International Humanitarian Law

By Udai Yashvir Singh

3rd February

Nothing done

4th February

INTRODUCTION

1. HRs are generally rights which are present just because we are humans.
    a. We intuitively understand somethings to be HRs and some of them may be political ideas a swell.
2. HRs and their conceptions are relatively new, and the IHRL has been developed mostly after WWII. However, there have been tracing of such rights which a person gets predominantly just because he is a human being.
    a. So the term HRs is new, but ideas similar to these have been around for long.
        i. Like Magna Carta, American Decalration of Independence, etc.
        ii. But finally we have the idea of HR post WWII by the UN Charter and the UNDHR
    b. **HR is not something which are granted**, nothing is giving us HR. in HR we are saying that these present simply by the fact that you are a human.
3. The idea of IL initially was that the state is the subject of IL, and individuals were the objects of IL. So we intuitively understand that HR offer **protection from the state**. Normally, the domain of protection of citizens is part of domestic law.
    a. So the right of the state is sovereignty and the duty is non-interference. But HR does this interference to this principle of state sovereignty.
    b. HR also signify the transformation of state of individuals as subjects of international law after the WWII

The Philosophic Foundations of Human Rights – Shestack

1. Why should one be concerned about the philosophic foundations of International Human Rights Law
    a. Others say that Philosophy deepens our understanding of the Truth
    b. First, one's own attitudes towards IHRL are likely to be obscure till the time they understand the underlying philosophies behind them
    c. Second, if one understands IHRL, they are more amenable to the authority of IHRL
        i. This is useful since IHRL doesn't have a formal enforcement mechanism
    d. Third, philosophical understandings allow men and women to look beyond creed and dogma, which is necessary for universal recognition of IL principles.
        i. ***Ma'am-*** the understanding philosophies allows for universal recognition of HRs.

6th February

NATURE OF HR

1. *Human rights are a set of moral principles and their justification lies in the province of moral philosophy*

2. MEANING of HRs
    a. How people understand the menaing of HRs will influence one's judgment on such issues as:
        i. which rights are regarded as universal,
        ii. which should be given priority,
        iii. which can be overruled by other interests,
        iv. which call for international pressure
        v. Which can demand programmes for implementation
        vi. For which one will fight
3. **MAAM**- Why is it important to define Human Rights?
    a. Considering the fact that there is a lot of fragile implementation of HR. So if we are not very sure what is HR and how it is defined, then it is going to create more difficulties in terms of implementation.
    b. So the fragile implementation mechanisms and the shaky positivist undertones are the reasons to define HRs.
4. **Human Rights are the rights that Humans have simply because they are humans and independent of their social circumstances and degrees of merit.**
    a. Ma'am- This is the most general way of defining HRs i.e. the rights that we have simply by virtue of being a human. BUT there are problems in this way of defining HRs as follows:
        i. The first issue is that this definition does not provide that what specifically are these rights
        ii. The second issue is the question that whether such rights can be of a universal nature
        iii. The third issue is who determines that what these rights are
5. Shestack however says that it is not the other way around i.e. those who have these HRs are Humans. This conception might allow people like slaves to not be considered humans saying that they do not have human right. We are saying that because you are humans you have these rights.
6. The **FIRST** way of identifying these HRs is to conceive them as something which is important in nature or something which is moral in nature and something which is universal in nature.
    a. Once we say that HRs are something which is important, moral or universal, the issues with this conception is that:
        i. When one says that a right is "important" enough, one may be looking at the following qualities:
            1. intrinsic value;
                a. intrinsic means that the basic nature of the right is important irrespective of it benefits the right has.
            2. instrumental value;
                a. Instrumental value means that there is a value of the right which determined by what it is trying to achieve.
            3. value to a scheme of rights;
                a. Instead of looking at each right individually, we look at scheme of rights which are necessary to give value to a particular right. So what all rights would be important, for

lets say, individual dignity to give value to individual dignity. Such rights could be personal liberty, freedom of expression etc.

4. importance in not being outweighed by other considerations; or
5. importance as structural support for the system of the good life.

ii. "Universal" and "moral" are even more complicated words.

1. What makes certain rights universal, moral, and important,
2. who decides that these rights are universal, moral and important

7. The **SECOND** way of defining HRs is how Moral Philosophers define it. ***Intuitive Moral Philosophers*** say that definitions of HRs are futile because they involve moral judgments that must be self-evident. So HRs must be something which are self-evident, they must be something which we know to be intuitively to be a core. Thus we should not go ahead and explain it further that why this is an HR
    a. Other moral philosophers focus on the consequences of HR and their purpose. Prescriptivist School is concerned with what is actually achieved and not with what is sought to be achieved.
8. The **THIRD** way of defining HRs is for looking at how rights themselves have been defined. RIGHT – it has been used in different ways like
    a. Strict sense of the rightholder being ***entitled*** to something with a correlative duty
    b. ***Immunity*** from legal status being altered
    c. ***Privilege*** to do something
    d. ***Power*** to create legal relationships
    e. However, there are concerns in relation to defining HRs in this manner as well.
        i. If we define HR as ***an inalienable right***, what does it mean? Does it mean that a right to which no exceptions or limitations are there. OR does it mean a right where there is a special burden on the proponent of the limitation to justify the exercise of such limitation on the right OR is it a principle which one must follow till the time another principle which is weighty enough comes in.
        ii. If we define HR as a ***claim against the government*** to refrain from certain acts, then it becomes difficult to determine that what is the source of the claim
            1. If the claim is stemming from a metaphysical concept like nature of humanity or divine will, then the claims may be an immunity against which nothing can be done. Usually you make judgement as to the reasoning of why should something be done or not be done. But if the source is something meta-physical, you would have to comply with the claim and no normative judgment for its reasoning can be made
            2. If the claim is coming form interest like doing common good of the society, then also it becomes an issue to determine what is the common good of society
        iii. If we define HRs as ***privileges***, and we know that privielges need to be granted. So if privileges are granted by the state, then presumably the state is entitled to condition it. Even this is dependent upon the mroal strength of the right/privilege.

