

Lesson Plan Overview

Course	Asylum Officer Basic Training
Lesson	<i>International Human Rights Law</i>
Lesson Description	This lesson provides background information on the sources of international law and its relationship with U.S. domestic law and describes many international human rights instruments. Through reviewing the instruments and discussion, the trainees will have a strong understanding of how international human rights law plays a role in asylum adjudications.
Field Performance Objective	Given a request for asylum to adjudicate, the asylum officer will correctly refer to international human rights law and principles, in appropriate circumstances.
Academy Training Performance Objective	Given written questions or a roleplay request for asylum to adjudicate, the trainee will correctly identify the appropriate circumstances under which to refer to international human rights law and principles.
Interim (Training) Performance Objectives	<ol style="list-style-type: none"> 1. Identify the sources of international law. 2. Identify the circumstances under which international law may be used in asylum adjudications. 3. Identify core human rights established by the international community.
Instructional Methods	Lecture, class discussion, practical exercises
Student Materials/References	Participant Workbook
Method of Evaluation	Written test
Background Reading	<ol style="list-style-type: none"> 1. United Nations. <i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>. G.A. Res. 39/46, U.N. GAOR, Dec. 10, 1984. (attached) 2. United Nations. <i>Convention on the Elimination of All Forms of Discrimination against Women</i>. G.A. Res. 34/180, U.N. GAOR, Dec. 18, 1979. (attached) 3. United Nations. <i>International Covenant on Civil and Political Rights</i>. GA Res. 2200A (XXI), UN GAOR, Dec. 16, 1966. (attached) 4. United Nations. <i>International Covenant on Economic, Social, and Cultural Rights</i>. G.A. Res. 2200A (XXI), UN GAOR, Dec. 16, 1966.

(attached)

5. United Nations. [*Universal Declaration of Human Rights*](#). G.A. Res. 217(a)(III), U.N. GAOR, Dec. 10, 1948. (attached)

CRITICAL TASKS

SOURCE: Asylum Officer Validation of Basic Training Final Report (Phase One), Oct. 2001

Task/ Skill #	Task Description
001	Read and apply all relevant laws, regulations, procedures, and policy guidance.
SS 08	Ability to read and interpret statutes, precedent decisions and regulations.
SS 19	Maintain current working knowledge of relevant laws, regulations, procedures, policies, and country conditions information.

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Presentation

I. INTRODUCTION

Recognizing the importance of international law in the context of asylum adjudication, the Attorney General has mandated through regulation that all asylum officers be instructed in international human rights law. The purpose of this lesson is to explain the role of international human rights law in asylum adjudication, sources of international law, and the relation between international law and United States law. Additionally, this lesson will provide an overview of the international instruments pertaining to human rights law and humanitarian law, as well as the rights protected by those instruments.

While this lesson discusses many of the specific human rights protected by international law, focusing on those that most often arise in the asylum context, students do not need to memorize each specific right protected by international law. Rather, students should become familiar with the types of human rights that are protected and the international instruments in which they are set forth, for future reference.

II. RELEVANCE OF INTERNATIONAL LAW TO ASYLUM ADJUDICATION

Modern asylum law in the United States is rooted in international treaty. In 1968, the United States acceded to the *1967 United Nations Protocol Relating to the Status of Refugees (1967 Protocol)*, which incorporates the *1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention)*. The fundamental treaty obligation pertaining to the protection of refugees is Article 33 of the *Refugee Convention*, which prohibits the *refoulement* (return) of a refugee to a country where the refugee would be persecuted.

Because the U.S. statutory provisions regarding asylum and withholding of removal are based on international law, the Supreme Court, other federal courts, and the BIA have all recognized that it may be appropriate to consider international law when adjudicating requests for asylum and withholding of removal. This includes consideration of guidance provided by the UNHCR, whose mandate includes supervision of the application of international conventions relating to the protection of refugees.

