MANUAL ON
human rights
MONITORING

Chapter **05**

APPLICABLE INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW FRAMEWORK






UNITED NATIONS
HUMAN RIGHTS
OFFICE OF THE HIGH COMMISSIONER

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A. Key concepts

- Determining the legal framework of human rights monitoring will help define its parameters, the information to be gathered and the elements to be proven to establish that violations have taken place.
- In peacetime, international human rights law, including regional human rights treaties, will apply. International human rights law also applies during disturbances, sporadic violence and internal strife, but the State may suspend or derogate from some rights if it officially declares a state of emergency and respects certain strict conditions.
- Some basic human rights cannot be suspended even during armed conflict or other public emergencies; they are found in article 4 of the International Covenant on Civil and Political Rights or common article 3 of the Geneva Conventions, or have been qualified as non-derogable by the Human Rights Committee.
- International human rights and humanitarian law requires States to prosecute and punish those responsible for violations of such law so as to end impunity.
- In armed conflict—whether international or non-international—both international human rights law and international humanitarian law will apply. International humanitarian law applies only in armed conflict, with different rules applicable to international and to non-international armed conflicts.
- International criminal law is relevant insofar as it defines key elements that have to be proven in order to successfully prosecute crimes that are defined, inter alia, in the Rome Statute of the International Criminal Court: crime of genocide, war crimes, crimes against humanity and torture.[1]
- Violations against refugees and internally displaced persons, also relevant in the context of human rights monitoring, require the application of specific standards.
- National laws may be relevant to human rights monitoring to the extent that they have provisions relating to human rights and/or humanitarian law, to reinforce the obligation of the State concerned and to advocate for remedial action for violations, including holding perpetrators accountable. National laws may also criminalize actions constituting international crimes or other serious violations of human rights, providing for such crimes to be prosecuted in national courts.

1 These crimes may also be defined in national legislation, and the Rome Statute may be less relevant if the State is not a party to it.


B. Introduction

This chapter provides a brief summary of international human rights and humanitarian law standards applicable to the work of human rights officers (HROs). In addition, more detailed coverage of standards relating to specific areas of international human rights law may be found in the chapters relating to elections, detention, economic, social and cultural rights, internally displaced persons, refugees, fair trial, etc.

Every HRO should have a good knowledge of the rights guaranteed by international human rights and humanitarian law insofar as relevant to the mandate of the field presence or human rights component of the peace mission or commission of inquiry or special procedure. This chapter provides the framework for international human rights and humanitarian law and the relationship between the two, clarifies the sources and legal force of international norms and discusses the relevance of such law to the work of HROs.

HROs need to be aware of international human rights standards because those norms define their mandate, provide an international identity to United Nations operations, mechanisms and bodies, establish legal obligations for the State, and therefore provide the basis for requiring respect for human rights from the Government and others. The international minimum standards provide a point of basic agreement not only among nations, but also among HROs as to what they should monitor, promote or recommend. These cannot be replaced or superseded by national standards or experience of the country of origin of the HRO. Whether monitoring government compliance, reporting violations, intervening with local authorities or offering advice, the legitimate basis for any action of HROs is the international norms and standards contained in United Nations and regional human rights instruments, international humanitarian law and refugee law.

International human rights law applies in all circumstances, including armed conflict. International humanitarian law—also called the law of armed conflict or the laws of war—applies only in armed conflict alongside international human rights law and will be relevant in both international and non-international armed conflicts. International criminal law provides the framework for holding individuals accountable for war crimes and serious violations of human rights amounting to crimes against humanity and genocide. Refugee law protects individuals who have fled their own countries to seek refuge from persecution, and some of its legal protections overlap with international human rights law and international humanitarian law. In addition to international law, HROs may also need to consider the applicability of national legal provisions, especially to assist national advocacy focused on domestic accountability and remedies, and/or to highlight areas of national law that require reform.

C. Defining the mandate

1 Charter of the United Nations

Whatever the precise *mandate* of a particular field presence, it will ultimately be *based upon the authority of the United Nations under its Charter*. The Charter of the United Nations is both the *most prominent treaty* among nations and *contains fundamental human rights* provisions (see its Arts. 1, *55*, 56 and 103). *Its Article 55* defines the basic human rights objectives of the United Nations:

> … 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.

By ratifying the Charter of the United Nations, Member States in *Article 56* "pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article *55*."

Treaties, including the Charter, constitute the **primary sources of international law**, including international human rights law. Hence, if the mandate indicates that the human rights field presence should monitor and promote the protection of human rights, *human rights* will be defined by the terms of the Charter, human rights treaties and other human rights instruments as well as relevant customary international law and general principles of law.

2 Mandate of the field presence

An OHCHR field presence is usually established with the agreement of the Government of the country and through a memorandum of understanding, which stipulates its mandate. Most field presences have a mandate to monitor and report on compliance by the State with its human rights obligations, which also allows HROs to undertake fact-finding into specific human rights violations or incidents.

