



International Human Rights Law & The Administration of Justice: Issues & Challenges

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1. Principles of International Human Rights Law

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1. Principles of International Human Rights Law

Obligations of States

**UN Charter: Chapter I, Purposes and Principles,
Article 1, paragraph. 3:**

"...in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion..."

Nairobi Declaration *(24 October 2008)*

"The State has the primary responsibility to ensure that the administration of justice is in full compliance with both international and domestic human rights obligations."

1. Principles of International Human Rights Law

Inalienability:

“All human beings are born free and equal in dignity and rights” (UDHR, Article 1)

*“...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...”
(UDHR, ICCPR & ICESCR Preamble)*



1. Principles of International Human Rights Law

*Vienna World Conference on Human Rights
June 1993*

Universality:

‘All human rights are universal’

‘it is the duty of States, **regardless of their political, economic and cultural systems**, to promote and protect all human rights and fundamental freedoms’

*Norms of customary international law – universal protection
(e.g. the prohibition on torture).*

1. Principles of International Human Rights Law

Vienna World Conference on Human Rights 1993

Indivisibility:

‘The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis’.

Interdependence:

The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affects the others.

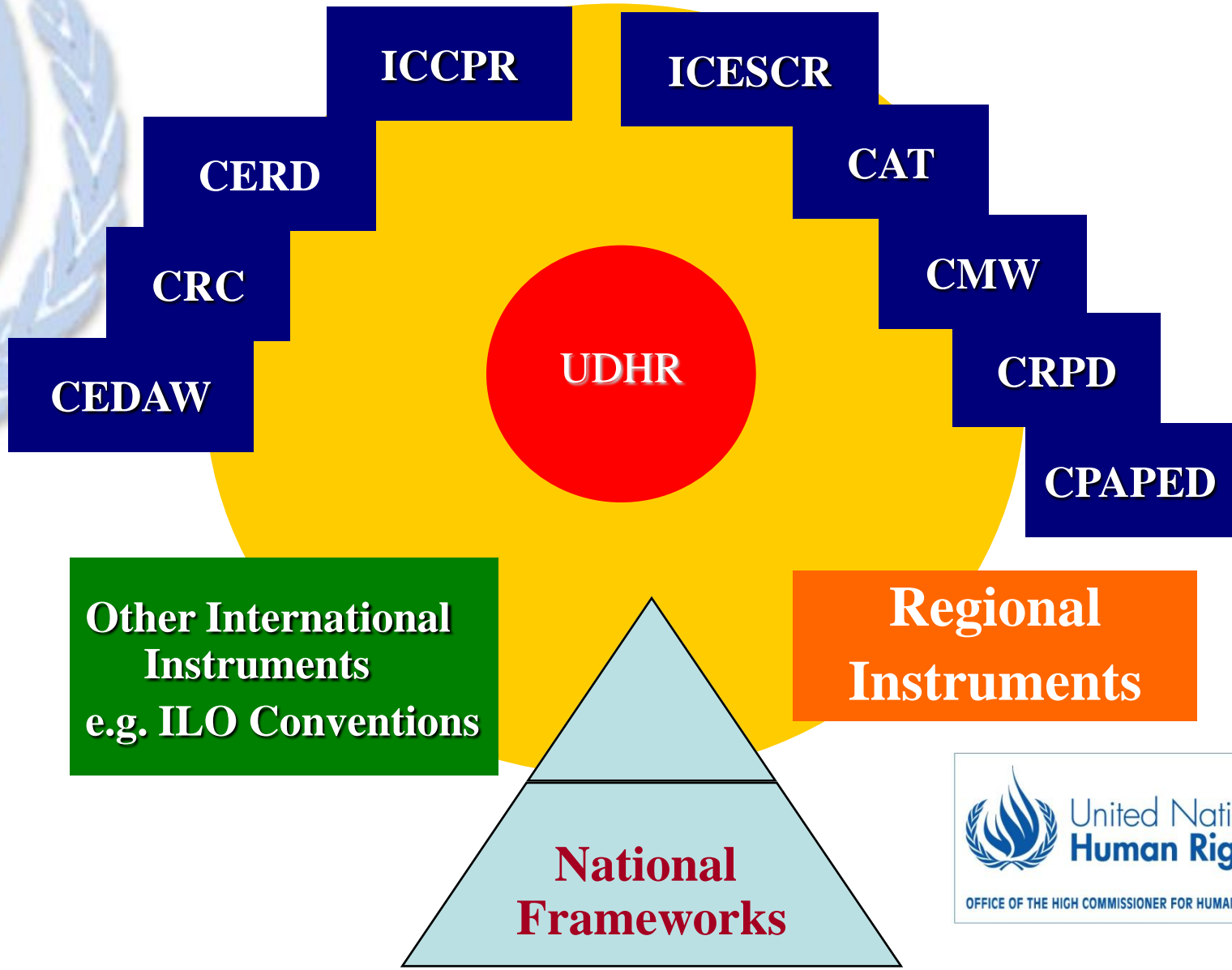
1. Principles of International Human Rights Law