Reference to international law may assist in determining whether an applicant meets the definition of refugee, if there is no United States law addressing the specific legal issue at hand. In particular,

References

OH #1 Objectives

[8 C.F.R. § 208.1\(b\)](#)

International law regarding the protection of refugees is mentioned only in brief at the end of this lesson, because it is discussed in greater detail in the lesson [Introduction to the United Nations High Commissioner for Refugees and Concepts of International Protection](#).

OH #2 Relevance of International Law to Asylum Adjudication

Article 33 of [the Refugee Convention](#) is often referred to as the “non-refoulement” provision.

Instructor Note #1

Just a few examples include, [Cardoza-Fonseca](#), 480 U.S. 421, 107 S.Ct. 1207 (1987); [Perkovic v. INS](#), 33 F.3d 615 (6th Cir. 1994); [Aguirre-Aguirre v. INS](#), 121 F.3d 521 (9th Cir. 1997); [Matter of Acosta](#), 19 I&N Dec. 211 (BIA 1985).

Instructor Note #2

international human rights and humanitarian law may provide guidance in evaluating whether particular acts constitute persecution (serious human rights violations); whether punishment for a particular crime constitutes persecution or legitimate prosecution; and whether a crime is considered “political.” International humanitarian law (the law of armed conflict) may provide guidance in the determination of whether an act is a legitimate act of war or is persecution. Asylum officers should, however, first look to United States law for guidance before evaluating the claim solely upon international law or obligations.

Guidance from the UNHCR includes the [Handbook of Procedures and Criteria for Determining Refugee Status](#), advisory opinions on specific cases and issues, and UNHCR Executive Committee Conclusions.

III. SOURCES OF INTERNATIONAL LAW

A. Treaties

Treaties are agreements made between countries. Treaties may be made between several nations (multilateral) or two nations (bilateral). Every treaty in force is binding upon the parties to it and must be performed by them in good faith. After a treaty is signed, it generally does not go into effect immediately, but may need to be ratified by a legislative branch of a country’s government, depending on the laws of the country. Countries may make declarations, understandings, or reservations that may limit their application of the treaty.

OH #3 Sources of International Law

[U.S. Const. Art. II § 2](#)

The Constitution of the United States provides that, with the advice and consent of two-thirds of the Senate (ratification), the President has the authority to enter into treaties with other nations.

Treaties that are not "self-executing" require implementing legislation to be enforceable by a private party in courts.

Instructor Note #3

B. Customary International Law

1. Nature of customary international law

Customary international law consists of principles that nations acknowledge as binding legal norms, in the absence of a treaty or other legal obligation.

2. Sources of customary international law

- a. the customs and practices that nations actually observe, to the extent that these practices flow from a sense of international legal obligation

OH #4 Sources of Customary International Law

[The Paquete Habana](#), 175

- b. general principles widely recognized as law by civilized nations, even if these principles are not always observed in practice
 - c. decisions of national and international courts in cases involving international legal issues
 - d. the writings of scholars and other "most highly qualified publicists"
3. Declarations and resolutions

U.S. 677, 700 (1900);
[Statute of the International Court of Justice, Art. 38\(1\)](#),
 59 Stat. 1031, 1060 (1945)

Declarations and resolutions made by inter-governmental bodies are not binding law. However, they may be evidence of customary international law, which is binding.

OH #3 Sources of International Law

IV. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND U.S. DOMESTIC LAW

The United States Constitution provides that treaties, along with the U.S. Constitution and statutes, are part of the "supreme law" of the United States.

[U.S. Const. Art. VI](#)

Customary international law is also part of United States law, where there is no treaty, controlling executive or legislative act, or precedent judicial decision that conflicts with the customary law.

[The Paquete Habana](#), 175 U.S. 677, 700 (1900);
[Matter of Medina](#), 19 I&N Dec. 734 (BIA 1988)

United States Courts are bound to construe U.S. statutes as consistent with the United States' international obligations whenever possible.

