it, Miguelito. What do you mean? You're going to just sit there waiting for life to give you something?' 'Exactly,' he replies, 'I'm going to just sit here, waiting for life to give me something'. And Mafalda finally wonders, 'Maybe the world is just full of Miguelitos and that's why things are the way they are.'

If we apply this to a university context, we can ask ourselves whether, on educational issues and as teachers, we take the role of Miguelito or Mafalda. We often encounter sceptical colleagues and critical students, passively waiting and complaining.

It is possible that many of us on this course will be like Mafalda. Hopefully, we will be capable of spreading Mafalda's enthusiasm, knowing that there are many Miguelitos in the university.

This topic will cover how to carry out service learning projects with the enthusiasm of Mafalda and the realism of Miguelito.

## 2. LEVELS OF CURRICULAR INTEGRATION OF SERVICE LEARNING IN HIGHER EDUCATION

Flor Cabrera (2009) identifies four levels of integration of service learning in the university curriculum. It may be an extracurricular activity (level 1), closer in nature to a volunteering activity; it may be a teaching unit within a course (level 2), part of a course or subject; it may be a compulsory or optional course/module, which is organised and designed around a determined project (level 3); or it may be integrated into the institution (level 4).

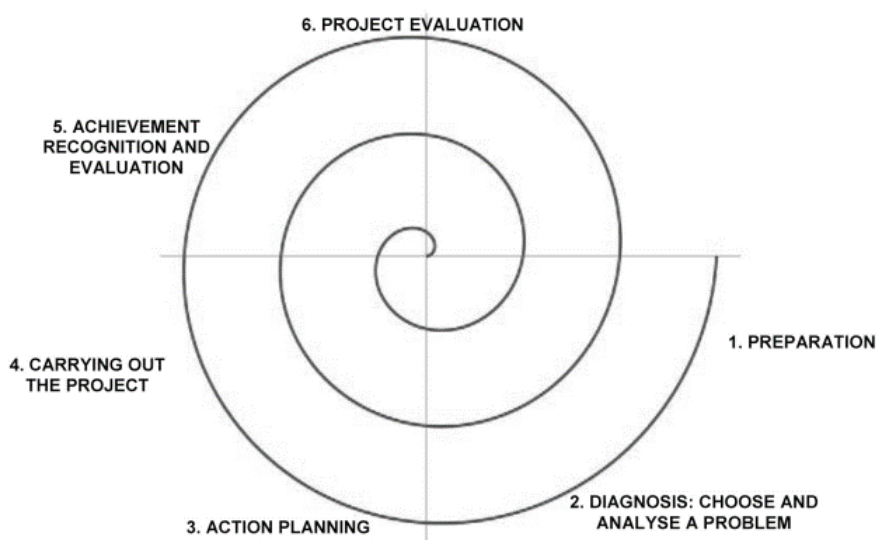
We can therefore distinguish different models and practices for integrating SLPs. This will fundamentally depend on who promotes the initiative and the degree of consolidation of service learning within the institution.

If the promoter of the initiative is the teacher, their ability to act is limited to their responsibility for a subject or course. If, on the other hand, the initiative comes from the governing body of the institution or university, it may be structured as a curricular/extracurricular activity which is complementary to other subjects or as a fixed service of the institution in which students can participate voluntarily.

For the purposes of this training programme, we adopt a level 2 approach, i.e., the practical application of the course will be implemented considering a course or subject as a curricular unit. At this level, decision-making about the development of the project within the framework of the course or subject is mainly the responsibility of the corresponding teacher, within the limits of their academic freedom.

## 3. PHASES IN THE DESIGN OF A SERVICE LEARNING PROJECT

As explained in Topic 1, service learning basically consists of carrying out a task with the community, on the basis of a project related to the curricular content of a course, subject or syllabus. As with any other community-based social intervention project, the implementation of an SLP involves a series of stages which unfold in a spiral fashion, as can be seen in the following figure.



Flor Cabrera (2009) University-based social responsibility and service learning

All real-world intervention projects unfold in a spiral fashion, beginning with preparation and decision-making. The first stage involves the desire to actively engage with the community and get involved in the development of the project. Starting from this first fundamental decision, decisions must be taken concerning the content of the intervention, the participants, the opportunities presented by the project and the difficulty of its implementation. This is what we call the preliminary plan, where we either take the decision to go ahead with the project or discard it.

If the decision is taken to go ahead, the next step is to consider it realistically. We must identify, select and define the problem which requires intervention and offer a choice of responses. The problem must be analysed to make a diagnosis of the situation before planning the action, implementing it and finally evaluating it.

Each of these phases is broken down into a sequence of micro-phases, which we can see in more detail following the guidelines drawn up by Puig, J.M; Martin, X and Batlle, R. (2008) entitled *Cómo iniciar un proyecto de Aprendizaje Servicio Solidario* (How to Begin a Charitable Service Learning Project). The guidelines distinguish three significant junctures: (a) preparation, (b) implementation and (c) evaluation. All involve progressing through seven stages that enable us to specify, implement, and evaluate the project.

This topic will examine in more detail the first juncture (PREPARATION), which involves the design of the project itself, and simply outline the other phases (IMPLEMENTATION and EVALUATION), which will be discussed in subsequent topics in this module.

## A. PREPARATION

### Stage 1: Preparing the draft

#### Phases

1. Determine where to begin
2. Analyse the group and each of its members
3. Determine a socially necessary service
4. Establish the learning experiences related to the service

### Stage 2: Establishing relationships with social organisations

#### Phases

5. Identify entities for potential collaboration
6. Set out needs and reach an agreement

### Stage 3: Planning

#### Phases

7. Define the educational aspects
8. Define the management and organisation
9. Define the aspects of group work

## B. IMPLEMENTATION

### Stage 4: Preparation

#### Phases

10. Motivate the group
11. Diagnose the problem and define the project



12. Organise the work to be carried out
13. Reflect on learning outcomes from the preparation

### Stage 5: Implementation

#### Phases

14. Perform the service
15. Interact with local people and entities
16. Record, report on and disseminate the project
17. Reflect on learning outcomes achieved

### Stage 6: Finalisation

#### Phases

18. Reflect on and evaluate the outcomes of the service performed
19. Reflect on and evaluate the learning outcomes
20. Forecast future prospects
21. Celebrate the experience

## C. EVALUATION

### Stage 7: Multifocal evaluation

#### Phases

22. Evaluate the group and each of its members
23. Evaluate the networking with social institutions
24. Evaluate the experience as a service learning project
25. Self-assessment as an educator

## 4. FROM IDEA TO PROJECT: SETTING OUT THE SPECIFICS

Getting a service learning project underway requires keeping in mind its two core elements - learning and service - structured around an action project in partnership with a local community. Below, we outline each of the stages and phases of the preparation juncture of a service learning project.

### Stage 1: Preparation of the draft

#### Phases

1. Determine where to begin
2. Analyse the group and each of its members
3. Determine a socially necessary service
4. Establish the learning experiences related to the service

The first thing that we have to do is **determine where to begin**. To do this, we need to specify the type of project that is best suited to the issue or subject that we want to develop using this methodology. We need to define the student profile (year and level), the context of the intervention in relation to the course of studies (communication, law, education or social work), the environment which the project will be geared towards (university, local community) and the human rights approach (general or specific rights issues).

The second step is to **analyse the group and each of its members**. This involves understanding the attitudes of the participants who will be involved in the project. We need to determine their motivation and interests. We also need to identify who might support the project, boosting and spreading enthusiasm, and who might act as a hindrance.

During the course of this second phase, and prior to the implementation of the actual project, it may be useful to present an initial outline of the idea and gather information on participants' interests. This will help them to feel involved during the entire process, right from the design phase.

The third step is where we **determine a socially necessary service**. This step is crucial to avoid raising false expectations among the participants. It is vital to be realistic about the capabilities of the group with regard to the intervention process. A wide range of socially necessary services may be identified whose resolution may exceed the group's capacity for action. The aim, therefore, is to identify local needs where the organised activity of the group can help to improve an aspect identified as a privation. Any ambitious desires to make profound changes should be resisted. We should always keep in mind the time and space constraints of any intervention that we are going to organise. Participants' risk of frustration is very high and represents a difficulty to be overcome in subsequent actions, both in terms of the community we work with and the students involved in the project.