Nepal

An **agreement** between the host country and OHCHR stipulates:

The Office shall have the following functions, as prescribed by its mandate, which shall be exercised under the authority of the High Commissioner:

(a) Monitor the situation of human rights in cooperation with the National Human Rights Commission (NHRC) pursuant to its Constitutional mandate.

Source: Agreement between the Government of Nepal and the United Nations High Commissioner for Human Rights, 9 June 2010.


Colombia

An **agreement** between the host country and OHCHR stipulates that:

… the Office shall monitor the situation of human rights with the aim of advising the Colombian authorities in the formulation and implementation of policies, programmes and measures for the promotion and protection of human rights …

Source: Agreement relating to the establishment in Colombia of an Office of the United Nations High Commissioner for Human Rights, 26 November 1996.

The mandate of the human rights component of a peace mission is derived from the resolution of the Security Council that establishes the mandate of the mission itself, which usually includes human rights monitoring, fact-finding or investigation.

Democratic Republic of the Congo

The **Security Council resolution** setting out the mandate of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) provides:

Monitor, report and follow-up on human rights violations and abuses, and support the [United Nations] system in-country to ensure that any support provided by the United Nations in the eastern [Democratic Republic of the Congo] shall be consistent with international humanitarian law and human rights law and refugee law as applicable …

Source: Security Council resolution 2098 (2013).

In addition to regular monitoring, fact-finding and investigations undertaken by HROs in field presences, special investigations into specific incidents or violations may be established by the field presence or by the High Commissioner. For example, the human rights investigations into intercommunal violence in Jonglei State undertaken by the United Nations Mission in South Sudan[2] or the fact-finding mission to the Central African Republic established by the High Commissioner to gather information on human rights violations in that country.[3] When a special investigation is established, its terms of reference would define its mandate.

Furthermore, investigative bodies such as commissions of inquiry or fact-finding missions may be established by the Security Council, the General Assembly, the Human Rights Council, the Secretary-General or the High Commissioner for Human Rights. Their mandates will be set out in a constitutive document such as a resolution of a United Nations body (e.g., a Security Council, General Assembly or Human Rights Council resolution) or a letter of the Secretary-General setting out the terms of reference. This constitutive document will define the tasks to be carried out by the investigating body. Some mandates, such as those of a commission of inquiry or fact-finding mission, will be explicit about the particular fact-finding or investigation to be carried out.

2 United Nations Mission in South Sudan, "Report on incidents of inter-communal violence in Jonglei State", June 2012.

3 "Situation of human rights in the Central African Republic: Report of the High Commissioner for Human Rights" (A/HRC/24/59).

Democratic Republic of the Congo: mapping human rights violations 1993–2003

- Conduct a mapping exercise of the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003.
- Assess the existing capacities within the national justice system to deal appropriately with such human rights violations that may be uncovered.
- Formulate a series of options aimed at assisting the Government in identifying appropriate transitional justice mechanisms to deal with the legacy of these violations, in terms of truth, justice, reparation and reform, taking into account ongoing efforts by the authorities, as well as the support of the international community.

Source: OHCHR, "Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003", August 2010.

D. International human rights law

The development of modern international human rights law started with the adoption of the Universal Declaration of Human Rights by the General Assembly in 1948 and now encompasses a number of treaties on specific rights or sets of rights.

There are nine core international human rights treaties, each with its own committee of experts to monitor implementation by its State parties:

- The International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- The International Covenant on Economic, Social and Cultural Rights (1966) and its Optional Protocol
- The International Covenant on Civil and Political Rights (1966) and its two Optional Protocols
- The Convention on the Elimination of All Forms of Discrimination against Women (1979) and its Optional Protocol
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) and its Optional Protocol
- The Convention on the Rights of the Child (1989) and its three Optional Protocols
- The International Convention on the Protection of All Migrant Workers and Members of Their Families (1990)
- The International Convention for the Protection of All Persons from Enforced Disappearance (2006)
- The Convention on the Rights of Persons with Disabilities (2006) and its Optional Protocol

Some treaties are supplemented by optional protocols dealing with specific concerns, such as the Optional Protocols to the Convention on the Rights of the Child on children in armed conflict, or on the sale of children, child prostitution and child pornography, or the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. Other treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, may also be pertinent to monitoring and fact-finding.