[The Charming Betsy](#), 6 U.S. 14 (1804)

Whenever a state becomes party to a treaty, it has the right to make known its reservations on particular articles of the document. For example, the United States issued reservations upon ratification of the *International Covenant on Civil and Political Rights*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment*.

V. INTERNATIONAL HUMAN RIGHTS LAW

There are many differences between cultures regarding the weight accorded to individual rights, as well as differences in the balance between state or community rights and individual rights. However, the international community has agreed that there are certain human rights and freedoms so fundamental to human dignity that states have entered into agreements to respect those rights.

The *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) are the three most important international instruments pertaining to human rights and are collectively known as the International Bill of Human Rights.

OH #5 International Bill of Human Rights

A. Universal Declaration of Human Rights

1. Background

The drafting and acceptance of *the Universal Declaration of Human Rights* was spearheaded by Eleanor Roosevelt in the aftermath of WWII. The Universal Declaration is not a treaty. The United States, as the lead drafting country voted for it when the United Nations General Assembly adopted and proclaimed the Declaration by resolution on December 10, 1948.

2. Legal force

Many scholars have asserted that all of the rights enumerated in the *Universal Declaration of Human Rights* have become customary international law:

The Universal Declaration remains the primary source of global human rights standards, and its recognition as a source of rights and law by states throughout the world distinguishes it from conventional obligations. Virtually every international instrument concerned with human rights contains at least a preambular reference to the Universal Declaration, as do many declarations adopted unanimously or by consensus by the U.N. General Assembly.

Hurst Hannum. [“The Status of the Universal Declaration of Human Rights in National and International Law.”](#) 25 Georgia Journal of International and Comparative Law 290 (1995/1996). Hannum, Associate Professor of International Law, The Fletcher School of Law and Diplomacy, Tufts University, wrote this article based on a report he prepared as Rapporteur of the Committee on the Enforcement of International Human Rights Law of the International Law Association.

Nevertheless, others have argued that, while certain of the rights identified in the Universal Declaration may constitute customary norms, other rights, especially certain economic and cultural rights, have not achieved this same

See e.g., [Restatement of the Foreign Relations Law of the United States \(Third\)](#) § 701, Reporters’ Notes 4-6 (1987)

status.

3. Right to seek asylum

Article 14 of the Declaration provides:

- a. "Everyone has the right to seek and to enjoy in other countries asylum from persecution."
- b. "This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

While this provision states that individuals have the right to seek and enjoy asylum, it has not been interpreted to mean that everyone has the right to be granted asylum. Article 14 was carefully worded to protect the sovereign right to control the entry of aliens into a state's territory.

OH #6 Universal Declaration of Human Rights – Article 14

See, Martin, "Refugees and Migration," United Nations Legal Order, Vol. 1, Schachter and Joyner, eds. (Cambridge: Cambridge University Press 1995).

Instructor's Note #4

4. Expansion and implementation

The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which were opened for signature in 1966, are the treaties that implement and expand on protection of the rights set forth in the *Universal Declaration of Human Rights*. On October 5, 1977 the United States signed both the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*, and ratified the latter on June 8, 1992.

Instructor's Note #5

B. International Covenant on Civil and Political Rights (ICCPR) (16 December 1966)

The ICCPR proscribes certain conduct by the state in order to protect civil and political rights of individuals or groups of individuals. Some of the rights that often arise in the context of asylum adjudication and that are protected by this Covenant are discussed below.

It should be noted that not all human rights violations constitute persecution. Some of the human rights violations listed below would in themselves constitute persecution. Others, when considered along with other factors or cumulatively might

This is discussed in lesson, [Eligibility Part I: Definition of Refugee; Definition of Persecution; Eligibility Based on Past Persecution](#)

constitute persecution.