9. Other issues which may arise are whether HRs are aspirational goals or whether they can be realistically achieved?
    a. Shestack gives the example of the ICESCR which states rights like right to social security, health education, holidays with pay etc. So how may of thse rights can be achieved.
    b. FURTHER, if these are the rights, then on whom are the correlative duties imposed?
10. Shestack **concludes** by saying that a philosophical understanding of of nature of HR is not an academic exercise. Understanding the nature of the right can help in identifying:
    a. The degree of protection available
    b. The nature of derogations and exceptions
    c. The priorities to be afforded
    d. The hierarchical relationships in a series of rights
    e. Whether rights trump competing claims based on cultural rooting
        i. The answers to these will develop over time through legal ruling, interpretations, decisions etc BUT how the answers will emerge will be influenced by the moral justification of the HR in question

SOURCES OF HUMAN RIGHTS

Religion

1. Human rights is not a term which is used by any religion BUT still religion provides us with an idea that HR stem from a law higher than that of the state and whose source is the Supreme Being.
    a. If you as a human have been created by god, then you have some moral worth and every human being might be considered as sacred in religion. the state cannot take these away from you.
2. Further, most religions do not talk about rights but in terms of duty i.e. you as a human being have XYZ duties which you need to perform.
    a. Infact most religions put restrictions on the rights of certain sections of the society like women etc. So the question arises, that how far can we look at religion as a source of HRs.
    b. Thus we can see that there are serious incompatibilities between various religious practices and the scope of HRs.

10th February

Natural Law

1. Philosophers believed that natural law embodied those elementary principles of justice which were right reason i.e. in accordance with nature, unalterable and eternal.
    a. Unlike positivism, natural law is deriving the source from something higher than the state.
    b. A lot of natural law thinks came from theology and they conceptualized natural law as conferring certain immutable rights upon individuals as part of the law of God.
    c. However, slowly we starting becoming more secular and in out thoughts in relation to natural law. In this we have given a lot of emphasis to by Grotius and Pufendorf.

i. Grotius says that there is a human characteristic to live peacefully and in harmony with others. Whatever conforms to the nature of men and women as rational, social beings was right and just and whatever opposed it by disturbing the social harmony was wrong and unjust.
ii. Grotius defined natural law as a **dictate of right reason.** So natural law ideas a coming from the idea that we have this inherent right reason.
iii. He says that all states have inherent rights and obligations as states which is based on reason.
    1. If all states have these rights and obligations, then all states must be having this "reason" as well on which these rights and obligation are based. This implies that this "reason" is universal in nature.
    2. Thus since human rights are also based on this reason, they must be universal and uniform in character.

2. Natural law theory lead to **natural rights theory** and the NRT is the thory most closely related to modern human rights. NRT was expounded by John Locke.
    a. Locke imagined existence of human beings in the state of nature which was state where men and women were in a state of freedom and were able to determine their actions and were also in a state of equality in the sense that no oe subjected to anyone's will
    b. Locke said that to end the hazards and inconveniences of the state of nature, the people entered into a social contract by which they mutually agreed to form a community and set up a body politic. The people agreed to cede a few of their rights in favour of the state.
    c. However, even while setting up this political authority, individuals still retained their natural rights of life liberty and property.
    d. The state was obligated to protect the natural rights of its subjects and if the government neglected this obligation, it forefieted its validity and office.
    e. Ma'am- so natural law as can be seen also goes against state absolutism.
3. NRT makes an important contribution to HR as it appeals to the an higher authority for protection of human rights.
    a. NRT provides for security for human freedom and equality, from which other human rights can easily flow.
4. What are the challenges of the NRT?
    a. how to determine the norms that are to be considered as part of law of nature and are therefore inalienable
    b. In the state of nature, only life libertya dn property were needed to be self-dependent. However, is the NRT flexible to satisfy new claims based on contemporary conditions and modern human understanding.
        i. However this flexibility itself is a critique of NRT as rights that can be considered natural can vary from theorist to theorist depending upon their conceptions of nature.

Positivism

1. In both religion and natural law, we allude to a higher authority. So a priori is there. The crux of positivism is that we dent is priori being their. We say that there is no *a priori* source for rights, the rights are simply stemming from the prescription of the state.

2. The biggest debate between natural law and positivists is that if the law passed by the state is itself unjust, should we still follow it?
3. For a positivist, the law is what is prescribed by the state. It doesn't deal with what the law "ought to be"/ There can be nothing which can transcend this idea of prescription by the state.
4. Under a positivist theory, the source of HRs is found only in the enactments of the system of law with **sanctions** attached to it.
5. The criticism for the positivist theory was seen in the Nuremburg Trials where the people took the justification that we were doing things as per our constitution. Now if things were being done as per the constitution, how can the person acting in accordance of the same b guilty of a wrongful act.
    a. So the fact that positivist philosophy has been used to justify obedience to iniquitous laws is the central focus for much of the modern criticism of the positivist doctrine.
6. HOWEVER, positivist contribution to HRs is still significant.
    a. If state process can be used for protection of human rights, it becomes easier to focus upon the specific implementation that is necessary for protection of the HRs
    b. Further, since a positivist system is always under human control, it offers flexibility to meet changing needs
7. The concern that still remains is that for positivists, state is supreme. And thus from an international human rights perspective, it becomes difficult to think about such rights from an positivist perspective because for positivists, domestic law is supreme and for positivists, international law is not law.

Marxism

1. Marxist theory, like natural law, is also concerned with the nature of human beings. Marxism sees men and women as "specie beings".
    a. Specie Beings means that humans have inherent potential and capacities just because we are human beings. Marx sees a person's essence as the potential to use one's ability to the fullest and to satisfy's one's needs.
    b. HOWEVER, the issue is capitalism, as capitalism alienates a human being from this inherent capacity or inherent potential. this is because in capitalism, production is controlled by a few persons.
2. The issue with Marxism is that it is parental in nature i.e. the parent tell you that if we do X in a way. Marxism has this authoritarian political body which gives you sole guidance in value choice.
    a. In this process of being authoritarian, the autonomy inherent in a human being is being lost.
3. On an international level the Marxism theory has proved incompatible with a functioning universal system of human rights. communist governments have theoretically recognized the competence of international community to impose transnational norms BUT have held the application of those norms to be a matter of exclusive jurisdiction of the domestic jurisdiction.

11th February

Sociological School

1. Sociological school moves away from *a priori* theories and analytical types of jurisprudence. Prior to the sociaological school, legal principles were either very formalistic or were very abstract.
    a. So the sociological school said that law is in essence a product of social forces.
    b. The school builds on the principle that the essence of good is simply to satisfy a demand. So whatever rights we need to have should be co-related to the demands that individuals have.
    c. The emphasis of the sociological schools is to obtaining a just equilibrium of interests among prevailing moral sentiments and the social and economic conditions of time and place.
        i. So we need to have the least possible sacrifice of interests in the sociological school
2. When we look at the sociological school from the HR perspective,
    a. It sometimes directs to the questions of institutional development
    b. it sometimes focuses on specific problems of public policy that have a bearing on HRs
    c. It sometimes aims at classifying behavioural dimensions of law and society
3. The criticism of the sociological school
    a. It might be attractive to have rights conceptualized as that there is a demand of the society and the rights should be correlative to the demands of the society. BUT even from this perspective there could be issues related to hierarchies and priorities between the rights.
    b. FURTHER, Sociological School does not exactly have a theory here because there is no normative conclusion that we can come to as to what are these rights. We cannot base a normative conclusion on interests and demands. This is the critique of the sociological schools

<u>Utilitarianism</u>

1. The core idea of utilitarianism is greatest happiness of the greatest number of people. so you take decisions to maximize the utility of the maximum number of people.
    a. The criticism of utilitarianism is that the adding and subtracting of pleasure and pain units of different persons to determine what would produce the greatest net balance of happiness has come to viewed as a practical impossibility.
2. Human rights are based on individualism i.e. we cannot take away certain rights from the individual. However, Utilitarianism is actually taking away this individuality as at the core of utilitarianism is *collective* maximization in which for the greatest happiness of all, we could sacrifice an individual.
3. More normatively, the problem with utilitarianism is that we do not have security that justice will be delivered at all points because if we are seeing benefit in some other way, then there could be a situation where we would be sacrificing certain rights.
        a. Thus there is no security of a rights language within the framework of utilitarianism.