The fourth step before we have a draft service learning project is to **establish the learning experiences related to the service**. This means identifying in advance what direct learning experiences the students are going to gain from the implementation of the project. All real-world intervention projects offer a combination of direct and indirect (i.e., planned and unplanned) learning experiences. The wealth of experience involved in direct contact with the real world and its social hardships offers a learning process that is relevant to all aspects of education: learning to know, to do and to be. Nevertheless, we must not lose sight of the fact that the main aim of higher education focuses on structured learning. We must, therefore, be able to relate the competences that students need to develop in the course of their studies to the service learning project that we intend to carry out. It is not about carrying out the action for the sake of taking action, but to create a win-win situation for both elements.

## Stage 2: Establishing relationships with social organisations

### Phases

5. Identify entities for potential collaboration
6. Set out needs and reach an agreement

Service learning projects involve a relationship with the local area. Because of this, we need to **identify entities for potential collaboration**. All SLPs involve getting out of the classroom and connecting subject matter with real-world problems in the wider society of which the university is a part. The service activity can either be implemented within the educational institution, as an internal project to improve a specific aspect, such as boosting student participation or promoting intercultural dialogue between members of the university community, or it can be carried out in contact with local social organisations. In either case, we must identify potential partners for the project, who can help us define it and bring a real-world perspective to the intervention.

For this identification task, it is useful to consider the role that each actor might play in the project.<sup>689</sup>

Whether dealing with an external entity or an internal body, the relationship with its leading members, who will be the project partners, is a crucial element for its satisfactory development. During this step, it is essential to be willing to listen to partners' points of view: how they define the problem and how they value the planned actions. It is also essential to

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<sup>689</sup>. See the section CSL Partnerships - Roles and Responsibilities on the [Canadian Alliance for Community Service Learning website](#).

understand their priorities, their internal dynamics and the possibilities which the proposed collaboration offers.

In relationships with external entities, universities frequently try to impose the rhythms of the academic calendar without taking into consideration the entity's characteristics. It is important to be sensitive to these issues to ensure good cooperation throughout the development of the project.

The next step is to **set out needs and reach an agreement** for collaboration. This agreement does not need to be a written document such as a partnership agreement. It can be based on internal working documents and above all on a relationship of trust between the project leaders: the teaching staff and partners from the entities involved.

In a working document, it is important to specify what the collaboration will comprise and what it is expected to achieve. We also need to establish the framework for action, with regard to calendar, schedules, deadlines and other aspects that involve direct interaction between both actors (university and social entity).

### Stage 3: Planning

#### Phases

7. Define the educational aspects
8. Define the management and organisation
9. Define the aspects of group work

The planning stage will enable us to avoid having to improvise during the implementation of the project. Planning imposes seriousness and rigour, and shows respect for all participants.

Once the service has been determined, in connection with the course of studies, it is important to clearly **define the educational aspects of the project**. What do students need to learn in order to carry out the project? This will depend on the subject matter and the chosen project. Learning will be more motivating when students are able to identify the relationship between the subject matter, the activity to be carried out and its usefulness in meeting a local need.

In parallel with the previous phase, it is necessary to **define the management and organisation** for the development of the service. This will depend on the nature of the project, whether it is a diagnosis of a specific real-world situation (e.g. identifying a violation of the right to appropriate housing in a specific neighbourhood), the provision of a particular service (supporting the schooling of children from families in extreme poverty) or the development of an awareness-raising campaign (making publicity videos in defence of the human rights of local organisations).

Depending on the project, the next phase is to **define the aspects of group work**. This involves establishing, to the greatest possible degree of specificity, what the work will entail for the actors involved. At this stage, it is essential to answer the greatest possible number of questions relating to the implementation of an intervention project, taking into account that in this case, learning elements must also be factored in. The following scheme may be of use for this purpose.

ELEMENTS	QUESTIONS TO ANSWER
Justification	Why are we doing it? Analysis of the real-world situation, social needs, etc.
Participants	Who is going to carry it out and who is it geared towards? Students, teachers, socio-educational agents, representatives of social organisations, recipients, etc.
Objectives	What do we want to achieve with this action? What do we need to learn to carry out these activities?
Activities	What are we going to do to achieve the objectives? Curriculum-based learning and service-related activities
Methodology	How we are going to carry out the activities? Steps to be followed
Timetabling	When are we going to carry out the activities? Number of sessions, days, hours, etc.
Resources: human, material, economic, etc.	What resources do we need? What resources do we have available? How can we obtain the resources that we lack?
Dissemination	What, to whom and how do we want to communicate? Students, families, general population, etc. Media: press, radio, etc. ICT: internet, social networks, etc.
Celebration	How do we want to celebrate our work? Celebratory activities in recognition of the work carried out
Evaluation	What, how and why have we learned? In relation to curriculum-based learning and in relation to the service Weaknesses, potential and proposed improvements

Source: Mayor, D. (2013) Aprender realizando una actividad de utilidad social. [Guía Básica para el diseño de proyectos de Aprendizaje Servicio, en Revista de Educación Social.](#)

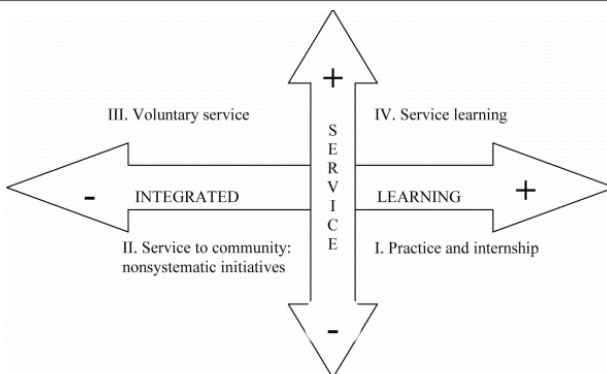
During this first juncture of service learning projects we should consider the principles of good practice listed on the [Canadian Alliance for Community Service Learning website](#).

## REFERENCES

Mayor, D. (2013) [Aprender realizando una actividad de utilidad social. Guía Básica para el diseño de proyectos de Aprendizaje Servicio, en Revista de Educación Social.](#)

Flor Cabrera (2009) [Responsabilidad social universitaria y aprendizaje servicio.](#)

Puig, Josep M<sup>a</sup>; Martín, Xus y Battle, Roser (2008) [Cómo iniciar un proyecto de Aprendizaje Servicio Solidario.](#) Ed. Zerbikas, Bilbao.

<b>The ABC of SLP</b> <b>Imagining other forms of acting and teaching</b> <b>Activity: Planning a service learning project</b>	
<b>Instructions for designing an SLP</b>	
<p>There are many ways to design a service learning project. There are also many projects and actions, close to and even within our educational environments, which are similar to and share many common features with a service learning project.</p> <p>To recognise them or transform them into an SLP, we start by identifying 5 key elements:</p> <ul style="list-style-type: none"> <li>• <b>The learning experience:</b> what the participants learn before, during and after its completion.</li> <li>• <b>The service:</b> a response to the real needs of the area, with a clear goal for improvement.</li> <li>• <b>The project:</b> the planning and evaluation of the whole process.</li> <li>• <b>The active participation:</b> the engagement of the students.</li> <li>• <b>The reflection:</b> the awareness of the steps that are being taken.</li> </ul> <p>To start work, we propose taking the following steps:</p>	
<b>1. Identify the context for the SLP</b>	
Title: Module: Subject: Course: Topic/Teaching unit: Year:	
<b>2. Teaching staff involved</b>	
<b>3. Briefly describe the idea (max. 5 lines)</b>	
<b>4. Starting from the chosen experience, what service will the project produce? Answer in terms of a response to social needs in a real-world situation.</b>	
<b>5. If starting from a previous experience related to an SLP, position the experience on the service learning quadrant.</b>	
 <p>The diagram is a 2x2 matrix with a central vertical axis labeled 'SERVICE' and a central horizontal axis labeled 'LEARNING'. The vertical axis has a '+' at the top and a '-' at the bottom. The horizontal axis has a '-' on the left and a '+' on the right. The four quadrants are labeled as follows:</p> <ul style="list-style-type: none"> <li>Top-Left (Integrated Service, Negative Learning): III. Voluntary service</li> <li>Top-Right (Integrated Service, Positive Learning): IV. Service learning</li> <li>Bottom-Left (Disintegrated Service, Negative Learning): II. Service to community: nonsystematic initiatives</li> <li>Bottom-Right (Disintegrated Service, Positive Learning): I. Practice and internship</li> </ul> <p>The central intersection is labeled 'INTEGRATED' on the left and 'LEARNING' on the right.</p>	

6. What elements could be introduced to obtain a win-win situation from service learning?

7. What does the SLP bring to the student's learning experience?

Answer in terms of competences.