The detail of all these treaties cannot be captured in this *Manual*. However, to give a sense of the coverage, two treaties, which together with the Universal Declaration form the International Bill of Human Rights, are presented below:

- The International Covenant on Civil and Political Rights establishes an international minimum standard of conduct for all State parties to it, *ensuring* the rights of self-determination; legal redress; equality; life; liberty; freedom of movement; fair, public and speedy trial of criminal charges; privacy; freedom of expression, thought, conscience and religion; peaceful assembly; freedom of association (including trade union rights and political parties); family; and participation in public affairs; but *forbidding* torture; "cruel, inhuman or degrading treatment or punishment"; slavery; arbitrary arrest; double jeopardy; and imprisonment for debt.
- The International Covenant on Economic, Social and Cultural Rights establishes international minimum standards for States that have ratified it to respect, protect and fulfil economic, social and cultural rights. This Covenant requires State parties to devote the maximum of their available resources in the most efficient and rapid manner to ensure the full, and in some cases progressive, realization of the rights it recognizes, such as the right to gain a living by work; to have safe and healthy working conditions; to enjoy trade union rights; to receive social security; to have protection for the family; to have adequate housing and clothing; to be free from hunger; to receive health care; to obtain free public education; and to participate in cultural life, creative activity and scientific research. The Covenant also strictly prohibits discrimination with respect to economic, social and cultural rights, and ensures the equal rights of men and women to the enjoyment of these rights.

Limitations on rights

Under certain specific conditions set forth in the relevant international human rights treaties, States can impose limitations on the exercise of some human rights. It should be clear, however, that such limitations should be the exception, rather than the rule. Limitations on rights, where they are permitted, are **specified** in the various human rights treaties. In general, such limitations and restrictions are **determined by law** and **necessary in a democratic society** to:

- Ensure respect for the rights and freedoms of others; and
- Meet the just requirements of public order, public health or morals, national security or public safety.

International human rights law does not tolerate limitations on rights imposed outside or beyond the above-mentioned conditions.

Derogation of some civil and political rights during a state of emergency

The International Covenant on Civil and Political Rights allows States to derogate from (that is, to temporarily suspend) some rights under the specific and strict conditions indicated in its 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. (emphasis added)

There is, however, a group of rights which can never be restricted nor be derogated from—even in the situation described in article 4 (1) above. These **non-derogable rights** are: the right to be free from arbitrary deprivation of life; the prohibition of torture and other ill-treatment; the prohibition of slavery, imprisonment for debt and retroactive penalty; recognition as a person before the law; and freedom of thought, conscience and religion (art. 4 (2)).

The Human Rights Committee has noted that, in addition to the rights specifically mentioned as non-derogable in the Covenant, there are other rights that cannot be derogated from by virtue of their status as peremptory norms, or because they are also applicable in international humanitarian law or their protection is necessary in order not to undermine explicitly non-derogable rights. These rights are: the right of all persons deprived of liberty to be treated with humanity; the prohibition against taking of hostages, abductions or unacknowledged detentions; the prohibition of genocide; non-discrimination; the prohibition of deportation or forcible transfer of a population; the prohibition of propaganda for war, or advocacy of national, racial or religious hatred that would constitute incitement to discrimination, hostility or violence; the right to a remedy; procedural and judicial guarantees necessary to protect non-derogable rights; and the fundamental principles of fair trial, including the presumption of innocence.[4]

The Covenant underlines the exceptional nature of derogations. The substantive and procedural conditions under which derogations from rights are permitted by international law should be carefully noted:

- Existence of a threat to the life of the nation
- Official proclamation of a state of emergency
- Derogations to be strictly required by the exigencies of the situation
- Derogations not to be inconsistent with the State's other international obligations
- Derogations not to be discriminatory
- Non-derogable rights to be respected.

Article 4 (3) further requires that States introducing derogations from rights should immediately inform, through the United Nations Secretary-General, the other State parties to the Covenant of the provisions from which they have derogated and of the reasons for the derogations.

Application of a treaty to a particular country

In order for a *treaty to apply* to a particular country, the *State* must have *ratified* or otherwise formally adhered to it. Hence, it is important for the HRO to check whether the State where the field presence is established (or other mechanism or body is operating) has ratified the treaty. Some States attach *reservations* or other limitations on their ratification. Accordingly, it is also important to verify whether there is such a reservation/limitation related to the rights which might be relevant to the work of an HRO. It should be noted that even if there is such a reservation, *it may be invalid* if it violates the object and purpose of the treaty.

Related United Nations non-treaty instruments ("soft law")

In addition to treaties, the United Nations has overseen the development and adoption of dozens of declarations, codes, rules, guidelines, principles, resolutions and other instruments that serve to interpret and expand on the general human rights obligations of Member States under Articles

4 Human Rights Committee, general comment No. 29 (2001) on states of emergency, paras. 13–16.


55 and 56 of the Charter of the United Nations and may reflect customary international law. The Universal Declaration of Human Rights is the most prominent of those human rights instruments. Not only does it provide an authoritative, comprehensive and nearly contemporaneous interpretation of the human rights obligations under the Charter, it also has provisions that reflect customary international law binding on all States, irrespective of whether they are parties to the treaties which also contain those provisions. Among the other prominent instruments of great importance to human rights are (in chronological order):

- Standard Minimum Rules for the Treatment of Prisoners
- Declaration on the Rights of Disabled Persons
- Code of Conduct for Law Enforcement Officials
- Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")
- Declaration on the Right to Development
- Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment
- Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions
- Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- Declaration on the Protection of All Persons from Enforced Disappearance
- Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
- Declaration on the Elimination of Violence against Women
- Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms.