Non-Discrimination and Equality

“Everyone is entitled to all the rights and freedoms....., 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”
(Art. 2 of UDHR)

The principle of equality complements the principle of non-discrimination.

2. Instruments of International Human Rights Law



2. Instruments of International Human Rights Law

1. International Convention on the Elimination of All Forms of Racial Discrimination
2. International Covenant on Civil and Political Rights
3. International Covenant on Economic, Social and Cultural Rights
4. **Convention on the Elimination of All Forms of Discrimination against Women**
5. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
6. **Convention on the Rights of the Child**
7. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
8. Convention on the Rights of Persons with Disabilities
9. International Convention for the Protection of All Persons from Enforced Disappearance

3. UN GA & HRC Resolutions on Human Rights and the Administration of Justice

General Assembly Resolution on ‘Human rights in the administration of justice’ [A/RES/56/161, 20 February 2002]:

- Reaffirmed the importance of the **full and effective implementation of all United Nations standards on human rights in the administration of justice;**
- Reiterated its call to all Member States to **spare no effort in providing for effective legislative and other mechanisms and procedures, as well as adequate resources,** to ensure the full implementation of those standards;

3. UN GA & HRC Resolutions on Human Rights and the Administration of Justice

- **Invited Governments to provide training, including gender-sensitive training, in human rights in the administration of justice, including juvenile justice, to all judges, lawyers, prosecutors, social workers, immigration and police officers, and.....;**
- **Invited States to make use of technical assistance offered by the relevant United Nations programmes in order to strengthen national capacities and infrastructures in the field of the administration of justice;**
- **Appealed to Governments to include in their national development plans the administration of justice as an integral part of the development process and.....**

3. UN GA & HRC Resolutions on Human Rights and the Administration of Justice

HR Council Resolution 10/2 (2009): Human rights in the administration of justice, in particular juvenile justice

Reaffirmed the importance of the full and effective implementation of all United Nations standards on human rights in the administration of justice;

Called upon Member States to spare no effort in providing for effective legislative, judicial, social, educative and other relevant mechanisms and procedures, as well as adequate resources, to ensure the full implementation of those standards, and invites them to take into consideration the issue of human rights in the administration of justice in UPR;

3. UN GA & HRC Resolutions on Human Rights and the Administration of Justice

- **Stressed the need for national capacity-building in the field of the administration of justice, in particular to establish and maintain stable societies and the rule of law, through reform of the judiciary, the police and the penal system [...] training, including anti-racist, multicultural and gender-sensitive and child rights training, in human rights in the administration of justice, including juvenile justice...for all professionals working in the field of administration of justice.**

4. The Three-Pillar Strategy

HUMAN RIGHTS MECHANISMS

Treaty-based

CESCR

HRC

CERD

CEDAW

CAT

CRC

CMW

CRPD

Charter-based

Human Rights Council

Special Procedures

UPR

4. The Three-Pillar Strategy

Treaty Bodies:

Treaty bodies monitor and facilitate the implementation of the treaties through:

- Reviewing **State Party & Alternative Reports**
- Adopting **Observations & Recommendations**
- Adopting **General Comments** on HR Standards contained in the treaty
- Examining **individual complaints** (*e.g. OP1 of the ICCPR*)

4. The Three-Pillar Strategy

Special Procedures:

- **Independent experts (country & thematic)**
 - **Country visits**
 - **Reporting (*e.g thematic studies*)**
 - **Communication to Member States**

4. The Three-Pillar Strategy

Universal Periodic Review:

Principles:

- **Universal coverage**
- **Review of all human rights**
- **Conducted in an objective, transparent, non-selective, constructive, non-confrontational and non-politicised manner**
- **Cooperative mechanism based on objective and reliable information**
- **Intergovernmental process**

4. The Three-Pillar Strategy

UPR: Malaysia's support to the recommendations:

- *‘Pursue the ongoing reforms aimed at restoring **public confidence in the judiciary**’*
- *‘Continue its **judicial reforms**, including by strengthening the independence of the Judiciary’*
- *‘Continue with the positive steps it has taken in the **implementation of the Bangalore Principles of Judicial Conduct**’*
- *‘Provide and improve **training programmes on human rights for the judiciary, law enforcement personnel and lawyers**’ [A/HRC/11/30, 3 March 2009]*

5. International Human Rights Instruments to which Malaysia is a State Party

1. Convention on the Rights of the Child (*Acceded 17 Feb 1995*)

Four principles – guiding values:

1. non-discrimination (art 2)
2. best interests of the child (art 3)
3. right to life, survival and development (art 6)
4. due weight to the views of a child (art 12)

[Committee on the Rights of the Child, General Comment No 7: Implementing Child Rights in Early Childhood, UN Doc CRC/C/GC/7, 1 November 2005].

5. International Human Rights Instruments to which Malaysia is a State Party

2. Convention on the Elimination of All Forms of Discrimination against Women (*Acceded 5 July 1995*)

CEDAW provides a **broad definition of discrimination**:

‘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 1*)

5. International Human Rights Instruments to which Malaysia is a State Party

CEDAW also imposes specific obligations on states parties regarding:

- trafficking, forced prostitution (art 6)
- the right to equal participation (arts 7-8)
- equality in rights to nationality and education, employment, health services and other similar areas (arts 9-13)
- problems peculiar to women in rural areas (art 14)
- equality before the law and in relation to marriage and family (arts 15-16).

5. International Human Rights Instruments to which Malaysia is a State Party

With respect to Malaysia, the CEDAW Committee

- Expressed its concern that the *provisions of CEDAW were not widely known by judges, lawyers and prosecutors.*

[CEDAW/C/MYS/CO/2, concluding comments, para 11].

- Stated that *gender-sensitive training* of judicial and law enforcement officers and other public officials *is essential for the effective implementation of the Convention* (CEDAW General Recommendation No. 19, para 24(b)).

5. International Human Rights Instruments to which Malaysia is a State Party

With respect to Malaysia,

- The CEDAW Committee has reflected that *‘women are excluded* from top-ranking positions in cabinets, the civil service and in public administration, in the judiciary and in justice systems’ (CEDAW, *General Recommendation No. 23 para 30*).
- The CEDAW Committee recently expressed its concerns that *CEDAW was not yet part of Malaysian law* and thus its provisions were not enforceable in domestic courts (CEDAW/C/MYS/CO/2, *concluding comments, para 8*).

6. IHRL & Judicial Administration

- **Courts may apply human rights standards through:**
 - » **Constitutional interpretation**
 - » **Development of the common law**
 - » **Judicial review of administrative decisions**
 - » **Judicial discretion**
 - » **Statutory interpretation**

6. IHRL & Judicial Administration

Bangkok Declaration

Judicial Colloquium on the Domestic Application of International Human Rights Norms’ – Outcome Document
(Adopted 25 March 2009 at Bangkok, Thailand)

The judiciaries should **consider referring, where pertinent, to the jurisprudence of the UN human rights treaty bodies and of the regional human rights mechanisms....;**

Where lacunae in the domestic law are identified, the judiciary should, **as far as possible, resort to interpretations consistent with principles of international law and customary international law, as well as the meaning of international instruments, as interpreted and applied by the UN human rights treaty bodies;**

6. IHRL & Judicial Administration

Where domestic laws or principles prevail over international law and thereby prevent the judiciary from applying international standards - where for instance such norms are expressed as non-justiciable in the domestic legal order or where domestic law which is inconsistent binds the judiciary – such **inconsistency should be highlighted in the judgments;**

Members of the judiciary should **meet with each other on a regular basis to exchange best practices and developments** in these areas, with a view to achieving approaches consistent with international human rights standards.