GENERAL COMPETENCES

SPECIFIC COMPETENCES

PREPARATION

There are usually several starting points, such as:

- a good educational practice which we have identified;
- learning content that we want to transfer to a service;
- an important social need that we know of.

Briefly explain the reasons for starting this process.

Define how the project will be carried out, in terms of the following aspects:

Schedule and weekly and total time needed

Internal or external entities involved

Students' motivation and involvement

Balance for getting the project underway:

Difficulties

Opportunities

## SUBJECT 2.:

# IMPLEMENTATION OF SERVICE LEARNING PROJECTS

**Hours:** 5

**Subject 3.2.** Implementation of service learning projects

**Lecturer:**

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## SUMMARY OF THE TOPIC

A real-world social intervention is a process which involves you in it.

## GENERAL AND SPECIFIC COMPETENCES

In general terms, following the three modules of the HRBA training programme and in line with the guiding principles of the World Programme for Human Rights Education Plan of Action, approved by the United Nations General Assembly (2010, p. 8; 2012, pp. 26 and 27), by the end of the course, the participating teachers should be able to recognise the educational potential of the *general and specific competences* described below in implementing meaningful human rights education. They should also be able to incorporate these competences into their teaching plans using an inclusive approach, aimed at effective application of acquired knowledge.

The following general and specific skills are included **in this topic**:

### GENERAL:

- **Teamwork:** To become part of a group and actively collaborate in order to achieve shared goals with other people, departments and organisations.
- **Adaptation to the environment:** To face critical situations in the psychosocial environment, maintaining a state of well-being and physical and mental balance that allows the person to continue acting effectively.
- **Interpersonal communication:** To positively relate with other people through empathetic listening and through a clear and assertive expression of what one thinks and/or feels, by verbal and non-verbal means.
- **Ethical sense and commitment:** To be positively inclined towards the moral good of oneself or of others (that is, towards everything that is or that means good, the



experience of meaning, personal fulfilment, sense of justice) and to persevere in said moral good.

#### SPECIFIC:

- Based on a specific situation within the university context, to plan the educational activity with a competency-based approach focused on learning about human rights.
- To identify, analyse, discuss and evaluate the critical deviations and the capacity and responsibility gaps between the rights-holders and duty-bearers that prevent action or the transformation of a specific situation where human rights are being violated.
- To contrast and evaluate situations, practices, legislation, local and national policies according to the legal human rights instruments ratified by their country, in addition to proposing and planning efficient alternatives.
- To design and orient a service-learning project linked to the defence or promotion of human rights with relation to the field of knowledge
- To assess, evaluate and reflect on the processes and results of the action carried out in contact with reality and the knowledge acquired by the students in service-learning projects.
- To evaluate the needs and possible options by means of participative methods to guide an intervention and management strategy aimed at ensuring that the activities carried out are in line with the desired results (results-based participative management models)
- To identify, interpret and act to solve at-risk situations

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

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Topic text

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

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Puig, Josep M<sup>a</sup>; Martín, Xus y Battle, Roser (2008) [Cómo iniciar un proyecto de Aprendizaje Servicio Solidario](#). Ed. Zerbikas, Bilbao.

## LEARNING OUTCOMES

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Having successfully completed the topic, learners should be able to:

- Identify and describe a violation of human rights as a starting point for designing a service learning project.
- Understand the implications of each phase of the service learning project cycle.
- Design a service learning project oriented to the field of knowledge within the framework of a course or curriculum area of the syllabus.

## METHODOLOGY

Methodology	Educational tools
Preparation of projects	Blog/forum/wiki
Learning contract	Blog/forum/wiki

This topic is largely practical. Students should apply the learning content using the project design and implementation templates provided in this topic.

## SCHEDULING OF LEARNING ACTIVITIES

A detailed description of the activities to be carried out by the student, either individually or in a group, specifying the expected results and, if applicable, the evaluation criteria.

- The annex includes a list of activities from which a selection can be made.

### ACTIVITIES:

#### 1. Read the teaching guide for the topic (duration: 15 minutes)

Carefully read the topic guide.

#### 2. Read the text for the topic (duration: 45 minutes)

Carefully read the text of Topic 2, which explains aspects relating to the design and implementation of service learning projects.

#### 3. Complete the activity 'Specifying the SLP' (duration: 8 hours)

Each participant should complete the 'Specifying the SLP' activity sheet, which follows on from the activity started in Topic 1. Completing this activity requires the use of the bibliography provided for Subject 4 (Analysis of specific rights and freedoms) in Module 2 (HRBA) and any other information concerning the context which enables the participant to specify a violation of rights and the action to be carried out.

The completed sheet should be submitted via the virtual classroom personal blog within 30 days of the end of the topic.

#### 4. Participation and follow-up on the forum (duration: 1 hour)

During the practical application phase a forum will be available for resolving issues that may arise during the course of the activity. It is important that participants read the forum and the responses to other participants.

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1: Read the information sheet for Topic 1	15 minutes	--
Activity 2: Read the topic text	45 minutes	--
Activity 3: Activity 'Specifying the SLP'	8 hours	Personal blog
Activity 4: Follow-up on the forum	1 hour	

## SUBJECT 2.:

# 3.2. IMPLEMENTATION OF SERVICE LEARNING PROJECTS

## 1. INTRODUCTION



*'Changing the world! Ha! It's just a youth thing!'*

*'I thought like that too when I was young, but now...'*

*'Guys, we're doomed! It seems that if we don't get a move on and change the world, it'll be the world that changes us!'*

To intervene in a real-world social situation through a service learning project requires an action-oriented approach. As Mafalda reminds us in this comic strip – and we can apply this to our teaching roles in the university – 'If we don't get a move on and change the world, it'll be the world that changes us!'

Introducing active methodologies into teaching/learning processes requires engagement, enthusiasm, interest, and a whole set of skills and qualities that enable the teacher to direct the process as it moves through the different phases of the project cycle's second juncture.

## 2. STAGES AND PHASES OF THE PROJECT IMPLEMENTATION JUNCTURE

As explained in Topic 1, we can divide service learning projects into three junctures: preparation, implementation and evaluation. Each of these phases is broken down into a sequence of micro-phases, which we can see in more detail following the guidelines drawn up by Puig, J.M; Martín, X and Batlle, R. (2008) entitled *Cómo iniciar un proyecto de Aprendizaje Servicio Solidario* (How to Begin a Charitable Service Learning Project).

The first topic discusses the phases of the first juncture (PREPARATION). We will now address the phases of the second juncture, IMPLEMENTATION or execution. The following table shows the stages and phases of this second juncture.

## Implementation<sup>690</sup>

### Stage 4: Preparation

#### Phases

10. Motivate the group
11. Diagnose the problem and define the project
12. Organise the work to be carried out
13. Reflect on learning outcomes from the preparation

### Stage 5: Implementation

#### Phases

14. Perform the service
15. Interact with local people and entities
16. Record, report on and disseminate the project
17. Reflect on learning outcomes achieved

### Stage 6: Finalisation

#### Phases

18. Reflect on and evaluate the outcomes of the service performed
19. Reflect on and evaluate the learning outcomes
20. Forecast future prospects
21. Celebrate the experience

## 3. DESCRIPTION OF THE CRITICAL ASPECTS OF THE STAGES AND PHASES OF THE SECOND JUNCTURE

The second juncture begins once the decision has been taken to undertake a project to address a real-world situation that we want to change. At this point, the teacher must be ready to engage with and get involved with the real-world situation and be convinced that the project will bring a change or improvement to a situation that has been defined as a privation, need, or violation of a human right. There are three stages in this second juncture: project preparation, implementation, and finalisation of the intervention. We discuss below the aspects to consider in each of these phases, which will help us reflect on the implementation of the service learning project itself.

### Stage 4: Preparation

#### Phases

10. Motivate the group
11. Diagnose the problem and define the project
12. Organise the work to be carried out
13. Reflect on learning outcomes from the preparation

690. The stages and phases of the project cycle process are numbered, as in the table in Topic 1, following the proposed sequence drawn up by Puig, J. M; Martin, X. and Batlle, R. (2008) entitled *Cómo iniciar un proyecto de Aprendizaje Servicio Solidario* (How to Begin a Charitable Service Learning Project).