MODERN HUMAN RIGHTS THEORIES

1. The critique of the Natural Law Theory was that we were ending up with the idea of a "norma setter" i.e. what exactly would one call as rights which are part of the natural law.

2. So when there was talks about human rights with the resurgence of the natural rights system, people finally came to the sense that firstly positive law needs to be there because that is how the implementation needs to be there BUT for an effective positive law, the core of positivism should be manned by certain effective value system and for a minimum effective legal order, we need the minimum core.
    a. This minimum cores needs to have a link with the idea of **individual freedom.**
    b. That is why when we see UDHR or ICCPR, we see emphasis on individual rights as we come from the conception that as an individual, we should have the autonomy and we should have the individual freedom.
    c. This is why the first two generation of HR have been individual centric.

13th February

1. We need to have a baseline. We require a positivist legal order but that positivist legal order needs to be based on certain minimum values and that is the minimum absolute that any positivist legal order should have.
    a. This **core theory idea** is built on Kantian ideas
2. Kant's core idea was an idea of personhood i.e. every person has the capacity to take responsibility as a free and rational agent for their own ends. Kantian ethic means that the person is the end itself and the state is to promote conditions which promote individuality.
    a. Kant maintains that persons typically have different esires and ends so any principle derived from them can only be contingent. HOWEVER, moral law needs to have a categorical foundation and not a contingent one.
    b. Human Rights at their core are built on the idea of morality and that is why we coming back to moral law.
    c. The idea of personhood is to take responsibility for one's actions for whatever ends one wants. So there is an idea that human life does encompass certain freedoms without which we would not designate someone to be human.
3. So you are talking about that there needs to be fundamental basic rights which every human being should have and this needs to be recognized in any positivist legal order.
    a. This minimum core rights theory which has evolved post WWII has heavily contributed to the conventional legal order of HR
    b. We see a reflection of these minimum core rights theory in UDHR. The opening state of UDHR states that:
        i. *Whereas 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*
        ii. Article 1 of UDHR- *Whereas 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*
        iii. The above lines reflect that humans have inherent worth and that we are all equals and we are equals in terms of rights.
4. Shestack then says that it is important to talk about a minimum ore but from this minimum core, we need to talk about a structured legal system. So the question arises that from the minimum core, how do you structure a set of rights coming from that minimum core.

a. To deal with that we have a number of theories being mentioned here. One is the Rawls Theory of Justice, another is Dworkin

Rawls Idea of justice – RIGHTS BASED ON JUSTICE

1. Rawls idea of justice was to create just institutions and he says that just institutions will create a just society. To create just institutions, he brings forth the idea of men and women who have come forth to form a social contract in the original position.
    a. in the original position, Rawls talks about equality of the contractors with respect to power and freedom. All the contractors know about general principles of human psychology, economics etc. BUT they do not know about (i.e. are under a beil of ignorance) about the particular circumstances of their own society or of their individual race, sec, social position etc. This would ensure that the contracts are prevented from making self-interested decisions.
    b. Rawls argues that these contractors, while taking self interested decisions in a veil of ignorance, would choose principles that would be good for all the members and not simply to the advantage of some. Thus Rawls system would allow us to derive ***universal principles of justice*** acceptable to all rationale human beings.
2. There are 2 principles which Rawls says would be developed in the OP.
    a. LIBERTY- Rawls idea of liberty actually represents freedom. Rawls does mention some values to this liberty like political liberty, freedom of speech and expression, liberty of conscience and thought. He says that everyone needs to have equally have all these liberties, but this is very idealistic, as when we bring this to the real world, there would be constrains.
        i. In the real world, each of us cannot have exactly the same liberties. Rawls talks about the worth of the liberty. for a person, the worth liberty might be lower than someone else's worth of liberty. to help with the problem of this unequal worth being attributed to these liberties, Rawls comes up with the difference principle to try and deal with this situation.
    b. DIFFERENCE PRINCIPLE- It deals with the idea of distributive justice. It states that social and economic inequalities are to be arranged so that they both are to the greatest benefit of the least advantaged and they need to be attached to offices open to all under the conditions of fair equality of opportunity.
        i. for the most advantageous, the only way they can justify their right to liberty is if the least advantaged are also able to get the liberty.
3. These 2 principles can bring forth the legal order of rights that may enable us to help with this principle. So our minimum core is these 2 principles.
4. Shestack brings forth a lot of criticism on both of the principles:
    a. When we look at liberties in Rawls framework, we are looking at it from an negative perspective i.e. we will have non-interference with liberty. Further, idealistically, there will never be a situation where liberty and equality will be clashing with one another.
    b. BUT in the real world, liberty will clash with other interest like public order, public health, safety, etc. Rawls identifies that there can be clashes and came up with the principle of reconciliation
        i. The principle of reconciliation provides that these basic liberties can only be restricted when methods of reasoning acceptable to all make it clear that

unrestricted liberties will lead to consequences generally agreed to be harmful to all.

c. For the second principle, we know that it states that we need to arrange the rights in such a way that the greatest benefit is going to the least advantaged. So the major idea in the second principle is the idea of ***equality of opportunity***. (the first principle was around idea of freedom).
    i. However Shestack criticizes this by saying that equality of opportunity is not enough as society can create conditions of pursuit. For someone coming from a background of deprivation and discrimination, it is more difficult to get into college than for someone with good elementary knowledge
    ii. Thus equality of opportunity must compensate for unequal starting points. Thus one provides for subsidies, special courses, quotas and affirmative action programmes to provide for equality of opportunity.
        1. But there are problems associated with these as it is met with public backlash.

d. Another criticism for Rawls conception wrt to justice is that Rawls idea od justice is suited for a domestic system and not an international system. This is because in an international system, who would be those people who are sitting in the original position? these would be people who would be representing the states and thus when representing states, if we need to arrive at the same 2 principles, we need to ensure that these states are themselves just states.
    i. Thus we are not sure that internationally, we would end up arriving at the same 2 principles

RIGHTS BASED ON REACTION TO INJUSTICE

1. It can be difficult to define "justice". We have scholars saying that it is easier to define injustice than to define justice, so we should react to whenever we see injustice and make rights according to that.
2. It is a more practical way of how rights can be structured. You are basing your action on the need to right a particular wrong.
3. The problem with this approach is that firstly it is contingent and further more sophisticated rights will not come through as we are simply reacting to the particular priblem which we see as injustice.
    a. Further in such a situation only those rights would come up, for which the people would like to move forward.