Interpretative guidance from treaty bodies, special rapporteurs and courts

The guidance from treaty bodies is particularly relevant to the interpretation of human rights treaties. Each of the core international human rights treaties has an expert committee (treaty body) that monitors compliance with the treaty by considering periodic reports of State parties, examines complaints by other State parties and/or individuals (for some treaties), and issues guidance in the form of general comments or recommendations. Whilst not binding on States as a matter of international law, their concluding observations, views and general comments are a persuasive source of interpretation concerning the human rights treaties. In addition, the Human Rights Council and its predecessor, the Commission on Human Rights, have established special rapporteurs on thematic and country situations whose reports can also serve to shed light on the meaning of particular human rights guarantees. Judgements of international, regional or national courts may also offer particular insights into the application of particular provisions (or comparable provisions in other instruments), and additional guidance may be sought in academic texts.

Customary international law

There is also a significant body of international custom, which binds every State regardless of whether it has adhered to a relevant treaty. Customary international law has two features: (a) the consistent practice of a wide range of States over a period of time ("State practice"), and (b) the belief that these actions are undertaken because of a legal rule to do so (*opinio juris*). Whether or not a human right has become an obligation under customary international law is a complex question. Some provisions

of the Universal Declaration, for instance, have been recognized as customary international law by the International Court of Justice[5] and some national courts.[6]

E. Regional human rights treaties

Concurrent with the development of international human rights law applying to all States, regional human rights treaties and monitoring mechanisms have been developed. The provisions of regional treaties and the jurisprudence of regional monitoring mechanisms, especially the binding decisions of regional courts, may have particular influence with States in the region. Regional human rights treaties may also be specifically mentioned in peace agreements, in Security Council resolutions relevant to the issue or situation being monitored and in agreements establishing the OHCHR office in a country or in the mandate of the United Nations mission. It is therefore important to consider the relevance and significance of regional human rights treaties during the planning and conducting of monitoring and fact-finding activities. In some countries regional standards may be better known and better respected than nearly identical international standards. In those circumstances, HROs would be well advised to use regional standards. Similarly, in instances where the constitution or national law incorporates regional standards, they should be prominently used.

In Europe, all members of the European Union and the Council of Europe have ratified the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, and cases concerning a State's compliance with it are adjudicated by the European Court of Human Rights. The European Social Charter was adopted in 1961 and revised in 1996. It deals with economic, social and cultural rights, and is monitored by the European Committee of Social Rights. An additional protocol provides for a system of collective complaints. In addition, specialist treaties have been developed such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Framework Convention for the Protection of National Minorities.

Members of the Organization of American States (OAS) adopted the American Declaration of the Rights and Duties of Man in 1948 and the American Convention on Human Rights in 1969. The implementation of both these human rights instruments is overseen by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. OAS has also adopted additional protocols to the American Convention on Human Rights and treaties on specific issues to strengthen the regional protection of human rights.[7]

5 See, for example, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, Separate Opinion of Vice-President Ammoun with particular reference to the right to equality in the Universal Declaration, p. 64. See also *United States Diplomatic and Consular Staff in Tehran, Judgment, I.C.J. Reports 1980*, para. 91, where the Court clearly invoked "the fundamental principles enunciated in the Universal Declaration of Human Rights" as legally binding on the Islamic Republic of Iran with regard to the wrongful deprivation of liberty and the imposition of "physical constraint in conditions of hardship".

6 See, for example, *Filártiga* v. *Peña-Irala*, Judgement of 30 June 1980, in which the United States Court of Appeals, Second Circuit, held that: "This prohibition [of torture] has become part of customary international law, as evidenced and defined by the Universal Declaration of Human Rights, General Assembly Resolution 217(III)A (Dec. 10, 1948) which states, in the plainest of terms, 'no one shall be subjected to torture.'"

7 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; 1990 Protocol to the American Convention on Human Rights to Abolish the Death Penalty; 1985 Inter-American Convention to Prevent and Punish Torture; 1994 Inter-American Convention on Forced Disappearance of Persons; 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; and 1999 Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities.


The 1981 African Charter on Human and Peoples' Rights has been ratified by all member States of the African Union (AU). The African Commission on Human and Peoples' Rights monitors its implementation by State parties and has adopted guidelines and principles that interpret its provisions. AU has adopted an additional protocol to the African Charter to strengthen the protection of women's rights and an additional treaty on children's rights.[8] In 2005, AU created the African Court on Human and Peoples' Rights.[9]

The 2004 Arab Charter on Human Rights was adopted by the Council of the League of Arab States. The treaty establishes the Arab Human Rights Committee to consider reports of State parties on the measures taken to give effect to the Arab Charter.