The first aspect to consider is to **motivate the group**. For this purpose, while planning the course of studies, the teacher can set what level of impact participation in the project will have on the student's final mark.

Intervening in real-world situations requires a high level of motivation, so it is important to consider the issue of whether involvement is a voluntary or compulsory part of the programme of studies. If we are dealing with a simple action with a low level of student involvement, we could set it as a compulsory activity. If, on the other hand, the project requires a high level of motivation, it could be set as a supplementary task for those who wish to gain higher marks.

In either case, we must bear in mind that the goals set for the project must be realistic in terms of both the timeframe for the subject/course and the effort required from the students.

We also need to show the link between the project and the competence-based and academic content of the syllabus. From a learning perspective, the project is a means and not an end. If we set overly ambitious goals it is likely that the group will become frustrated and fail to achieve the objectives of both learning and service. Nevertheless, to the extent that we are directly intervening in the real world, we must not forget the objectives of the intervention and those of the project partners (social organisations, beneficiaries of the intervention) for whom the project is an end and who hope to achieve at least the planned outcomes.

One motivating element is that the students themselves can participate in the design phase. This can involve organising a brainstorming session and orienting the project towards the interests of the group. It is also a good idea to start with small activities, which are manageable within the available timeframe, and gradually work towards more ambitious projects.

A last point to consider with regard to motivation is that we also need to take into account the interests and motivations of the project partners. Not all well-intentioned actions produce positive outcomes for their beneficiaries. We need to seek a win-win situation for both the university environment and the partner entities, where all participants perceive that the joint project will bring about an improvement in some respect.

Motivation needs to be nurtured throughout the entire process of the project. In general, there is a high level of motivation during the initial phases, when people are enthusiastically envisioning what they will achieve, and this provides a strong impetus towards action.

The next phase is to **diagnose the problem and define the project**. This requires the project leaders to clearly frame the problem and specify the project. For this, we need to answer two fundamental questions: what is happening and what can we do? During this phase is when we begin talking about the project leaders: the teacher and the representative of the partner entity. It is their responsibility to establish and agree on the nature of the problem that requires intervention and what actions will be carried out, in the most effective way possible.

Under a human rights-based approach, and for the practical part of this training course, this entails choosing a human right on which to focus, identifying and describing a violation of rights, and deciding what action will be developed in connection with the particular branch of knowledge (communication, law, education or social work).

To do this, it is important to remember the three-step analysis:

<b>Causal analysis</b>	<b>1. Why?</b> Which rights are implicated that explain why there is a problem?
<b>Role analysis</b>	<b>2. Who?</b> Who are the duty-bearers? Who are the rights-holders? Who has to do something about it?
<b>Capacity gaps analysis</b>	<b>3. What?</b> What capacity gaps are preventing duty-bearers from fulfilling their duties? What capacity gaps are preventing rights-holders from claiming their rights? What do they need to take action?

Answering most of the questions above in the most specific way possible will facilitate the work of the next phase, when we need to **organise the work to be carried out**. To do this, we need to determine the general and specific objectives, the activities and set a schedule for implementation. And with all this, we can get to work.

Puig, Martín and Batlle (2008) and, generally speaking, all authors who have worked on the service learning methodology, highlight that we must **reflect on learning outcomes from the preparation**. We must not lose sight of the fact that we are working on an educational project. Analysing how this preparatory phase has been carried out, from a perspective of continuous improvement, helps us to understand the meaning of the action that we are going to carry out.

## Stage 5: Implementation

### Phases

14. Perform the service
15. Interact with local people and entities
16. Record, report on and disseminate the project
17. Reflect on learning outcomes achieved

Project implementation is the stage most widely anticipated by participants. The first phase of the stage is to enter into action and **perform the service**, implementing what we have been working on for some time, generating expectations and desire for change. We now have the opportunity to go beyond imagining a planned action and put it into practice.

During this phase, we should take into account the specifics of each branch of knowledge and the nature of the project, so we can adopt the management measures necessary to fulfil our objectives.

Intervening in a real-world situation means we need to **interact with local people and entities** and this brings into play the majority of the general competences included in university education and, in particular, communication skills and teamwork.

During this phase, it is important to **record, report on and disseminate the project** - all necessary steps in assessing and transferring the experience through systematisation. This aspect will be covered in greater detail in Topic 4, Systematisation.

And finally, it is important to **reflect on learning outcomes achieved** from the implementation of the project and identify aspects for improvement.

## Stage 6: Finalisation

### Phases

18. Reflect on and evaluate the outcomes of the service performed
19. Reflect on and evaluate the learning outcomes
20. Forecast future prospects
21. Celebrate the experience

The last stage of this second juncture corresponds to the finalisation of the intervention. A good farewell is the best of meetings. If we **reflect on and evaluate the learning outcomes** and results achieved as a joint exercise between the university and the partner entity, we plant a seed for future collaboration. Using this shared experience as a starting point, we can **forecast future prospects**. If the experience has been a success, we can expand the objectives or explore new actions. Finally, it is important to celebrate the experience, allowing participants the opportunity to express their thoughts on the experience and what it has meant to them, whether positive or negative, but always from a perspective of continuous improvement.



Specifying the SLP	
Title (something engaging related to the project focus)	
Project promoter:	
Teacher's name:	Name of entity representative:
Qualification:	Entity:
Course/Subject:	Scope of intervention:
Topic/Teaching unit:	
Year:	
Selected human right (which human right is implicated?)	
Describe the violation of the right which is the focus of the project (include the causal analysis, role analysis and capacity gap analysis)	
What we can do from our context or branch of knowledge?	
Operational definition of the project	
Justification	

Participants	
Objectives	
Activities	
Methodology	
Timetabling	
Resources	
Dissemination	
Celebration	

# SUBJECT 3.:

## EVALUATION OF SERVICE-LEARNING PROJECTS

**Hours: 5**

**Subject 3.3.** Evaluation of Service Learning Projects

**Lecturer:**

Neus Caparrós Civera.

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### SUMMARY OF THE TOPIC

In the academic environment, we are currently experiencing a period of profound transformation and change with respect to the role and function of education in society and, in particular, in higher education. Over the last decade, various academic spheres have given rise to calls for the roles of universities and teaching staff to be radically changed to adapt to the knowledge society, and this has been echoed in institutional areas, through adjustment to the European Higher Education Area (Alonso and Arandia, 2013; Caride, 2008; Rizvi, 2010; Rodicio, 2010). Consequently, we have to respond to new needs and help realise students' potential using active methodologies that bring meaning to the education that they receive and that train them as future professionals. In this regard, service learning methodology, as we have seen in previous topics, connects to this need for change and transformation in the higher education area and the competences that students must acquire.

Service learning, therefore, as suggested by Puig et al. (2003), is a complex practice involving interdependent, converging and mutually reinforcing dynamics. Each experience discloses a multifaceted reality that must be assessed, and this is a fundamental point within the entire process of a service learning project.

Assessing, evaluating and reflecting on the implemented service learning project is a fundamental phase of the project itself, since we evaluate not just the outcome but also the process, in order to help future actions and replications of the project in other scenarios.

This topic, therefore, will address the evaluation phase of an SLP and present the different tools with which it can be carried out.

The process of improving a service learning activity does not conclude with an analysis of its dynamics, but rather requires us to consider the relationships established between them and to view the experience as a whole, visualising the complexity of the activity so that we can then optimise it.

The evaluation stage is when we take stock of the actions undertaken, commitments made, goals achieved and, of course, the learning acquired and service developed.

## GENERAL AND SPECIFIC COMPETENCES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course, participating teachers shall be able to recognise the educational potential of the general and specific skills described below in order to achieve significant learning in human rights. Moreover, these skills shall be included within teaching plans through a unifying approach and directed towards the effective implementation of the knowledge acquired.

The following general and specific skills are included **in this topic**:

### GENERAL:

- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards moral goodness, whether one's own or others' (i.e., towards everything that is or that means goodness, the experience of meaning, personal fulfilment, sense of justice), and to persist with this moral goodness.