1. Non-derogable rights

Certain rights are deemed to be so important that they must be protected under all circumstances, even in time of public emergency that threatens the life of the nation. No derogation is permitted from the following rights:

- a. the right not to be arbitrarily deprived of life (Art. 6)
- b. the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, or to be subjected, without free consent, to medical or scientific experimentation (Art. 7)
- c. the right not to be held in servitude or slavery (Art. 8, paras. 1 and 2)
- d. the right not to be imprisoned merely on the ground of inability to fulfill a contractual obligation (Art. 11)
- e. the right not to be convicted of an offense on account of an act or omission which did not constitute a criminal offense, under national or international law, at the time it was committed (Art. 15)
- f. the right to the recognition as a person before the law (Art. 16)
- g. the right to freedom of thought, conscience, and religion, including (Art. 18)
 - (i) the right to have or adopt a religion of one's choice and freedom, either individually or in community with others and in public or private, to manifest a religious belief in worship observance, practice, and teaching; and
 - (ii) the right not to be subject to coercion that would impair freedom to have or adopt a religion or belief of one's choice.

OH #7 Core Rights

[International Covenant on Civil and Political Rights \(ICCPR\)](#) (16 December 1966)(Art. 4); *See also*, James C. Hathaway, *The Law of Refugee Status*, (Toronto: Butterworths, 1992), page 109. Explain derogation clause (Art. 4).

Instructor's Note #6

See, lesson, [International Religious Freedom Act](#) for further discussion of the right to freedom of thought, conscience, and religion and in what instances violations of that right may be considered persecution.

2. Rights relating to arrest (Art. 9)

- a. An arrest or detention cannot be arbitrary, and any deprivation of liberty must be in accordance with

OH #8 Rights Relating to Arrest

established law and procedures.

- b. At the time of arrest, the person arrested must be informed of the reasons for the arrest and promptly informed of any charges against him or her.
- c. A person arrested on criminal charges must be brought promptly before an official authorized by law to exercise judicial power and shall be entitled to trial within reasonable time.
- d. Anyone deprived of liberty by arrest or detention is entitled to take proceedings before a court to decide, without delay, on the lawfulness of the detention and to order the individual's release, if the detention is unlawful.

3. Rights relating to custody (Art. 10)

OH #9 Rights Relating to Custody

- a. A person deprived of liberty must be treated with humanity and respect for the inherent dignity of the human person.
- b. Accused individuals must be segregated from convicted individuals (barring exceptional circumstances).
- c. Juveniles must be separated from adults, accorded treatment appropriate to their age and legal status, and brought as speedily as possible for adjudication.

4. Rights relating to trial (Art. 14)

OH #10 Rights Relating to Trial

- a. All persons shall be equal before courts and tribunals.
- b. In the determination of any criminal charges against an individual, an individual must be given a fair and public hearing by a competent, independent and impartial tribunal established by law (note, however, that there are many exceptions listed as to when the public may be barred from the hearing).
- c. An individual charged with a criminal offense has the right to be presumed innocent until proven guilty.
- d. There are minimum guarantees of due process accorded an individual charged with a crime,

including the right to be clearly informed of the charges; to have time to prepare a defense; to be tried without undue delay; to be present at the trial; to defend oneself; to have legal counsel; to examine witnesses; to have a free assistance of an interpreter, if needed; and not to be compelled to testify against oneself.

- e. Anyone convicted of a crime has the right to have the conviction and sentence reviewed by a higher court.
- f. No one shall be liable to be tried or punished again for an offense for which the individual has already been finally convicted or acquitted in accordance with the law and penal procedure of the convicting country.