F. International humanitarian law

International humanitarian law—also known as the law of war or the law of armed conflict—seeks to limit the effects of armed conflict by protecting persons who are not or no longer participating in the hostilities and restricting the means and methods of warfare. A major part of international humanitarian law is contained in the four Geneva Conventions of 1949 and the two 1977 Additional Protocols. In addition, the 1907 Hague Conventions and the annexed Regulations lay down important rules on the conduct of hostilities, notably on military occupation. Many of the rules contained in these instruments have become part of customary international humanitarian law, thus applying to all States, regardless of their ratification status.

Other international treaties that constitute part of international humanitarian law prohibit or restrict the use of specific weapons, including anti-personnel mines, exploding or expanding bullets, blinding laser weapons and cluster munitions, and protect certain categories of persons and property.[10]

International humanitarian law applies only to armed conflict; it does not cover internal tensions, disturbances or isolated acts of violence. The law applies only once an armed conflict has begun and then equally to all sides, regardless of who started the fighting.

International humanitarian law makes an important distinction between international and non-international armed conflict. The qualification of an armed conflict will determine which rules of the Geneva Conventions apply.

8 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; and 1990 African Charter on the Rights and Welfare of the Child.

9 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights. Once it comes into effect, the 2008 Protocol on the Statute of the African Court of Justice and Human Rights will create a new court, which will deal with human rights issues and those pertaining to other AU treaties. There are also a number of courts established by subregional organizations, such as the Economic Community of West African States (ECOWAS). Some have rendered decisions that have a direct impact on human rights. See, for example, ECOWAS Community Court of Justice, *Hadijatou Mani Koraou* v. *Niger*, Judgement No. ECW/CCJ/JUD/06/08 of 27 October 2008, in which the Court found Niger responsible for failing to protect the applicant from slavery and awarded her compensation.

10 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two protocols; 1972 Biological Weapons Convention; 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 and its five protocols; 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction; 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; and 2008 Convention on Cluster Munitions.

International armed conflicts are those in which at least two States are involved. They are subject to a wide range of rules, including those set out in the four Geneva Conventions. Moreover, States that have ratified Additional Protocol I to the Geneva Conventions are bound by the Protocol's provisions. Common article 2 of the Geneva Conventions pertains to international armed conflicts, and the commentary of the International Committee of the Red Cross explains the provisions thus:

> Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to the human person as such is not measured by the number of victims.[11]

An international armed conflict is also said to exist when a part of or the entire territory of a State is occupied (even if that occupation meets no armed resistance) by a foreign State or when peoples are fighting against colonial domination, alien occupation or racist regimes to exercise their right to self-determination.[12]

Non-international armed conflicts are those involving either government armed forces fighting organized groups of armed dissidents or organized armed groups fighting each other within a State. Treaty law regarding non-international armed conflict is more limited than that dealing with international armed conflict. However, an important range of human rights-related protections apply to internal armed conflicts and are laid down in common article 3 to the four Geneva Conventions and, when applicable, in Additional Protocol II. Common article 3 applies to all internal armed conflicts. Additional Protocol II, however, is applicable only if the State has ratified it and the internal armed conflict reaches a certain intensity with the following characteristics (art. 1 (1)):

- A confrontation within the territory of the State between the armed forces of the Government and opposing "dissident armed forces or other organized armed groups";
- The dissident armed forces are under responsible command; and
- They control a part of the territory as to enable them to "carry out sustained and concerted military operations" and to implement the Protocol.

Additional Protocol II "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" (art. 1 (2)).

It is important also to consider the operation of customary international law relating to international humanitarian law: both in relation to expanding protections beyond those explicitly stated in Additional Protocol II, as well as providing protections if a State has not ratified this Protocol.

11 Jean Pictet, ed., *The Geneva Conventions of 12 August 1949: Commentary* (Geneva, International Committee of the Red Cross, 1958), pp. 20–21.

12 Additional Protocol I, art. 1 (4).


Qualification of armed conflict

In many situations the qualification of an armed conflict as international or non-international is relatively easy: e.g., a classic inter-State armed conflict or a civil war involving an opposition armed group engaged in hostilities against the State. In other cases, the qualification may be more complex, requiring detailed analysis of the parties to the conflict and the nature of the activities taking place.

Armed conflicts can also change over time and evolve from one type of conflict to another. An armed conflict confined geographically to the territory of a single State involving the Government and an opposition force is a non-international armed conflict. However, if a foreign State intervenes with its armed forces on the side of the rebels fighting against government forces, it will become an international armed conflict. It is also possible that a non-international armed conflict becomes "internationalized" without becoming an international armed conflict. This occurs if a foreign State intervenes with its armed forces on the side of the territorial State in a non-international armed conflict.

Essential principles of international humanitarian law

Several essential principles of international humanitarian law can be identified. The principle of **distinction** is central and applies in all armed conflicts. It obliges parties to a conflict—whether State or non-State—to distinguish between military objectives and civilians/civilian populations and civilian objects (e.g., homes, schools and hospitals), and target only military objectives. The failure to make such a distinction in military operations amounts to an indiscriminate attack and may constitute a war crime.