### SPECIFIC:

To assess, evaluate and reflect on the processes and results of the action carried out in contact with reality and the knowledge acquired by the students in service learning projects.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

Text on the topic Evaluation of a Service Learning Project

- [L'Alliance canadienne pour l'apprentissage par le service communautaire](#)
- [Maruquette University South Africa. Service Learning Program](#)
- [University of Missouri. Office of Service Learning](#)
- [Mary Lou Fulton Teachers College](#)
- [The Ohio State University. Office of Service-Learning](#)
- [African Institute of Corporate Citizenship](#)

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

Grem (2013) Rúbrica para la autoevaluación y la mejora de proyectos de APS Fundación Jaume Bofill. Barcelona (disponible en pdf)

Rubio; Puig; Martín; Palós (2015) Analizar, repensar y mejorar los proyectos: Una rúbrica para la autoevaluación de experiencias de aprendizaje servicio en *Revista de curriculum y formación del profesorado. Profesorado*, vol 19, nº 1 (enero-abril. 2015) (disponible en pdf)

Alonso; Arandia; Martínez; Martínez; Geruzuaga (2013) El aprendizaje –servicio en la innovación universitaria, una experiencia realizada en la formación de educadores y educadoras sociales en *Revista Internacional de Educación para la Justicia Social* Vol. 2, nº 2. (disponible en pdf)

Puig, JM; Martin, X; Batlle, R ¿Cómo empezar una experiencia APS? Centro Promotor de Aprendizaje Servicio. Barcelona. (disponible en pdf)

## LEARNING OUTCOMES

Having successfully completed the topic, learners should be able to:

- Identify suitable instruments and tools for the evaluation of a service learning project.
- Apply at least one of the proposed tools to the SLP carried out.
- Prepare a report on the application of these evaluation tools to the project carried out.

## METHODOLOGY

Methodology	Educational tools
Expository method	Reading texts and/or watching audiovisual material
Cooperative learning	Forum
Field trips	

The methodology aims to combine an expository element, for learning about the necessary aspects for evaluating an SLP and the instruments for carrying this out, and a practical element, where we apply the concepts learned in this topic to a specific service learning project.

## SCHEDULING OF LEARNING ACTIVITIES

A detailed description of the activities to be carried out by the student, either individually or in a group, specifying the expected results and, if applicable, the evaluation criteria.

### Activity 1:

Read the topic Evaluation, extracting basic ideas so that they can later be used in the design of evaluation tools for the SLP. (pdf document)

### Activity 2:

Consult the following websites to see the different service learning-based activities undertaken by other universities and the projects they are carrying out, with special focus on the evaluation phase.

- [L'Alliance canadienne pour l'apprentissage par le service communautaire](#)
- [Marquette University South Africa. Service Learning Program](#)
- [University of Missouri. Office of Service Learning](#)
- [Mary Lou Fulton Teachers College](#)
- [The Ohio State University. Office of Service-Learning](#)

### Activity 3:

Using all the information from the topic, consider which tools might be useful for the SLP that we want to evaluate.

**Activity 4:**

Decide how to apply these tools.

**Activity 5:**

When at least one of the evaluation tools for the SLP has been considered, chosen and applied, write a report using the following structure:

- Project title (three-line description)
- Project goals
- Project evaluation phase: tool(s) and analysis
- Conclusions

Length: 800-1,200 words

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1: Read the topic text	60 minutes	
Activity 2: Consult the selected websites, focusing on the evaluation phase of the SLPs	60 minutes	
Activity 3: Choose the evaluation tools	60 minutes	
Activity 4: Apply at least one chosen evaluation tool for the SLP	60 minutes	
Activity 5: Report on the evaluation	60 minutes	Final report

## SUBJECT 3.:

# 3.3. EVALUATION OF SERVICE LEARNING PROJECTS

## 1. INTRODUCTION



*'Anyone who didn't understand, please raise their hand.'*

*'Come on, Manolito, what didn't you understand?'*

*'Since March until now, nothing at all!'*

As Rubio et al. (2015:113) point out, evaluation is widely recognised as a key element in the development of any educational project, programme or process. Evaluating involves obtaining information, assessing and analysing processes and results and, finally, making decisions for their optimisation. Consequently, evaluation is a vital task in improving educational practices, since it allows us to draw up a plan, prioritise tasks and review each participant's role.

The first question we need to answer in an evaluation process is what we are going to evaluate. In the case of service learning projects, there are many aspects which may be evaluated. Furthermore, there is no single way to evaluate a project; it will be determined by the type (initial, formative or summative), the institutional context (external or internal), the relationship between the evaluator and the object of evaluation (distant, participatory, cooperative, enabling or empowering), the objective of the evaluation (requirements, design, or product), its methodological design (from experimental to qualitative proposals), and the tools used (questionnaires, observation, interviews, discussion groups, videos and/or photographs). All this makes evaluation one of the most complex and at the same time most essential topics, with a wide scope in the study of service learning projects (Campo, 2015).

## 2. THE MEANING OF EVALUATION

To evaluate means to ascertain, estimate or appreciate the value of something. Evaluation implies making a judgement about an activity or task carried out, which involves reflecting on this action.

Evaluation is assigning value to what has been done, shining a light on the actions carried out and reviewing the work involved. To do this, it is necessary to create an adequate evaluation system that collects the necessary information to take stock of what has been done, allowing us, finally, to make a judgement of its worth.



Evaluation is an assessment, based on predefined criteria and benchmarks and using technically designed, systematically collected and organised information, about significant factors constituting the educational process, with the aim of facilitating decision-making for improvement (Pérez Juste, 2006:32).

The design of the evaluation is fundamental to a satisfactory evaluation of the project. Consequently, we need to decide whether the information is going to be collected during the implementation of the project or on its completion. We also have to consider which tools we will use.

Evaluation is a part of continuous improvement and also a training tool. This improvement function involves taking into account all project elements and all active participants, i.e. all those who have relevant information on the project. Evaluation is an integral part of the project, rather than a separate process; it is incorporated into the project and used as a means of improvement, based on reflection on what has been done. At this point, it is important to remember that in a service learning project - especially one using a human rights-based approach - the outcome (the change achieved) and the process (the road followed) are equally important.

As Puig et al. suggest (2008:17), being accountable for a commitment made is an act that carries significant educational potential, which should not be overlooked. This will require balancing the evaluation of the process and that of the outcome, taking into account that sometimes a very interesting process can nevertheless go hand-in-hand with poor results and vice versa.

Evaluation offers us information to help us better understand educational phenomena and practices. It also helps us to develop educational strategies and processes suitable for our students and their context. Evaluation verifies the usefulness of proposed procedures and the suitability of objectives and their outcomes, so that we can improve proposals for programmes, objectives and methodologies, etc.

Evaluation activities and tools, which may be diverse, should be consistent with the elements of the educational project and its objectives. (Campo, L., 2015:96).

Once the information has been collected, it must be assessed using predefined criteria and benchmarks which have been agreed by all participants. Evaluation criteria allow us to assign value to activities, tasks and the attitudes of participants in the programme (Perez Juste, 2006:32). Having the criteria set out from the planning of the proposal helps us to make assessments with a greater degree of objectivity and to guide our decision-making on improvements to any aspect of the programme.

### **In an SLP we must evaluate both learning and service, taking into account that:**

Evaluating the *service* means:

- getting the teams to reflect on their output
- consulting the recording instruments we have used
- involving the community in the evaluation of the service

Evaluating the *learning* means:

- seeing what competences have been acquired
- seeing what new knowledge has been acquired
- seeing what skills have been improved (attitudes and values)

We value the evaluation as a process of improvement and as part of a search for better alternatives. Consequently, the evaluation we propose for service learning projects is not static, but dynamic and continuous. We propose that evaluation is carried out throughout the project, during its planning and implementation, so that it can provide us with feedback that enables us to keep making the necessary adjustments. Evaluation will be one more part that we need to plan during the development of the project.

Evaluation should be multifocal and take into account both educational and social dimensions of service learning projects. In this way, we can evaluate the learning outcomes, the way the service is carried out and the overall experience. Campo, L. (2015:97)

### 3. EVALUATION PHASE

Following the explanations in the module's previous topics, the evaluation stage fits into an SLP as shown in the following table:

Table: Stages and phases in SLPs

STAGE		PHASES
I	Outlining the project	1 Determine where to begin 2 Analyse the group and each of its members 3 Determine a socially necessary service 4 Establish the learning experiences related to the service
II	Establishing relationships with social organisations	5 Identify entities for potential collaboration 6 Set out needs and reach an agreement
III	Planning the project	7 Define the educational aspects 8 Define the management and organisation 9 Define the aspects of group work
IV	Preparing the project with the group	10 Motivate the group 11 Diagnose the problem and define the project 12 Organise the work to be carried out 13 Reflect on learning outcomes from the preparation
V	Implementing the project with the group	14 Perform the service 15 Interact with local people and entities 16 Record, report on and disseminate the project 17 Reflect on learning outcomes from the implementation
VI	Completing the project with the group	18 Evaluate the outcomes of the service 19 Evaluate the set of learning outcomes 20 Forecast future prospects 21 Celebrate the experience shared
VII	Multifocal evaluation	22 Evaluate the group and each of its members 23 Evaluate the networking with social institutions 24 Evaluate the experience as a service learning project 25 Self-assessment as an educator in the process

Source: Puig et al. (2013:2)

In line with the scheme presented above, the last phase of evaluation should comprise the elements described below.