RIGHTS BASED ON DIGNITY

1. The aspect of dignity is there since history. your religious ideas are also coming through a conception of dignity. So you are basing your rights on human dignity
    a. a non-secular conception of dignity would involve that since we are all creations of god and thus we are sacred and thus we are giving value to a human.
    b. In a secular conception of dignity, we deal with natural law and the idea of reason
2. Any legal order based on dignity would involve giving value to this idea of dignity. therefore we will be using a value oriented policy approach to try and make institution and legal order that will help us give credence to the fact that human beings have inherent rights.

3. When we talk about dignity, there are other interdependent values, all of which fall under the rubrick of dignity.
    a. McDougal, Lasswell, and Chen have given these inderdependent values i.e. o (1) respect, (2) power, (3) enlightenment, (4) well-being, (5) health, (6) skill, (7) affection, and (8) rectitude.
    b. So we are using dignity as the minimum core from which we are getting a number of rights.
4. The criticism of this approach is the difficulty in defining dignity. There are too many interdependent values, so we are unsure if some of them are more important than the others

RIGHTS BASED ON EQUALITY OF RESPECT AND CONCERN

1. There can be problems between egalitarian ideas and utilitarian ideas. In this conception by Dworkin, we are seeing a reconciliation between natural rights and utilitarianism.
2. Dworkin says that when we look at society, there could be external impediments here because of the external factors, there could be problem with the utilitarian calculation. So liberties might face an impediment in their realization. Thus some specific liberties need to be kept out of the utilitarian calculation like freedom of worship, freedom of association etc.
    a. Dworkin says that there needs to be an egalitarian character of the utilitarian principle i.e. the state may exercise wide interventionist functions in order to advance social welfare.
    b. He says certain specific liberties like freedom of speech, freedom of worship, personal and sexual relations require special protection against governmental interference.
    c. This is not because these liberties are preferred or have certain inherent values but rather because they may face procedural impediments.
    d. If these liberties are left to utilitarian calculations, the balance would be tipped in favour of the restrictions.

17th February

1. Shestack credits modern human rights to resurgence of the natural rights. BUT he says that this resurgence of natural rights is different from the original conception of natural rights as it is trying to reconcile the idea of what law "is" and what law "ought" to be.
    a. He says that we are are looking for a positivist legal order but in that order, we are looking for a minimal core and for such an order to actually work, it needs to be based on the a minimum core.
    b. He says that we need to have a minimum core but that is also not enough, for an effective legal order, we need to have a number of rights and legal order based on "justice"

CULTURAL RELATIVISM

1. One of the basic idea of human rights is that they must be universal in nature and whichever region you might be coming from, the core remains the same. BUT CR is against this idea of universalism, you are saying that it could be relative depending upon where you are coming from.

2. ALSO, most of the human rights are conceptualized as being given to the individual, and we have a very minimum scope and understanding of the community based right.

TWO CONCEPTS OF HUMAN RIGHTS - LATTIMER

1. Shestack states that when we are talking about HR, we are talking about what we as Human Beings have BUT Lattimer is talking about 2 different concetps by which we can look at HRs.
2. Lattimer starts by saying that today we have huge core of positive legal rights which are talking about human values like right to freedom of speech, expression, right to liberty, etc. He further says that when we are using the term human rights itself, we have started to use it in a number of ways.
    a. So he says that there are a number of ways in which we have started to viw huma rights BUT he is only looking at two of the aspects.
    b. *Human rights are most often defined as those rights which all human beings possess simply by virtue of being human.*
        i. This is the general definition of Human Rights.
        ii. This definition maks us think that HRs are a set of basic minimum standards of human treatment
        iii. In the more legal sense, viewing HRs in this way would imply that the state would give its citizens certain fundamental rights for that person
    c. However, the second conception of HRs is that *they are rights that constitute the human: that is, human rights are the rights that make us human*
        i. So the first conception is that we are human beings, that is why we need to have these basic rghts.
        ii. HOWEVER, this second conception is that we have these rights and thus we are human. Without these rights we cannot be termed as a human right.
        iii. This second conception implies that when we are looking at the second conception, we are more ambitious that the first one.
            1. Latimer says that in the second conception, the idea of HRs cannot simply be an idea of basic minimum. it is something which is transformative in nature and it transforms us.
3. Lattimer further says that we could also summarize the conceptions as a ***minimalist*** and a ***maximalist*** conception.
    a. The idea of basic human rights would be the minimalist and the idea of getting as ambitious as we can get would be the maximalist conception.
    b. From a legal stand point, in a minimalist conception, we are talking about the operational principles that we have of a legal order
    c. In the maximalist conception, we are grounding the entire legal order on the idea that without these rights, one would not consider this person to be a human being.
4. He gives the idea of the identity struggles. He says that most of the HR causes of our time have been articulated in terms of identity struggles by those whose rights are violated.
    a. Ex- ethnicity, religion, gender identity, sexual orientation

b. However, such movements cannot be reduced simply to a please of decent human treatment. International law on Human Rights recognizes a wider scope or purpose of the relevant rights.
    i. Ex- Article 27 of ICCPR guarantees the rights of person beoging to minorities and it goes beyond a prescription of tolerance to confer a right to identity.

HOW HAVE THESE CONCEPTIONS EVOLVED

1. He is saying that both these conceptions are evolving from natural law but the end of the two conceptions are completely different.
    a. He posits that (A) saying that by virtue of being human beings we have certain rights and (B) saying that there are certain rights which constitute us as a human. BOTH these are coming from a natural law.
    b. BUT as an end, in the first conception in the end we are talking about rights as a basic standard of human decency. BUT in the second conception, we are talking about rights as the realization of human dignity and potential.