The principle of **necessity** means that a party to a conflict may apply only the amount and kind of force necessary to defeat the enemy, whilst the principle of **proportionality** means that attacks on military objects must not cause loss of civilian life or damage to civilian property which is excessive in relation to the expected military advantage. While it is not always possible to prevent civilian casualties in military operations, international humanitarian law requires parties to a conflict to take **precautions** to minimize civilian deaths and injuries and damage to civilian objects.

The principle of **humane treatment** requires that civilians and other persons not taking a direct part in hostilities (including fighters who are *hors de combat*) be treated humanely at all times. Common article 3 of the Geneva Conventions (applicable in non-international armed conflict), for instance, prohibits violence to life and person (including cruel treatment and torture), the taking of hostages, humiliating and degrading treatment, and execution without regular trial against non-combatants, including persons *hors de combat* (wounded, sick and shipwrecked). Detailed provisions concerning the protection of civilians and others not taking a direct part in hostilities are contained in the Geneva Conventions, the Additional Protocols and customary international humanitarian law.


G. Applicability of international human rights law and international humanitarian law during armed conflict[13]

The applicability of international human rights law in armed conflict—both international and non-international—has been confirmed by international bodies, including the International Court of Justice. International humanitarian law applies only in situations of armed conflict. Thus, both sets of law are applicable and their complementary application can be quite complex.

In explaining the relationship between international human rights law and international humanitarian law during armed conflict, the International Court of Justice has stated:

> … the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[14]

The International Court of Justice also concluded that, in cases where both sets of law apply, international humanitarian law should be considered as *lex specialis* (specialized law).[15]

In monitoring violations committed during armed conflict, it will be necessary to examine provisions of both international human rights law and international humanitarian law. One body of law may contain more detailed provisions to protect individuals. Human rights law, for instance, contains more detailed provisions in relation to understanding "fair trial" rights, which in turn inform international humanitarian law norms in this area. Concerning attacks on civilian buildings such as schools and hospitals, or attacks on medical staff or humanitarian relief personnel, international humanitarian law has specific provisions. A pragmatic approach during monitoring, fact-finding and investigations would be to assess the situation or incident with reference to provisions of both international human rights law *and* international humanitarian law in order to determine the rules providing the most specific procedural and substantive guarantees. Since there are inconsistencies and gaps between the protections afforded by the various human rights and humanitarian law instruments, as well as national and local laws, the individual should be entitled to the most protective provisions of applicable international, national or local laws. Accordingly, if international humanitarian law affords better protection than human rights law, humanitarian law should be applied and vice versa.

The table below explains the applicability of international human rights law and international humanitarian law in different situations.

13 See also *International Legal Protection of Human Rights in Armed Conflict* (United Nations publication, Sales No. E.11.XIV.3).

14 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, I.C.J. Reports 2004*, para. 106.

15 Ibid.


Situation	Applicable treaty law
1. Normal situations	**All human rights** (but for each right, see any relevant limitation. Rights can be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of morality, public order and the general welfare in a democratic society).
2. Other internal tensions Disturbances, riots and isolated acts of violence which do not qualify as a public emergency threatening the life of the nation. **No state of emergency declared**	**All human rights** (but for each right, see any relevant limitation. Rights can be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others, and of meeting the just requirements of morality, public order and the general welfare in a democratic society).
3. State of emergency Disturbances, riots, isolated and sporadic acts of violence and other public emergency which threaten the life of the nation, in which measures normally compatible with the constitution and laws are inadequate to address the situation. **State of emergency must be officially declared**	**All human rights** with the following exceptions: ■ Derogations from certain rights may be permissible to the extent strictly required by the exigencies of the situation, and only if not inconsistent with other requirements under international law. ■ No discrimination solely on the basis of race, colour, sex, language, religion or social origin. ■ No derogation is permissible with regard to rights stipulated in the International Covenant on Civil and Political Rights as non-derogable or rights regarded as non-derogable by Human Rights Committee jurisprudence (see sect. on derogation above).
4. Non-international armed conflict (a) Protracted armed violence between government authorities and organized armed groups or between such groups within a State. (b) Confrontation within the territory of a State between the armed forces of the Government and "dissident armed forces or other organized armed groups", which are under responsible command and exercise such control over part of the territory as to enable them "to carry out sustained and concerted military operations" and to implement Protocol II.	**(a) Common article 3** of the Geneva Conventions applies to situations of non-international armed conflict where the strife is low and does not meet the requirements of Protocol II; applies to government forces and armed opposition forces. **(b) Additional Protocol II** of 1977 supplements common article 3 but applies to conflicts of a certain degree of intensity. Common article 3 and the Protocol apply simultaneously. Applies to government forces and dissident armed forces. **All human rights provisions** shall apply in all non-international armed conflicts except those rights that have been lawfully suspended in a declared emergency; or if there is a more specific rule of international humanitarian law that affords better protection.