STAGE VII: MULTIFOCAL EVALUATION	
<p>Once the project has been completed and evaluated with the group of students, educators will need time to reflect on the experience, taking into account other evaluations besides our own, including those of the school or entity, families, and entities with whom we have worked or who have provided us with the service.</p> <p>At the end of this stage, it is useful to write a simple report on the experience, so that it is not forgotten and may serve as an inspiration to other educators and groups undertaking new projects.</p>	
22. Evaluate the group and each of its members	
<p>We could reflect on the four factors taken into account in the initial analysis of the group:</p> <ul style="list-style-type: none"> <li>*how have students' interests and motivations evolved?</li> <li>*how has the academic and intellectual level evolved with the acquisition of experience?</li> <li>*how have the group dynamics, leadership, roles and ways of managing conflicts evolved?</li> <li>*how have the moral climate of the group, attitudes and shared values evolved?</li> </ul>	
23. Evaluate the networking with social institutions	
<p>Since networking is one of the most important elements of SLPs, we should be able to evaluate:</p> <ul style="list-style-type: none"> <li>*the suitability of the entities/institutions with which we have shared the experience</li> <li>*the way in which we have organised ourselves and coordinated with them</li> <li>*the degree to which these institutions value our collaboration</li> <li>*the overall balance and the conclusions that we can draw from this networking.</li> </ul>	
24. Evaluate the experience as a service learning project	
<p>The experience merits evaluation as a service learning process. For this purpose, it is worth preparing a brief final report which states clearly whether or not: (a) it was a successful project that would be worth repeating; (b) it got off to a good start, but many things need improving before embarking on another attempt; or (c) it was a mistake which needs to be rectified. Setting out clear ideas in this regard can help us:</p> <ul style="list-style-type: none"> <li>*review everything as we plan it - the nature of the project, educational objectives, relationships with families, formal requirements, organisational aspects, economic balance, group work stages, etc.</li> <li>*consider the sustainability of the project in terms of economic resources, investment in human resources, effective response to the identified social need, etc.</li> </ul>	
25. Self-assessment by the educator	
<p>To complete this stage, we should allocate time for self-assessment on our work throughout the process:</p> <ul style="list-style-type: none"> <li>*Did we have the necessary knowledge?</li> <li>*Did we have the necessary teaching skills?</li> <li>*Were we able to handle the project's organisational aspects?</li> <li>*Were we able to nurture a good relational dynamic within the group?</li> <li>*Did we establish the right relationship and communicate adequately with the local community?</li> <li>*What was our personal and professional experience of the process?</li> </ul>	

Source: Puig et al. (2013:9)

Prior to the evaluation, we can use a series of questions to help us bring it into focus. The following table provides an example.

Table: Questions prior to evaluation

<p><b>Phase 1: Approach to the evaluation</b></p> <p><i>Who requested the evaluation?</i>  <i>Why has it been requested?</i>  <i>What is it intended to evaluate?</i>  <i>What problems might arise during the evaluation?</i>  <i>What resources does the evaluation require?</i></p>
<p><b>Phase 2: Developing the design of the evaluation</b></p> <p><i>Determination of objectives</i>  <i>Specification of measurable variables: dimensions and indicators</i>  <i>Selection of evaluation units</i>  <i>Determination of the evaluation timetable</i>  <i>Selection of tools for collecting information</i>  <i>Description of necessary resources</i></p>
<p><b>Phase 3: Collection of information</b></p> <p><i>Determination of tools for collecting information</i></p>
<p><b>Phase 4: Analysis of information</b></p> <p><i>On the basis of the information collected</i></p>
<p><b>Phase 5: Drawing of conclusions and presentation of outcomes</b></p> <p><i>1: Drawing of provisional conclusions</i>  <i>2: Presentation and discussion of provisional conclusions</i>  <i>3: Drawing up of the final report</i></p>
<p><b>Phase 6: Feedback measures and possible application</b></p> <p>It goes beyond the responsibility of the evaluating team, but we should consider that if we want the outcomes to be taken into account, we need to make sure that they get to whoever requested the evaluation, and that the conclusions and recommendations are practical, feasible, easily workable and applicable.</p>

Source: Adapted from Gómez Serra, M. (2004)

## 4. TOOLS FOR COLLECTING INFORMATION

There are various tools available for collecting information. The use of each will depend on the intended purpose.

Written tests	Surveys
Rubrics	Feedback/peer evaluation
Questionnaires	Videos
Symbolic images	Demonstrations
Attendance monitoring	Checklists
Personal written reflection	World Café
Timeliness monitoring	Field journals
Schedules	Reports and/or memos

Some examples of tools are listed below.

## 5. EVALUATION EXAMPLES

**Self-assessment:** Example of application to a public speaking workshop

Public speaking objectives	A lot	Quite a lot	A little	Not at all
Has your oral presentation generally improved? Do you now have more command?				
Have you improved your communication skills? (body language, content, structure, articulation, intonation, etc.)				
Has increased empathy been a key element in your speaking?				
Have you absorbed and applied concepts to help control nerves and feel more secure?				
Social leadership and community service objectives	A lot	Quite a lot	A little	Not at all
Do you think that having done a service for the community has allowed you to apply your learning?				
Have you improved your leadership skills, inspiring and motivating young people to value and improve their communication skills?				
Do you think improving students' oral communication skills is an educational and social need that requires action?				

Have you improved your ability to plan, develop and evaluate a project as part of a team through the activity?				
<b>Teamwork and individual work objectives</b>	<b>A lot</b>	<b>Quite a lot</b>	<b>A little</b>	<b>Not at all</b>
Have you improved your ability to work in a team, to collaborate actively and respect your fellow group members?				
Have you developed self-awareness and self-confidence in your own communicative and leadership resources?				
Have you strengthened your personal commitment? Is this true for all stages of the activity?				

Source: Batlle, 2014

### Teamwork evaluation questionnaire

- Do you think that it was well organised?
- Did it seem like there was harmony and respect between the members?
- What function(s) did each member fulfil? How did you view the others? How did you view yourself? How did the others view you?
- What was lacking in the team? How would you improve the teamwork?
- What was the best thing about this team? Define it in one sentence.
- Award a mark to each member of the team.

### FIELD JOURNAL

Date	Time dedicated	Requirement / situation of need / activity	Intervention/ development	Observations

Raya, E.; Caparrós, N. (2014)

## Observation sheet

INDICATORS					
Order	Student	Waits for their turn to speak	Actively participates	Does work on time	Listens to fellow students
1					
2					
3					
4					
5					
6					
...					

Source: Developed by the author

## RUBRIC FOR SELF-ASSESSMENT OF SLPs

CATEGORY	BASIC COMPONENT	INTERMEDIATE COMPONENT	ADVANCED COMPONENT	OUTSTANDING COMPONENT

Source: Developed by the author



## VIDEO

### Possible outline for the production of a short video

#### Objectives

- Convey which human right has been worked on and which social needs have been addressed
- Convey how we have worked to meet our objectives
- Explain what the outcomes have been (learning, service, value of experience, conclusions, etc.)

Source: Developed by the author

## WORLD CAFÉ

The World Café is an intentional way to create a living network of conversations around questions that matter. A Café Conversation is a creative process for leading collaborative dialogue, sharing knowledge and creating possibilities for action in groups of all sizes.