5. Other rights which often arise in the asylum context

OH #11-12 Other Rights

- a. the right to be free to leave any country, including one's own and the right not to be arbitrarily deprived of the right to enter one's own country (Art. 12)
- b. freedom from arbitrary or unlawful interference with privacy, family, home, or correspondence (Art. 17)
- c. the right to hold opinions without interference and the right to freedom of expression (Art. 19)
- d. the right to peaceful assembly (Art. 21)
- e. the right to freedom of association with others, including the right to form and join trade unions (Art. 22)
- f. the right to marry and found a family (Art. 23)
- g. the right not to be forced to enter into marriage (Art. 23)
- h. the right to be protected from discrimination on account of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Art. 26)
- i. the right of minority groups to enjoy their own culture, to profess and practice their own religion, and to use their own language (Art. 27)

C. International Covenant on Economic, Social and Cultural Rights (ICESCR) (16 December 1966)

In contrast to the provisions in the *Covenant on Civil and Political Rights*, which require immediate compliance by State Parties, the provisions in the *Covenant on Economic, Social and Cultural Rights* are generally viewed as goals to which the State Parties aspire. Article 2 provides that the State Parties to the Covenant should undertake steps, to the maximum of available resources, to achieve progressively the full realization of the rights recognized by the Covenant. A few economic, social, and cultural rights are listed below as examples.

1. Examples of economic rights
 - a. the right to the enjoyment of just and favorable conditions or work, including fair wages and equal pay for equal work, and safe and healthy working conditions (Art. 7)
 - b. the right to an adequate standard of living, including food, clothing, and housing (Art. 11)
2. Examples of social rights
 - a. the right not to be forced into marriage (Art. 10)
 - b. educational rights (including free primary education and the progressive introduction of free higher education) (Art. 13)
3. Examples of cultural rights (Art. 15)
 - a. the right to take part in cultural life
 - b. the right to enjoy benefits of scientific progress and its application

D. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (27 June 1987)

OH #13 Convention against Torture

The United States became party to the Convention against Torture on October 21, 1994.

1. Definition of Torture

Article 1 defines torture for purposes of the Convention 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. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

2. State Parties' obligations

- a. to take effective legislative, administrative, judicial, or other measures to prevent acts of torture in any territory under its jurisdiction (Art. 2)
- b. not to expel, return, or extradite a person to another State where there are substantial grounds for believing that the person would be in danger of being subject to torture (Art. 3)
- c. to make torture a punishable offense; take into custody individuals who torture; and submit cases of torture to the proper authorities for prosecution (Arts. 4-7)

3. U.S. Ratification

The United States Senate ratified the *Convention against Torture* on October 27, 1990. The Senate Resolution consenting to ratification of the Convention offers a number of reservations and "understandings" regarding the United States' obligations under the Convention. President Clinton deposited the United States instrument of ratification with the United Nations Secretary General on October 21, 1994. The *Convention against Torture* became operable in the United States thirty days later, on November 20, 1994.

OH #14 Senate Resolution

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990). For discussion of how the definition of "torture" as modified by the U.S. "understandings," see lesson, [Reasonable Fear of Persecution and Torture Determinations](#).

4. No exceptions

The Convention provides, "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," nor may an order from a superior officer of public authority be invoked as justification. (Art. 2)

5. Non-return to country of torture

As noted above, Article 3 of the *Torture Convention* prohibits the expulsion, return, or extradition of a person to a country where there are substantial grounds for believing that the person would be in danger of being tortured. This provision is very similar to the *non-refoulement* obligation (Article 33) in the *1951 Convention relating to the Status of Refugees*, but with some important distinctions, as described below.

OH #15 Article 3 of the Torture Convention

- a. no requirement regarding government's motive for torture

Unlike the *non-refoulement* duty in the *Refugee Convention*, the *Torture Convention* does not require that the threat of torture be tied to any of the five grounds identified in the refugee definition, or any other ground.

- b. none of the bars to withholding apply

The *Torture Convention* contains no bars to protection based on criminal or terrorist conduct. For instance, an "aggravated felon" is not barred from obtaining protection under Art. 3, if the individual can establish that it is more likely than not that he or she would be tortured if deported to another country.