6. IHRL & Judicial Administration

Bangalore Principles of Judicial Conduct (2002)

(The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, 25-6 November, 2002)

- The Bangalore Principles set out a number of principles intended to establish standards for ethical conduct of judges, vis.: Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence.
- The recommendation in the Bangkok Declaration that judges resort to constitutional and statutory interpretations that are consistent with international law where they face lacunae in the law is underscored by the Bangalore Principles. In particular, the Bangalore Principles provide that:
“A judge shall keep himself or herself informed about relevant developments of international law, including international conventions and other instruments establishing human rights norms.” (para 6.4)

6. IHRL & Judicial Administration

Constitutional interpretation

e.g. Gender Equality - *Vishaka*

Vishaka & Ors v State of Rajasthan & Ors (1997)

6 SCC 24 (1998) – Indian Supreme Court

‘**Any international convention** not inconsistent with the fundamental rights guaranteed in the Constitution and in harmony with its spirit **must be used to construe the meaning and content of the constitutional guarantee and to promote its object**; this is now an accepted rule of judicial construction’.

The Court used CEDAW and the General Recommendations of the CEDAW Committee to construe the nature and ambit of the gender equality guarantee in the Indian Constitution.

6. IHRL & Judicial Administration

Constitutional interpretation

e.g. Inhuman or degrading punishment – *The State v. Ncube*
Zimbabwe Supreme Court, Zimb.

L. Rep. 246, 1988.

Challenge to the constitutionality of a judicial whipping imposed upon a male offender above the age of nineteen years

Whipping was ‘**contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency**’.

6. IHRL & Judicial Administration

Development of the Common Law

e.g. Rights of indigenous peoples – *Mabo v Queensland [No 2]*,
High Court of Australia (1992 175 CLR 1)

Changed the common law of Australia by recognising indigenous peoples' native title to traditional lands.

'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights'.

International human rights instruments (ICCPR-OP1) were a **'powerful influence'** on the common law.

6. IHRL & Judicial Administration

Judicial Review of Administrative Decisions

e.g. Legitimate expectations – *Teoh* (1995)
183 CLR 273

‘**ratification** of a convention is a **positive statement** ... to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention... That ... is an adequate foundation for a **legitimate expectation**... that administrative decision-makers will act in conformity with the Convention’.

6. IHRL & Judicial Administration

Judicial Discretion

- The ability of judges to exercise their discretion is an **important aspect of judicial independence** as per the doctrine of the **separation of powers**.
- In making use of IHRL in their work, judges may exercise their discretion in relation to **court procedure and process**, particularly in regard to **standing** and **procedure**.
- **Judges are State actors and thus have human rights obligations.** In many cases, **IHRL imposes a clear legal obligation on the court** to ensure the full enjoyment of procedural rights by claimants.

6. IHRL & Judicial Administration

Judicial Discretion

- The court has broad discretion to **grant the right to act as *amicus curiae*** and to **admit the information submitted**.
- Submissions by human rights non-governmental organisations (NGOs), such as non-profit legal associations and others on a **point of law** or some other aspect of the case may assist the court in deciding a matter before it, in particular by **emphasising the relevance of IHRL** to the matter at hand.
- Admitting the submissions of *amicus* groups may be of particular importance in terms of **introducing new concerns**, including human rights concerns where a case may have broad legal effects or other implications.

6. IHRL & Judicial Administration

Judicial Discretion

e.g. Sentencing – *R v Toggias* Australia (2001)
127 A Crim R 23, [85], [179].

Review of a custodial sentence of a mother with a young child.

The **Convention on the Rights of the Child** informed the Court's consideration of the probable effects of a sentence on the family and dependents of a person.

A key argument raised by counsel was that the imprisonment would separate the child and mother.

6. IHRL & Judicial Administration

Statutory Interpretation

e.g. the best interests of the child – *Teoh*

Minister for Immigration and Ethnic Affairs v Teoh (1995)
High Court of Australia 183 CLR 273

Whether children born in Australia to a Malaysian national facing deportation had the right to a father under the Convention on the Rights of the Child.

‘Where a statute... is ambiguous, the **courts should favour that construction which accords with Australia’s obligations under a treaty to which Australia is a party**, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument’.

7. Challenges

- **Low rate of ratification of core human rights treaties.**
- **Harmonisation of national domestic laws with international human rights norms.**
- **National customary law versus international human rights standards.**



THANK YOU