### *The Café as metaphor*

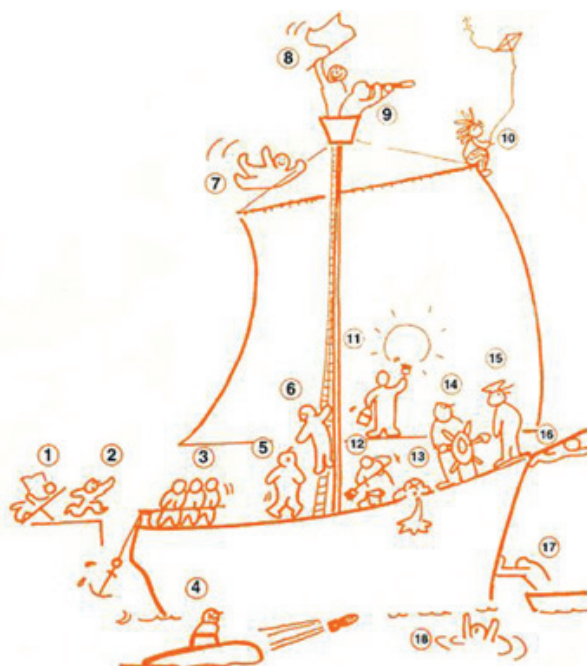
The World Café is a metaphor. It's a guiding image, a scenario of possibility, and an innovative set of tools and methods for evolving collective intelligence and creative futures.

As a guiding image, the World Café helps us appreciate the importance and connectedness of the informal webs of conversation and social learning through which we:

- Discover shared meaning
- Access collective intelligence
- Bring forth the future

**SYMBOLIC IMAGE** about teamwork.

Where would I put myself in the picture?



Source: Batlle (2014:6)

## REFERENCES

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# SUBJECT 4.:

## PROJECT SYSTEMATISATION

**Hours: 5**

**Subject 3.4.** Project Systematisation

**Lecturer:**

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### SUMMARY OF THE TOPIC

Systematisation is a methodological tool that allows us to learn from practice, with the aim of continuous improvement. Systematisation is more than a description of the implemented project. It is a process of analysis and reflection on the experience that involves asking questions about various aspects, including: *What worked well and what did not work? What were the key factors for success? What could have been done differently and why? What recommendations can we derive from the practice?* Systematisation is a reconstruction and an analytical review process of the observed experience.

It is considered a learning process which shares some basic methodological procedures with research and evaluation. Each fulfils a different function in the management of the project cycle.

Systematisation has a dual objective: to analyse in order to improve and to disseminate and transfer the knowledge acquired from experience.

One of the first questions to answer with regard to the project promoters concerns the scope of systematisation. This can focus on just one aspect of the project or the whole project. At the same time, we need to be realistic, understanding that *it is not possible to analyse everything, nor is it useful to do so*. This is why we recommended *focusing on doing what is feasible given the available time and resources*, and what enables us to achieve the expected outcomes according to the purposes of the systematisation and the target audience.

This topic briefly explains the systematisation process and its content. It aims to serve as an introduction to the topic and the importance of systematising the practical experience.

The supplementary bibliography includes support material for further exploration of this topic. There is also a model record for systematising the practical application, based on the violation of rights.

### GENERAL AND SPECIFIC COMPETENCES

In general, for the three Modules that make up the Educational Programme of the HRBA, and in line with the guiding principles of the action plan for the development of the World

Programme for education in human rights approved by the United Nations (General Assembly, 2010, p. 8; 2012, pp. 26 and 27), upon completion of the course, participating teachers shall be able to recognise the educational potential of the general and specific skills described below in order to achieve significant learning in human rights. Moreover, these skills shall be included within teaching plans through a unifying approach and directed towards the effective implementation of the knowledge acquired.

The following general and specific skills are included **in this topic**:

#### GENERAL:

- **Critical reasoning:** To analyse and evaluate the consistency of the approaches, in particular the statements or ideas that society accepts as true in the immediate context in which the person's life takes place.
- **Ethical sense and commitment:** To be positively inclined towards moral goodness, whether one's own or others' (i.e., towards everything that is or that means goodness, the experience of meaning, personal fulfilment, sense of justice), and to persist with this moral goodness.

#### SPECIFIC:

- To assess, evaluate and reflect on the processes and results of the action carried out in contact with reality and the knowledge acquired by the students in service-learning projects.

## BIBLIOGRAPHY AND OTHER OBLIGATORY EDUCATIONAL RESOURCES

Text on the topic Systematisation

## BIBLIOGRAPHY AND OTHER COMPLEMENTARY RESOURCES

Imbrechts, Cécile (2011) Systematiser les expériences: Manuel pour apprendre de nos pratiques, [Quinoa asbl, Belgique](#).

PNUD (2013) Systematization for knowledge Transfer, [Methodological Series on Knowledge Management, n.3. UNDP Regional Centre for Latin America and the Caribbean](#).

CREAS (2012) [Guía de Orientación para Sistematización de experiencias de Aprendizaje Servicio en la Universidad Alberto Hurtado](#).

ITECO.be. [Centre de formation pour le développement et la solidarité internationale](#).

## LEARNING OUTCOMES

Having successfully completed the topic, learners should be able to:

- Identify the importance of systematisation in a practice-based, knowledge-building process.
- Apply a systematisation tool to a service learning project.

## METHODOLOGY

Methodology	Educational tools
Expository method	Reading texts and/or watching audiovisual material
Cooperative learning	Forum

The methodology combines an expository element, through the reading of the topic text and reference material, with a practical element, through the application of systematisation to the project.

## SCHEDULING OF LEARNING ACTIVITIES

A detailed description of the activities to be carried out by the student, either individually or in a group, specifying the expected results and, if applicable, the evaluation criteria.

**Activity 1:** Read the topic Systematisation

**Activity 2:** Consult the supplementary bibliography to help understand the topic

**Activity 3:** Complete the systematisation activity on the project

## TIMELINE OF ACTIVITIES OF THE TOPIC

Identification of the activity	Estimated work time	Evaluation criteria
Activity 1: Read the topic text	1 hour	
Activity 2: Consult the supplementary documents	1 hour	
Activity 3: Complete the systematisation activity on the project	3 hours	Portfolio

## SUBJECT 4.:

## 3.4. PROJECT SYSTEMATISATION

## 1. INTRODUCTION



*'Yes, I know. There are more Problemologists than Solutionologists. But what are we going to do about it?'*

Mafalda introduces us to a new element in our reflection. She suggests that more time and effort is devoted to analysing problems than to solving them. It is important to remember that research carried out on a given problem or violation of rights leaves documentary evidence, in the form of reports, memos, studies and so on. Yet the intervention which is carried out in order to improve the situation is geared towards action and the documents produced during the process remain internal. Because of this, it is essential to systematise the practical experience so that we can transfer knowledge and outcomes as instruments for improvement.

## 2. DEFINITION OF SYSTEMATISATION

Systematisation as a knowledge-building tool, derived from a practical experience, is linked to Paulo Freire's popular education projects from the late 1970s. As Martinic (1984) has pointed out, this assigned value to the recovery of the knowledge, opinions and perceptions of the subjects involved in processes of social transformation, and this contrasted to some degree with the academic position that understood theoretical production as the only source of knowledge-building. Systematisation links theory with practice from a dialectical perspective.

For Martinic (1984), the systematisation of experiences is a process of reflection that allows us to order or organise project processes and outcomes, and seek within this dynamic the aspects that explain the course that the work followed. The UNDP document *Systematization for Knowledge Transfer* states that systematisation does not end with the description of

the evolution and outcomes of the project, but involves an in-depth analysis of how it was possible to accomplish what was accomplished: *What worked well and what did not work? What were the key factors for success? What could have been done differently and why? What recommendations can we derive from the practice?* (UNDP, 2013:11). Systematisation is a process of reconstruction and analytical reflection on observed experience (UNDP, 2013:22).

It is considered a learning process, which shares some basic methodological procedures with evaluation and qualitative and quantitative research, including document review, surveys, field work, interviews and discussion groups. While the aim of research is to analyse a specific situation and the aim of evaluation is to assess the degree of compliance with the approaches of the project, the aim of systematisation is to 'describe, order and reflect analytically on the development of a practical experience' (Morgan and Quiroz, 1988:14). Systematisation aims to capture the key elements in the development of the practice.

### 3. WHY SYSTEMATISE SERVICE LEARNING PROJECTS?

As we have seen in previous topics, reflection is a key element in any service learning project. Systematisation is also focused on this goal. The *Centro de Reflexión y Acción Social* (Centre for Social Action and Reflection) at the Alberto Hurtado University (Chile) highlights two objectives with respect to systematising service learning projects (2012:6):

- retrieving the knowledge, opinions and perceptions of the participants in service learning experiences;
- identifying elements that can contribute to better implementation of future service learning experiences.