18th February

2. Lattimer mentions that when we as lawyers are talking about Human Rights, so we as lawyers are only looking at the treaties, conventions that are present there, etc. Lattimer, when he saw a protest, he realized that what the people advocating there was not simply that but what they were asking for was an overall transformation in the way they live.
    a. He felt that this was more aspirational than a mere baseline ideas that we have.
    b. So he got triggered with the idea that we are using the term HR to mean many things. he further says that sometimes when we are looking at these advocates who are making these aspirational claims by using the term of human rights, for lawyers it might feel that these are more in the realm of the metaphysical or something which is more political than legal.
    c. Thus we as lawyers dismiss these claims
3. So he says that it is not so easy to dismiss this sort of advocation BUT we see most human rights advocates asking for more aspirational claims. So since it is becoming more and more commonplace for advocates to do so, we cannot dismiss it
4. He says that we understand "liberty" in a positive conception and a negative conception, but for both of these, e are in the end talking about human agency.
    a. BUT when we talk about the 2 conceptions of HR, do we reduce out conversations to the idea of human agency or we go further than that to try and figure out the human nature itself.
5. He mentions the normative foundation of the FIRST conception.
    a. He states Grotius to state that although all things ar permissible against a slave, yet there are somethings which the common law forbids to be permissible against a human being.
        i. Thus a Grotius notes that how a slave's legal position is trumped by his status as a human being

b. He states Hobbs to signify that even though under a socia contract the subjects alienate all rights to the sovereign, there are some rights which are not alienable.
    i. Thus no man can be bound to abstain from the use of food, medicine, etc.
c. Contemporary human rights is a product of the first idea that human rights basically entail basic minimum rights as a human being. When we are talking about the basic conception, it is a very powerful tool at arriving international consensus
d. Under the first conception, the HR are protection against serious abuses of power. Thus they have been quoted to mean "norms that help to protect all people everywhere from severe political, legal, and social abuses" AND Human rights are not concerned with "great aspirations and exalted ideals, BUT rather lower limits of tolerable human conduct.
    i. So when we conceptualize HR as some basic fundamental rights which we all should have as human beings and we want to have that articulated in the black letter of law, it becomes easier to do this with the first conception
e. The minimalist approach involves that the basic human rights are necessary and that is what need to be protected. HR are the basic tolerable limits and the basic human decency. If you go further, there could be a situation where there is a limitation.

6. SECOND CONCEPTION- he begins by stating Article 1 of the UDHR which states that "All human beings are born free and equal in dignity and rights."
    a. He says that this statement as a descriptive statement, applied to any know human society, the assertion is demonstrably false.
    b. BUT as a normative statement, speaking to our humanity, it enjoys near universal acceptance.
    c. We find this second conception, we are looking for rights that constitute you as a human being. So we are looking at that all of these right are needed for you to become a human being. THIS HELPS IN IDENTIFYING THE CONTENT OF THE **FIRST CONCEPTION** i.e. what should be the basic minimum rights. So we are going for a maximalist idea that we will require aspirational ideas for you to say that you are a human being.
7. Lattimer says that both of these two conceptions, help in triggering the creativity in finally figuring out what kind of rights we would like to have in a International HRs legal order.
    a. He also says that in a true maximalist situation, you might reach a situation where the entire edifice of the HR itself crumbles. The capabilities approach is where the synthesis of both these conceptions can be seen but as soon as Nussbaum sets herself to producing a list of the indispensible central human capabilities, they go beyond the basic minimum human rights.
        i. Ex- being able to use imagination and thought in connection with expressive works, religious, literary, musical etc. (these are examples of the list which Nussbaum highlight)

ii. But when we conceptualize human rights like this, does that mean that an individual who is not capable of producing a "literary" work cannot live a life

b. *For the purposes of this article, it illustrates a general problem. As human rights demands become more detailed and comprehensive, more constitutive, the weight of human diversity they attempt to bear becomes too much—and the edifice collapses.*

i. Lattimer is saying that it is a demand which is being made.

8. The two conceptions coincided at a particular historical moment i.e. the moment of revolution.
    a. The French Declaration said "*The aim of [every] political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression*"
    b. The great revolutionary declarations document the points at which the demands of the oppressed flower into the constitution of a new order.
        i. As if in homage, it is a documentary model followed by virtually all international human rights instruments, with an expansive statement of human values and norms in the preamble, but with the operative articles quickly settling down to a legal enumeration of specific protections.
        ii. So any convention, the preamble will have an expansive statement of HR but the Articles of the same boil it down to specific protections
    c. when the new authority has power to guarantee protections, they also assume power to define what constitutes human, either explicitly in the promotion of values or implicitly by exclusion.
9. *The distinction between the two concepts of human rights is thus useful not just because it helps **to map the space** between the minimalist and maximalist positions in which human **rights demands are negotiated**, but also finally because it focuses attention on the question of **who owns human rights**. Are human rights primarily a principle of good government—and therefore a matter of state—or a cause for civil action (in both legal and political senses of the term)? Could any government ever recognize in prac tice the French Declaration's right to resistance? If human rights are more than simply limits on a regime's internal autonomy, who has the power to define them or make them effective?*
    a. So this Paragraph reason gives the purpose of the minimalist and the maximalist approach.

19th February

CULTURAL RELATIVISM

1. There is a tension in viewpoints. First viewpoint is that diversity exists. it exists in the way you understand a particular situation or a particular social structure is there. BUT then the second vie point came post WWII that irrespective of our religion, group, colour of our skin, we as Human Being have inherent rights and this is a universal idea.
    a. Today our legal instruments like UDHR, ICCPR, etc have gone the way of universalism

    b. BUT there was a debate when these instruments were written that you cannot make these rights a universal idea because when you are talking about rights, they are rooted in our own cultural setups and the wa we view something as a right or wrong, may be very different
2. There was also a heightened feeling that the rights which were being considered rights of a universal idea involve rights which were stemming from ONE particular culture's idea.
3. So from a Cultural Relativism point, we are simply saying that diversity exists. No one culture is morally wrong, we are all equal in worth.
    a. BUT from a universalism point, they say that we are not saying that cultural diversity should not be there. A lot of IHL document say that everyone has a right of freedom to immerse themselves in their cultural practices. So they say that we are recognizing these cultural diversities.
4. BUT a strong form of Cultural Relativism, they say that we are so diverse that it is impossible to have transcendent ideas. it is impossible to have certain rights which shall eb considered to be morally right everywhere.
    a. Such strong form of CR advocates form diversity and local autonomy it is in a fundamental clash with the idea of HR because the idea of HR is a top down approach to say that you DO NOT have the local autonomy. This strong form clashes with universalism severely.
5. Culture as used in "culture relativism" it is used in a broader sense, which includes a lot of practices, traditions but also includes things like institutional structures, political ideologies that a person is having.