- c. standard of proof

The United States has adopted an important "understanding" of Article 3. The United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture" in Article 3 to mean "if it is more likely than not that he would be tortured."

136 Cong. Rec. at S17, 491-2 (daily ed. October 27, 1990).

Thus, the standard of proof required for protection under Article 3 is identical to the standard of proof required to obtain withholding of removal under section 241(b)(3) of the Immigration and Nationality Act (INA) (based on likelihood of persecution), and there is no protection offered based on past torture alone.

See lesson, *Termination of Asylum and Withholding of Removal*

- d. no ability to adjust to permanent residence

The United States' regulations implementing the *Convention against Torture* do not allow those individuals granted protection under Article 3 of the *Convention against Torture* to adjust their status to permanent residence. Furthermore, an individual granted such protection could be returned to his or her country of nationality at such time as the likelihood of torture is diminished.

6. Implementation

On October 21, 1998, President Clinton signed legislation that required the Department of Justice to promulgate regulations to implement the United States' obligations under Article 3 of the *Convention against Torture*, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution to ratify the Convention.

Section 2242(b) of the Foreign Affairs Reform and Restructuring Act of 1998 (Pub. L. 105-277). Prior to this, the INS considered requests for protection under Article 3 through an informal process, in which asylum officers conducted interviews and the INS Office of General Counsel made determinations on whether protection was required.

Pursuant to the statutory directive, the Department of Justice published an interim regulation that allows individuals to seek withholding of removal under the *Convention against Torture*.

[64 Fed. Reg. 8478](#) (February 19, 1999)

An individual must be granted withholding of removal under the *Convention against Torture* if it is more likely than not the individual would be tortured in the country to which the individual would be removed, and no mandatory bars to withholding apply (including conviction of an aggravated felony, persecution of others, terrorist activities.) Withholding of removal is country specific, which means the individual could be removed to a third country, so long as he or she would not be tortured there.

[8 C.F.R. § 208.16\(c\)](#) and [\(d\)](#) (1999)

An individual who cannot be granted withholding of removal because a mandatory bar applies must be granted deferral of removal if it is more likely than not the individual would be tortured in the country to which he or she has been ordered removed. Deferral of removal is more easily terminated than a grant of withholding of removal.

[8 C.F.R. § 208.17](#) (1999)

Asylum officers do not make decisions on eligibility for withholding or deferral of removal under the *Convention against Torture*. However, asylum officers are tasked with conducting a “reasonable fear of torture” screening in certain INS administrative removal cases. Those who are found to have a reasonable fear of torture are referred to an immigration judge to apply for withholding or deferral of removal under the *Convention against Torture*.

[8 C.F.R. § 208.31](#) (1999);
See, lesson, [Reasonable fear of Persecution and Torture Determinations](#)

E. Other UN Treaties Pertaining to Human Rights

1. *Convention on the Political Rights of Women* (31 March 1953) was signed by the United States on July 17, 1980 has not yet been ratified.
2. *International Convention on the Elimination of All Forms of Racial Discrimination* (21 December 1965) was signed by the United States on September 28, 1966 and was ratified on October 21, 1994.
3. *Convention on the Prevention and Punishment of the Crime of Genocide* (9 December 1948) was signed by the United States on December 11, 1948 and ratified on November 25, 1988.

OH #16 Human Rights Treaties

Note that the majority of UN member states have ratified these two conventions.

Genocide is defined in the Convention (Art. II) as any of the following acts "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group":

- 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;

For the purposes of determining inadmissibility, the INA adopts the definition of genocide as developed in the Convention.

[INA § 212\(a\)\(3\)\(E\)\(ii\)](#)

- d. imposing measures intended to prevent births within the group;
 - e. forcibly transferring children of the group to another group
4. [Convention on the Rights of the Child](#) (2 September 1990) was signed by the United States on February 16, 1995. The U.S. has not ratified this *Convention*.