The UNDP guide (2013:12) highlights the following reasons for systematising experiences:

- to facilitate knowledge exchange, transfer and adaptation for capacity-building, improving efficiency and promoting innovation;
- to facilitate visibility, knowledge-sharing and impact on public policy.

In short, systematisation is a (participatory) process that allows us to bring order to the service learning experience, retrieve historical memory, interpret it and acquire new knowledge that can be shared and disseminated.

A key element in service learning projects is the reflection of the participants. Systematisation allows us to order the key aspects of the process and the reflections made during its course. Once systematised, the experience is an instrument for the reflection of all those involved.

It is important that this process is participatory, allowing all participants to share their perceptions, experiences and interpretations as well as the project's impact at both personal and contextual level. At the same time, we need to be realistic in terms of the available timeframe for implementing the action and systematising the experience. If the systematisation cannot be carried out with at least some degree of participation, it is important to draw up a report on what has happened, even if this is not a fully participatory process.

### 4. SCOPE OF SYSTEMATISATION

The first element to clarify in the systematisation process is its scope: what are we going to systematise? It might be the entire project or just one part, focusing on a single aspect. Following the premise in the UNDP guide that 'it is not possible to analyse everything, nor is it useful to do so', we recommend focusing on doing what is feasible given the available time and resources, and what enables us to achieve the expected outcomes according to the purposes of the systematisation and the target audience (2013:17).

The next element consists of determining the right time for systematisation. It can be carried out throughout the project cycle or during the final phase (UNDP, 2013:19).



**Systematisation throughout the project cycle:** systematisation can be planned from the beginning of the project, incorporating review processes such as 'analysis and systematisation milestones' during the implementation.

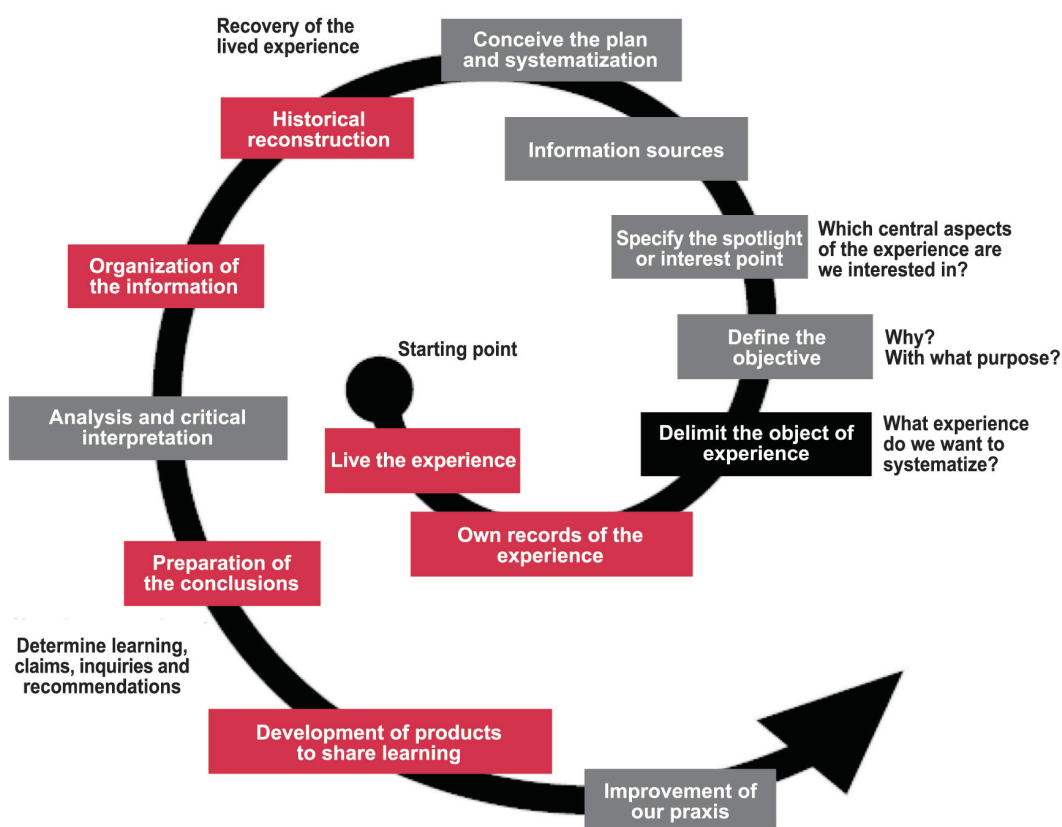
**Systematisation at the end of the project or after its evaluation:** knowledge gained from a systematisation process at the end of the project cycle is aimed at establishing guidelines, developing knowledge tools and/or products that can guide the formulation and implementation of new projects, or a new phase of the project.

With scope, we must apply the same premise as before. In all cases, at the very least, it is useful to systematise the key elements of the process at the end of the project.

## 4. SYSTEMATISATION PROCESS

Regardless of whether we choose to focus the systematisation on one part of the project cycle (diagnosis, planning, implementation or evaluation) or on the entire project, it will follow a series of stages. Figure 1 shows the course of the systematisation process.

Figure 1: Systematisation process



Source: Imberechts (2011:28)

Systematisation seeks to document an experience in order to transfer it to other actors and situations. The UNDP distinguishes three main stages in the systematisation process: preparation, development and transfer.

In the first or **preparation** stage, we select the project to be systematised, define its purpose and select the systematisation team. In the second or **development** stage, we begin the actual work. At this stage, it is recommended to hold a 'kick-off workshop' or training session for the team responsible for systematising the practice. From this point forward, we create knowledge products (documents, reports, accounts, etc.) and submit them for comment and review. In the third or **transfer** stage, we establish the dissemination strategy, report on the experience and develop the work plan for the knowledge transfer, through submission to various forums.

## 5. CONTENT OF THE SYSTEMATISATION

The content of the systematisation is determined by its objective and target audience. In general terms, we can set out a series of elements to use as an overall scheme. Below, we show a model drawn up by Morgan and Quiroz (1988:14) from the *Centro Latinoamericano de Trabajo Social* (Latin American Centre for Social Work).

- Description of the experience
- Theoretical-conceptual framework for the experience
- Context for the experience and its relationship with the scope of the project
- Intentionality of the experience
- Methodological strategy used
- Analysis of the experience
- Outcomes of the experience
- General perspectives, conclusions and hypotheses about the work

The UNDP guide suggests a simple work sheet as a tool for use in an after action review:

After action review form

<b>Project identification</b> Component: Activity: Date: Participants:
<b>What are the purpose and the objectives of this review?</b> What activity are we reviewing?
<b>What was expected to happen?</b> In relation to the project objectives
<b>What happened in practice?</b>
<b>Analysing the outcomes</b> What worked well and why? What could have worked better? What can we do differently next time?
<b>Conclusions</b>

Source: UNDP Guide [2013:71]

## REFERENCES

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Morgan, M<sup>a</sup> de la Luz y Quiroz, Teresa (1988) Acerca de la sistematización en VV.AA. (1988) La sistematización de la práctica, ed. Humanitas – Celats, Buenos Aires, Argentina, pág. 7 -16

PNUD (2013) Systematization for knowledge Transfer, Methodological Series on Knowledge Management, n.3. [UNDP Regional Centre for Latin America and the Caribbean](#).

## OTHER USEFUL RESOURCES

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ITECO.be. [Centre de formation pour le développement et la solidarité internationale](#).



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The main objective of the ABDEM project is to contribute to the modernisation of higher education in the Maghreb, through the integration of a human rights-based approach (HRBA). This is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to understand the causes of human rights violations, analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress. Its primary goal is the development of the capacities of duty-bearers to meet their obligations and of rights-holders to claim their rights and freedoms - and not merely reduce their needs.

The HRBA introduces a fundamental shift into higher education institutions, since it is not limited to purely academic content; it also sets out an educational and management model for guaranteeing and promoting the rights of all members of the university community and its environment.

The ABDEM project has involved the collaboration of twelve European and Maghreb universities:

- the University of La Rioja, (project leader);
- the universities of Bergamo (Italy) and Westminster (United Kingdom);
- the Spanish universities of Zaragoza, Extremadura and A Coruña;
- the Moroccan universities Mohamed V at Souissi (Rabat) and Hassan II Casablanca-Mohammedia;
- the University of Setif 2 and the National Institute of Political Sciences (Algiers), in Algeria;
- and the National Institute of Labour and Social Studies at the University of Carthage and the Institute of Press and Information Sciences at the University of Manouba, in Tunisia.