20th February

Human Rights and Asian Values – Sen

1. We say from one perspective that we cannot adhere to some basic universal idea of rights because there can be no such thing as a universal idea of rights because all ideas of right and wrong are intrinsically linked to your particular socio economic and cultural situation.
    a. This idea has been built to a level that how a state should run politically, to a degree of how the state needs to governed in legal terms and that is why the term "culture" has been defined broadly.
2. the reason why we see this whole debate of universalism and cultural relativism is also because post WWII, there was decolonization and after that there was a call for self-determination. So you are now coming out of colonialism and you now want to showcase that your culture which is good as your own practices were being suppressed by colonial powers earlier.
    a. So when you come out of the colonial rule, you start putting your culture at the forefront and saying that your culture and heritage are equally important.
    b. This lead to the tension between the cultural relativism and universalism
3. Thus one of the main points which come from here is that you cannot conceptualize HR as a global concept because they emerge differently depending upon you socio-economic context. so you cannot visualize a universal idea.
4. Further HRs are individualistic in nature but most Asian societies have ideas of family. So they believe that it is the family's interest which is important. So we have the family's

interest and individual's interest. So the idea of individual rights do not sit in a situation which values family interest. So this was also an argument pro-cultural relativism

5. Also, we value the idea of development i.e. of socio-economic rights, more than the idea of civil and political liberties. so if we get social and economic upliftment, it amount to happiness for everyone, thus here as well, the point of relativism is asserted rather than universalism.
6. However, Shestack says that the debate f universalism and CR stands negated because we have Jus Cogens which is binding on all state parties.
7. Ananya- There are 2 approaches Sen takes. FIRSTLY, he wants to show that Asia is not a monolith in itself and there is diversity within Asia as well and SECONDLY, he draws parallels between west and the east to show that they are quite similar, so a heavy distinction cannot be made.
8. Sen throughout his work uses the illustrations of freedom and tolerance and these are the 2 aspects which he looks into.
9. The reason why Sen is even writing about Asian Values is because there is a debate that Asian value and western values are different and as cultural relativists we would not want western values imposed on us as we just came out of imperialism.
    a. BUT Sen points out that we have both western and asian scholars using the same arguments for different ends. From one end we have western scholars saying that Asian societies do not value freedom and do not value individual rights so they say that western societies are better since they have ingrained in them these ideas of freedom, tolerance, dignity etc.
    b. BUT the scholars in the East write that their value systems are completely different so they should not come and tell them what to do. so you are saying that ideas of HR is a completely western concept and it does not work in Asian countries so it should not be imposed on us.
    c. Then Sen looks historically into a number of things. He thus looks at the thesis that "*I shall examine the thesis that Asian values are less supportive of freedom and more concerned with order and discipline than are Western values, and that the claims of human rights in the areas of political and civil liberties are, therefore, less relevant in Asia than in the West*"
        i. So he sees whether this is right or not.
    d. Throught Sen's piece, he talks about modern day statesman who say that we will not be giving civil and political rights as that is not our value system. So he is examining whether the above thesis is right or not.
        i. here is where authoritarianism comes in as the statesman say that we will dictate that how we want our social and economic policies to be and we will dictate the interests of all prior to your individual interests.
10. The first concept Sen talks about is Asian values and economic development. He says that the way towards economic development is this authoritarian regime wherein civil and political liberties would not be realized or will be stifled to a degree and it would work.
    a. So the leaders in Asia was invoking CR to defend limitation in political freedom and this will lead to economic development.
    b. BUT Sen finally answers by saying that economic development is not just contingent on the form of government that you have. If you look at the data, irrespective of whether you are a democracy or more authoritarian, it does not

have any effect on how do you economically develop. While there may be a correlation, the causation of the limitation of political freedom and economic development has not been proved as there are so many other factors which enable economic development in these countries.

c. He then gives counter examples of countries like Botswana which is one of the most rapidly economically developing country in Africa which is an oasis of democracy. So statistically it doesn't not matter which way you are politically structured, there are counter examples on both ends AND also democracy nevertheless has certain advantages over authoritarianism and this he explains through the idea that democracies forces you to take people's suffering seriously. So there is a clear advantage of democracy which might not be there in authoritarianism.
d. Sen say that it doesn't matter which sort of government you have, the idea of economic development can be on different parameters. BUT then Sen talks about that when you have these polticial liberties, you are then able to articulate your problems. You are not stifled and you have a forum in which you can state your situation.
    i. HE gives the examples of famines that no famine has ever occurred in an independent and democratic country.
    ii. So he says "*Political and civil rights give people the opportunity to draw attention forcefully to general needs and to demand appropriate public action The response of a government to acute suffering often depends on the pressure that is put on it, and this is where the exercise of political rights (voting, criticizing, protesting, and so on) can make a real difference..*"
e. So there are 2 things, FIRST, there is no such thing that authoritarianism is the way for economic development, SECOND, if you have questioning ability, it can prevent serious economic and social disasters.
    i. *To concentrate only on economic incentives (such as the market system provides) while ignoring political incentives (such as democratic systems arc equipped to provide) is to opt for a deeply unbalanced set of ground rules*.

11. He then arrives at a conception of homogeneity. He says that firstly we look at Asian Values as in asia itself there is a lot of dynamism and there is a lot of diversity. Then he says that we are tyring to question, that irrespective of whether there is diversity etc, whether all Asian countries have an aversion to the idea of freedom.
    a. He says that it has been said that the idea of freedom has been so intrinsically embedded in the western philosophy. He debunks this notion as well by saying that the freedom how we conceptualize it today, it is not something which was there traditionally. so in western society as well, this idea of freedom that we are seeing is a modern conception.
    b. Earlier we did have hierarchical statuses even in western cultures. Further the conception of freedom is also composed of 2 different components-
        i. *(1) the value of personal freedom that personal freedom is important and should be guaranteed for those who "matter" in a good society, and (2)*

equality of freedom that everyone matters and should have similar freedom.

ii. So clearly slaves were not guaranteed freedom BUT for citizens, their freedom was considered to be essential. So then how is freedom being viewed?

c. Then he comes to Asian systems where statesmen argue that we follow Confucianism and there we talk about ideas of tolerance and order and this is our traditional system. Sen in this context says that Confucianism is not the only tradition which was prevailing in ancient asia. He gives the example of how Budhhism was also there which attaches great important to freedom. He further says that even Confucianism is not all about authoritarianism. Sen directly quotes Confucius to say that Confucius recommend did not blind allegiance to the state. he gives an example where when Confucius was asked that how should we serve a price, he replied that "*tell him the truth even if it offends him"*

i. Sen, as an example of freedom in Asia, also says that in Asian cultures, there is a fondness for arguing, and for discussing things at leisure and at length. There have been writings about tolerance by King Ashoka and there are other Indian traditions which include arguments in favor of tolerance, in defense of freedom, or support equality.

ii. He also gives the example of Kautilya who in his works have values the importance of freedom as far as upper classes are concerned. Kautilya is not an egalitarian but when he characterizes what the upper classes should get, freedom features first. This limitation to upper classes, is not quite different from what the Greek concern of free men as opposed to women and slaves.

d. So Sen is talking talks about the diversity of religion within Asia and further he is trying to figure out whether we as Asian societies have always been averse to the idea of freedom. So what he is trying to do is that the West is saying that they have freedom and the East is saying that they have authoritarianism, BUT Sen is trying to say that there have been both freedom and authoritarianism in both west and the east.