F. Regional Treaties Pertaining to Human Rights

1. [American Convention on Human Rights](#) (22 November 1969)
2. [Banjul \[African\] Charter on Human and Peoples' Rights](#) (27 June 1981)
3. [Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms](#) (4 November 1950) and its Protocols

VI. INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICT

A. Application to Asylum Adjudication

Many asylum seekers have fled countries that are engaged in civil war. An understanding of international norms governing the conduct of combatants may assist the asylum officer in evaluating whether the harm an applicant has experienced in the context of warfare may be considered persecution or is harm incidental to armed conflict. Familiarity with international humanitarian law will also enable the asylum officer to determine whether applicants who served as combatants have taken actions that violate international law.

While humanitarian law may provide guidance in evaluating asylum eligibility, the BIA has held that neither the Fourth Geneva Convention nor customary international law provides potential relief from deportation that can be sought over and above that which is provided by the INA.

[Matter of Medina](#), 19 I&N 734 (BIA 1988)

B. Geneva Conventions of 1949, Protocol I and Protocol II

The most important international instruments governing conduct

during warfare are the Geneva Conventions of 1949. With the exception of Article 3 in each convention, the Geneva Conventions apply to international armed conflict, that is, war between two or more nations. The Protocols, however, apply to civil war and colonial domination.

1. The Four Conventions and the Protocols

OH #17 The 4 Geneva Conventions (1949)

- a. [Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field](#) (1949)
- b. [Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea](#) (1949)
- c. [Geneva Convention Relative to the Treatment of Prisoners of War](#) (1949)
- d. [Geneva Convention Relative to the Protection of Civilian Persons in Time of War](#) (1949)

- e. [Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts \(Protocol I\)](#) (1977).

OH #18 Protocols

Protocol I applies to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Art. 1, para. 4.

- f. [Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts \(Protocol II\)](#)(1977).

This protocol was signed by the U.S. and 101 other nations. President Reagan submitted it to the Senate on January 29, 1987, but it has not been ratified. [Matter of Medina](#), 19 I&N 734, 736, n. 3 (BIA 1988)

Protocol II expands on Article 3, common to all four of the Geneva Conventions, and applies to armed conflicts that take place in the territory of a 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 [the] protocol." Art. 1, para. 1

2. Article 3 of the four Geneva Conventions

OH# 19 Article 3 of the Geneva Conventions

More asylum seekers come from countries where the authorities are engaged in civil wars or some other form of internal strife than from countries involved in international armed conflict. Therefore, Article 3, which applies in the case of armed conflict not of an international character, is the most relevant to asylum adjudication.

The provisions governing conduct during armed conflict may provide guidance in evaluating whether the harm an applicant has experienced in the context of conflict constitutes persecution, as well as whether an applicant involved in armed conflict has engaged in persecutory activities or other activities warranting denial of the asylum request.

These issues will be discussed in lessons on eligibility.

Article 3 provides the following:

- a. 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 [out of 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.
- b. The following acts are prohibited with respect to the above-mentioned persons:
 - (i) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (ii) taking of hostages;
 - (iii) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (iv) 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.

- c. The wounded and sick shall be collected and cared for.

VII. INTERNATIONAL LAWS PERTAINING TO THE RIGHTS OF REFUGEES AND STATELESS PERSONS

Instruments pertaining to refugees and stateless persons, will be discussed in more detail in the lesson on the United Nations High Commissioner for Refugees. In this lesson, they are simply listed for future reference.