Situation	Applicable treaty law
5. International armed conflict Including wars between States, and against colonial domination, alien occupation or racist regimes in the exercise of self-determination.	**Four Geneva Conventions of 1949** (1) Wounded and sick in the field (2) Shipwrecked (3) Prisoners of war (4) Civilians (under occupation) **Additional Protocol I of 1977** **All human rights provisions** are applicable in international armed conflict, except those rights that have been lawfully suspended in a declared emergency; or if there is a more specific rule of international humanitarian law that affords better protection.

H. International criminal law

International criminal law is a branch of international law that recognizes certain categories of very serious acts (war crimes, crimes against humanity, genocide, aggression) as international crimes and assigns individual criminal responsibility to perpetrators of such acts.

International criminal law is applied through the International Criminal Court, international ad hoc tribunals (e.g., International Criminal Tribunal for Rwanda), hybrid tribunals with national and international components (e.g., Special Court for Sierra Leone) as well as national courts (military tribunals and ordinary criminal courts).

The 1998 Rome Statute of the International Criminal Court established the first permanent international judicial body to prosecute individuals for "the most serious crimes of concern to the international community". The jurisdiction of the International Criminal Court is complementary to that of national criminal courts. The Court will not exercise its jurisdiction where a State that has jurisdiction is investigating and prosecuting the case, unless the State is unwilling or unable to genuinely to carry out the investigation or prosecution. The Court has jurisdiction in respect of:

(a) The crime of genocide
(b) Crimes against humanity
(c) War crimes
(d) The crime of aggression.[16]

These crimes are defined in the Rome Statute.

16 The Court's jurisdiction over the crime of aggression will not commence until at least 2017, subject to a decision to be taken after 1 January 2017 by a two-thirds majority of State parties and the ratification of the amendment concerning this crime by at least 30 State parties.


Genocide covers acts such as murder or serious bodily or mental harm, committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such (see art. 6).

Crimes against humanity include murder, deportation, imprisonment, rape, enforced disappearance and other inhumane acts that are committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (see art. 7). Such crimes can be committed in peacetime as well as during an armed conflict.

War crimes consist of grave breaches of the 1949 Geneva Conventions and serious violations of the laws and customs applicable in international armed conflict, and serious violations of common article 3 of the Geneva Conventions and other serious violations of the laws and customs applicable in non-international armed conflicts. The Rome Statute lists the acts which constitute war crimes (see art. 8).

Crime of aggression means the planning, preparation, initiation or execution of an act of aggression, which is the use of armed force by a State against another State in violation of the Charter of the United Nations, by a person in control of the political or military action of a State (see art. 8 bis).

The International Criminal Court has also adopted Elements of Crimes, which assist it in interpreting and applying articles 6, 7 and 8 of the Rome Statute, and define the elements that have to be proven to successfully prosecute a person for a specific crime.

HROs may be required by their mandate or terms of reference to gather information that will indicate the commission of international crimes that fall within the jurisdiction of the International Criminal Court. However, HROs have to bear in mind that they are not investigators of the Court. Therefore, they gather information only to show that there are reasonable grounds to believe that an international crime has been committed. It should then be left either to the national authorities and/or to the prosecutor of the International Criminal Court to institute a criminal investigation and gather evidence for prosecution.

Several States have incorporated the Rome Statute into national law, providing not only a legal basis for cooperation with the Court, but also incorporating the international crimes into national law.[17] The national laws of some States provide for the exercise of universal jurisdiction in respect of international crimes, permitting national authorities to investigate and prosecute such crimes, irrespective of where or by whom they may have been committed.[18]

17 For example, Germany: Act to Introduce the Code of Crimes against International Law, 26 June 2002; Panama: Criminal Code, Law No. 14, 18 May 2007; Samoa: International Criminal Court Act, No. 26, 9 November 2007; South Africa: Implementation of the Rome Statute of the International Criminal Court Act, No. 27, 2002. See Coalition for the International Criminal Court (www.iccnow.org/).

18 States that have exercised universal jurisdiction in investigations or prosecutions of persons suspected of crimes under international law include: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Netherlands, Norway, Senegal, Spain, the United Kingdom and the United States of America.

I. International refugee law

International refugee law defines who is a refugee and what protections should be afforded to such a person. The entitlement to protection as a refugee is dependent on a person satisfying the following criteria:

- They are outside their country of origin or of habitual residence;
- They are unable or unwilling to avail themselves of the protection of that country owing to a well-founded fear of being persecuted; and
- The persecution feared is based on at least one of these five grounds: race, religion, nationality, membership of a particular social group, or political opinion.

The main sources of international refugee law are the 1951 Convention relating to the Status of Refugee and its 1967 Protocol. Additional protection is provided for refugees in Africa by the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa. The latter expands the definition of refugee to include a person "who, 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, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

The principle of "non-refoulement" is central to international refugee law and places an obligation on the State in which the person has sought refuge not to return the refugee to a country or territory where he or she would be at risk of persecution or, in the case of the Convention Governing the Specific Aspects of Refugee Problems in Africa, to a situation in the expanded definition where the refugee's life, liberty or physical integrity would be threatened.