12. So Sen looks at three things, first is that we in the east did have discourses and arguments on idea of liberty and freedom. So to say that Asian Value systems are averse to the idea of freedom simply because of some cultural construct is not correct. HE then says that there is diversity in Asia. Lastly he says that how you conceptualize a particular understanding of freedom can differ and once you compare the conceptions, can you say that one's idea od freedom is better than the other's?

24th February

1. So people argue that human rights are not considered to be of any relevance in the eastern world because they have never been there. and on the side of eastern societies, there have been the arguments that we have different cultural ideas and we stand by the fact that our conception of HR is completely different than yours and therefore out idea of authoritarian regimes should prevail.

2. Sen then finally talks about intervention across national boundaries. in this part, Sen takes a universalist approach and says that the standards of HR should be the same across the world and therefore it is not necessarily wrong for the people from the west to say that the people from the east deserve the same level of HR that they have achieved and that they enjoy. So it should not always be seen as western hegemony or as a sort of imposition.
    a. So basically Sen is trying to figure out what is the nature and reach of these Asian Values. He basically talks about the fact that in most cases, what we are trying to say is that because we have different cultural context, different socio economic situations on the ground level, we view things differently. So if whatever is understood as individual rights from the west is imported to us, it would amount to imperialism. This is what the authoritarian governments from Asia uses as an argument.
    b. He builds on the idea of human rights that they build upon the idea of our shared humanity. These rights are not derived from the citizenship of any country, or the member ship of any nation, but taken as entitlements of every human being.
    c. Since the conception of HR transcend local legislation and citizenship of the person, thus support for HR can also come from any person. Further the reach of the corresponding duty can also be on any person.
        i. *The claim is that the barriers of nationality and citizenship do not preclude people from taking legitimate interest in the rights of others and even from assuming some duties related to them*
    d. He says that we are not talking about governments per se but rather Asian people. So when we keep on talking about the "west" and the "east" we are missing out on the people and the shared humanity and similar human aspirations that we all have.
    e. He thus says that support for HR can come from anywhere, because of the shared humanity and therefore the reach of HR is across borders and human rights interventions can take place across borders. BUT should we do HR interventions across borders?
        i. *This basic recognition does not, of course, suggest that everyone must intervene constantly in protecting and helping others. That may be both ineffective and unsettling. There is no escape from the need to employ practical reason in this field, any more than in any other field of deliberate human action.*
3. Ma'am- one of the strongest counters to universalism has been that whatever we today consider as universal ideas are coming from a particular culture. So we that particular culture's values and idea systems is being spread across the world.
    a. the other question is that do we even want a homogenized system? Further the we might have certain HRs in a universal context but the realization of those rights might have a general context. Ex- If we say that we all have a right to fair trial, but would fair trial mean the same thing in all contexts?

The Origins of Totalitarianism – Hannah Arendt

2. She talks about what happened post WWI, that led to certain changes which then had implications on the idea of HR. in WWI, this spread of nationalism was going on and the

idea of nation state was widespread, but post WWI, the Ottoman Empire and the Austria-Hungry empire suddenly collapsed. These empires had different linguistic and ethnic minorities under them. Further post WWI, we see the Russian Revolution as well. All this lead to disintegration of these states and redrawing of maps.

a. Widrow Wilson started talking about the idea of self-determination. there is also an underlying rhetoric that a claim for a stat is when you have one nation with territorial integrity but the reality was very different as we started seeing different ethnicities in one state. So the states which came up were clearly not homogenized states.
b. So there was a fear if we are not able to ensure that these states work, we might end up in another war (which did eventually happen with WWII). Many states started feeling that their territorial integrity is threatened by these minorities. So the peace treaties which were made, they started saying that you have to ensure that no abuses of these minorities take place and therefore they started making legal obligations into many of these new states that they have to guarantee certain specific rights to the minority populations.
c. So Arendt talks about the League of Nations and the entire minority rights system that League of Nations had visualized.

25th February

1. Around 1933, Ardent wanted to escape the Nazi regime, so she went to Paris to seek protection. There was a situation in WWI, where groups were directly declared not to be citizens of a nation. Jews who were staying in the Germany, we suddenly not considered citizens. The French government also treated as an enemy as she is not French and then Germany also treated her to not be a citizen
2. Then there was a German Occupation of France and she escaped that and went deeper into French territory. So she wanted to move out of France and to US and she somehow managed to get a visa to go to US. After arriving there, she received status as a refugee and as naturalized 10 years later as an US citizen.
3. So she does the recounting of how things went in WWI and WWII.
4. Arendt is looking at a practical realization of HR i.e. whether it happened or not. How was there was a testing of HR in real life. she tests the entire idea of rights through her on experience.
5. In WWI, one of the major issues was the empires falling post WWI. these empires were multi ethnic in nature. So now we are having disintegration of these states and re-organization including new creation of states. You also have an idea that your state is a nation state.
    a. in IL, a nation state involves one nation in one state being able to do self-determination and self-determining that nation's idea, political core, cultural core, religious core etc. So you have that concept, and the idea of statehood is being built on the idea of a nation.
    b. BUT post WWI, post the re-organization, we suddenly start seeing that there are more nations in that states boundaries, there are different ethnicities and you are no longer as homogenized.