A. International Instruments

1. [*Convention relating to the Status of Refugees*](#) (28 July 1951)
2. [*Convention relating to the Status of Stateless Persons*](#) (28 September 1954)
3. [*Convention on the Reduction of Statelessness*](#) (30 August 1961)
4. [*Protocol relating to the Status of Refugees*](#) (31 January 1967)
5. [*U.N. Declaration on Territorial Asylum*](#) (14 December 1967)

B. Regional Instruments

1. [*Organization of African Unity \(OAU\) Convention Governing the Specific Aspects of Refugee Problems in Africa*](#) (10 September 1969)
2. [*Convention Determining the State Responsible for examining Applications for Asylum lodged in one of the Member States of the European Community*](#) (Dublin Convention) (19 August 1997)
3. [*Convention on Territorial Asylum*](#) (28 March 1954) (OAS)
4. [*Cartagena Declaration on Refugees*](#) (22 November 1984)

VIII. SUMMARY

A. Sources of International Law

OH #20 Summary A

International law is comprised of treaties and customary law. Customary international law consists of principles that nations acknowledge as binding legal norms, even without a treaty. Declarations and Resolutions are not binding law, but may be evidence of customary international law.

B. Relevance of International Law to Asylum Adjudication

OH #21 Summary B

Modern U.S. asylum law derives from international law and, in particular, the United States' obligations as a signatory to the 1967 Protocol relating to the Status of Refugees. International human rights law and humanitarian law may provide guidance in evaluating whether an applicant meets the definition of refugee.

Specifically, international law can provide guidance on whether harm constitutes persecution; whether a crime is "political" or criminal; and whether an act committed during armed conflict is a legitimate act of war or persecution.

C. Relationship between International Law and U.S. Domestic Law

OH #22 Summary C

Treaties are part of the "supreme law" of the land. Customary international law is part of United States law where it does not conflict with existing domestic laws.

D. International Bill of Human Rights

OH #23 Summary D

The International Bill of Human Rights includes the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR), and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). The ICCPR and ICESCR expand upon and implement the rights enumerated in the *Universal Declaration of Human Rights*.

1. The *Universal Declaration of Human Rights*

Many scholars agree that certain of the rights defined in the *Universal Declaration of Human Rights* have become customary international law.

2. *International Covenant on Civil and Political Rights*

The ICCPR proscribes certain conduct by states, such as extrajudicial execution and torture, and protects civil and political rights including those that pertain to expression, association, privacy, arrest, detention, and trial. Several of the rights protected in the ICCPR are considered so fundamental that States cannot derogate from their duty to protect them, even in times of public emergency.

3. *International Covenant on Economic, Social and Cultural Rights*

Provisions in the ICESCR are generally viewed as goals to which the State Parties aspire. The State Parties to the ICESCR agree to take steps to the maximum of available resources to guarantee rights regarding standards of living, employment, education, scientific and cultural rights, and certain social rights.

E. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

OH #24, #25, #26
Summary E

The Convention prohibits acts of torture under all circumstances, with no exceptions; requires State Parties to take effective measures to prevent torture within their territories and to punish those who have engaged in torture; and prohibits the return of an individual to a country where he or she will be tortured. For an act to constitute torture within the meaning of the treaty definition, the following elements must be met:

1. The act must be specifically intended to inflict severe physical or mental pain.
2. The purpose of the harm must be to obtain information or a confession from an individual or third person; punish, intimidate, or coerce an individual or third person; or discriminate against an individual for any reason.
3. The harm must be at the instigation of or with the acquiescence of a public official or someone acting in official capacity.

Torture does not include pain or suffering arising from lawful sanctions.

In contrast to the prohibition of return of a refugee to a country of persecution, the prohibition on returning an individual to a state where he or she will be tortured applies regardless of the motive for the torture and regardless of any reason for which a person would not be granted refugee protection.

F. International Humanitarian Law Applicable to Armed Conflict

OH #27 Summary F

The four Geneva Conventions and their two Protocols are the most important conventions governing conduct in the context of armed conflict. Article 3, which is common to all four conventions, governs armed conflicts not of an international character. Article 3 prohibits certain acts of violence against individuals who are not involved in the hostilities or have laid down their arms, and requires care for the sick and the wounded.