The principle of non-refoulement is considered part of customary international law and therefore binding on all States. The principle is also incorporated into several international human rights treaties, such as the Convention against Torture, which prohibits the forcible removal of persons to a country where there is a real risk of torture.

International refugee law also contains specific provisions concerning the treatment of refugees. The Convention relating to the Status of Refugee lays down basic minimum standards, without prejudice to States granting more favourable treatment, on issues such as access to the courts, to primary education and to work, as well as to documentation. The treatment of refugees may be included in the mandate of a field presence or the fact-finding activity and HROs should, therefore, be able to define the protection to which refugees are entitled in order to assess if there have been any violations.

Other persons who are in a similar situation to refugees but who fall under a different legal protection regime are internally displaced persons (IDPs), who are defined in the 1998 Guiding Principles on Internal Displacement as "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".


There are several differences between refugees and IDPs:

(a) IDPs are not protected by a specific international treaty. The Guiding Principles are not binding on States although they have been drawn from existing binding international human rights law and international humanitarian law;
(b) Unlike refugees, IDPs have not crossed an international border but have sought refuge in another part of their own country;
(c) The definition of IDPs in the Guiding Principles uses a broader approach to reasons for fleeing than the equivalent definition of refugees, in that it includes those displaced by armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters.

Some mandates, for example that of MONUSCO, make specific reference to refugee law, requiring HROs to understand this body of international law and integrate its provisions in their monitoring activities. When monitoring violations against refugees and IDPs, international refugee law and the Guiding Principles respectively will provide an important framework in addition to international human rights law and, if there is an armed conflict, international humanitarian law.[19]

J. National legislation

Most State constitutions enshrine human rights principles with additional legislation, policies and procedures giving force and effect to these principles. Some constitutions incorporate economic, social and cultural rights as enforceable rights while others refer to such rights as principles of State policy. The constitutions of some States, especially those with a civil law system, include provisions that make all treaties ratified by the State (including any international human rights treaties) directly applicable in the national legal system without the need for any enabling legislation. In some legal systems the constitution provides that, if the national law is in conflict with the international treaty, the provisions of the treaty shall prevail. The constitutions and laws of some countries may be more protective of human rights than international law and, in such cases, HROs should use the applicable standards that are the most protective, be they international, national or local.

In determining whether the violations that form the subject matter of the human rights monitoring or fact-finding constitute breaches of both international treaties and national laws, it is imperative to examine the constitution and other pertinent laws. It may also be necessary to scrutinize subsidiary laws and official policies, directives and procedures. Such scrutiny may also reveal the existence of official orders or policies that may link senior political, military and security officials to the human rights violations.

Often an incident or event that constitutes a human rights violation, for example an unlawful killing, may also constitute a crime in national law. On the other hand, national legislation may be silent regarding remedies for breaches of certain human rights, especially economic, social and cultural rights.

19 Both refugees and IDPs are entitled to protection as civilians under international humanitarian law, which also prohibits compelling civilians to leave their places of residence unless their security or imperative military reasons so demand (Protocol II, art. 17). However, refugees receive special protection under international humanitarian law, which recognizes their vulnerability as aliens in the hands of a party to the conflict and the absence of protection by their State of nationality (see Fourth Geneva Convention, arts. 35–46).

K. Conclusion

Defining and understanding the legal rules provides the framework for any monitoring, fact-finding or investigation. The mandate or terms of reference of some information-gathering activities may already refer to the applicable body of law, but in other instances the team conducting the activities will have to decide whether, besides international human rights law, there are any additional bodies of law that are relevant, and whether the monitoring, fact-finding or investigation includes reference to international criminal law.

Defining the legal framework will not only assist with the gathering of information, but will also provide guidance to the ongoing and final analysis of that information.


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HR/P/PT/7/Rev.1

MANUAL ON human rights MONITORING

This chapter forms part of the revised *Manual on Human Rights Monitoring*. Following the success of its first edition, published in 2001, the Office of the United Nations High Commissioner for Human Rights has updated and restructured the *Manual*, to provide the latest and most relevant good practices for the conduct of monitoring work by human rights officers, under the approach developed and implemented by the Office.

The revised *Manual* provides practical guidance for those involved in the specialized work of human rights monitoring, particularly in United Nations field operations. This publication comprehensively addresses all phases of the human rights monitoring cycle, setting out professional standards for the effective performance of the monitoring function. It also outlines strategies to maximize the contribution of monitoring to the protection of human rights.

While each chapter has been made available separately, linkages with other chapters are highlighted throughout. A full reading of the *Manual* is thus recommended for a comprehensive understanding of human rights monitoring.

This tool has been tailored to the everyday needs of United Nations human rights officers in the field. The methodology it sets out would, nonetheless, be of equal relevance to others tasked with human rights monitoring functions. Its wider use and application by regional organizations, national human rights institutions, non-governmental organizations, relevant governmental bodies and others is strongly encouraged.






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