6. So on one side you are theorizing a natin state comprises of one nation and homogeneity, but there is also a practical reality, that you have people from different ethnicities.
7. When there was a monarchy, the legitimacy of the king was the divine right theory as god has asked me. But there was a fall in this idea of divine right. the legitimacy was based on one ethnicity which lead to territorial integrity. So now since thre were multi-ethinic people, there was an issue as your legitimacy as king was being derived by the idea of one ethnicity and territorial integrity
    a. This led to problems. Lets say a state has 80% of A ethnicity and 20% of B ethnicity, you start feeling that this 20% ethnicity wills tart creating a problem for territorial integrity of A.
    b. So *firstly*, you are already suspicious of B therefore your rule and regulations are made in a way to ensure that they B does not end up fracturing the territorial integrity of the state
    c. *OR Secondly,* you can give B good guarantees to ensure that they don't become a threat to the territorial integrity of the state
    d. Sometimes there could be a situation of a 60-40 ration as well. here the 40% is ot a proper minority. you are still quite a good population.
    e. Sometimes a good amount of people were left in, but that ethnicity has another nation state in another place, so there were questions of population transfer as well. Do we transfer population from one state to another to try and keep this whole nation state situation so that we do not end up in another WW.
        i. This is where the League of Nations, the Minority Treaties and the Peace Treaties came in.
8. These protections which were accorded to minortiies were in the form of guarantees rather than rights
    a. Ex- we will not interfere in your school system. you are allowed to have your school. You are allowed to write your name in your own indigenous language
    b. BUT things did not work out the way people wanted it to, there were other issues and this lead to WWII
9. So when Arednt is writing the chapter, she is putting the idea of HR to test post WWI
    a. So she was saying that post WWI, we had a lot of problems and amongst that we suddenly have a lot of people, who were in effect without any claims to citizenship.
    b. She groups them into 2 categories i.e. the **<u>stateless AND the Minorities</u>**
        i. technically minorities have citizenship and they are a group of people considered to be citizen of some state. Many of these minorities were in these newly established states in the eastern and southern portions of Europe because of disintegration of the ottoman empire.
        ii. These minorities were not able to enjoy the same rights which the citizens of the dominant ethnicities had and much of it was due to politically being conscious that our territorial integrity might be lost by these minorities.
        iii. OTHER issues also cropped up. there have been conversations that whether a person who comes to another country should have the ideals of that society. So the person needs to assimilate. BUT in many of these cases, the non-dominant communities were very particular about continuing to carry on their identity as their ethnicity and that language.

1. So you want their assimilation and when that is not happening, you start conceiving them as threats

iv. So technically these minorities had citizenship but functionally they were not given any sort of protection.

c. Stateless people were those who did not have any citizenship.

10. Arendt mentions that earlier the situation was such that if you had lost your home because of war, you had the option to find a new home. earlier there was naturalization for people who had to leave their countries and go to other countries BUT because of the number of people who started coming in, the countries start revoking citizenships of even those people to whom they had given it because you cant deal with the number any more.
    a. FURTHER, movement of people is also in the domain of a nations state. so there were national institution which came up. So fi you want to deport/expel someone, you can.
11. so the way out of this whole refugee and migrant situation was first to deport them to the country of origin. The issue first is that if that country of orign has denationalized, then the country of origin is no longer there. *secondly*, in some situations, you might be sending them back to a violent atmosphere, you cannot do that. *third* is to naturalize them in your own country, this is where the issue comes as these people still identify them as their own nationality, they do not want to assimilate, so now you will have assimilation policies coming in
    a. So what Arendt says is that you will start witnessing that you do not have any protection from any way. no government is there to help you. SO this is now a point, that the only identity these people have is that they are a "human" as they do not have any identity as a citizen or any nationality as there is no other status.
    b. So this is where the reprieve comes for HR. Since you are no longer a citizen or do not have any status, then your basic natural human rights are looked towards
    c. So HR are ights which belong to you simply because you are human.
12. So now she goes into the portion of rights of man.
    a. She starts with the Declaration Of The Right Of Man- it provided that *It meant nothing more nor less than that from then on Man should be the source of law, not even God's command of Customs or history*
        i. the declaration indicated man's emancipation from all tutelage and announced that he had now come of age……man had hardly appeared as a completely emancipated, completely isolated being who carried his dignity within himself without reference to some larger encompassing order, when he disappeared again into a member of a people
        ii. So you ar saying that these are rights which are there for you, as simply as a human being. This concept was used to give legitimacy to the French and American Republics by saying that we have come through so that we realize these rights of man that each person carries in the abstract
        iii. BUT when you start ot actually put this theory in practice, Arendt says that you see the reverse happening.
        iv. You are only a human being BUT since you do not have the protection of a political immunity, you are actually left in a situation where violence can be perpetuated. You are no one since you do not belong to any policial

community and you are not the citizen of any state because of which no one would give you these rights.

b. So she says that when you start looking at the complete human, the way humans have been abused in WWI and WWII, then your right to life, which is very sacred, has been jeopardized.

c. So it is then you start to realize, that **<u>you need to have a right to have rights</u>**

i. *We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when miIlions of people emerged who had lost and could not regain these rights because of the new global political situation.*

ii. So in practice, HR will give you a relief, where you are nothing but a human but this is not working out in practice. So she keeps mentioning that that the struggle made by minorities and stateless people to be recognized as nationals is there as you say that we need to be considered a part of a body political. Then only we will get some thing and some sort of protection.

iii. *The Rights of Man, supposedly inalienable, proved to be unenforceable even in countries whose constitutions were based upon them-whenever people appeared who were no longer citizens of any sovereign state*

d. So you don't have any right to stay somewhere. So she says that you need to belong to an organized community, only then can the rights be realized. if you are belonging to no one, you will be left at mercy and violence will be perpetrated against you and this is the exact opposite of what was conceptualized for human rights.

<u>27th February</u>

1. Arendt's idea becomes problematic from the fact that she says that state was the one which led to the persecution of many people but now again you are placing your faith in the state.
    a. When she uses the term "first instance of rights" she mean that it is more of a moral claim to membership which you are placing on humanity per se
    b. The "second instance of rights" involves that you have rights which gives an obligation or duty to someone and then you have some institutional mechanism to do an enforcement of that. This mechanism in most cases would be the state.
    c. So the first instance of rights is in the great sense of humanity that you belong somewhere as a human being and that will allow you to have these rights which you talk about as these abstract ideas of human rights
2. Syla Benhabib has written on the idea of right to have rights- when we look at Arendt, she comes across by saying that as human beings we have those inherent rights and that has been put to test by the situation of refuges and minorities, so we need to vest ourselves in an idea of a global body. So Seyla says ask how can a person who does not belong to any political membership, fight to get that membership without being a member of the polity.
    a. So again the idea that you need to belong to a membership is stemming from a meta-physical idea. So have tried to go against the understanding of HR as that inherent HR coming through by saying that you need a policitcla community but how does one who is not a member of that community, fight to get a membership in that community

    b. This is one of the critique of rights to have rights.
3. Arendt says that by the 18th century when we have the idea of "Rights of Man" etc, the idea of nation states and legitimacy as built into this and the idea was that the legitimacy of the state is to protect the human rights which are already there and you are just realizing these HRs. BUT all of this failed in WWI and WWII and Arendt says that a person's right bearing became contingent on him being recognized as a member of something.
    a. So thus there is a "right to have rights" and until and unless you have this membership, your rights will not eb realized. it doesn't work if you are simply human and being simply human led to severe atrocities.
    b. So you need to have a right to have rights.
4. In a more contemporary situation, we are trying to determine thatc an you still have rights as a Human divorced from some kind of a legal status a being a citizen of some country or a national of some country? that is the question that needs to be answered
    a. we have started seeing this in migrant law and refugee law, where they do try and asay that we need to give your protection even though you are not a citizen of any state
    b. FURHTER, it has been started being said that HR is a regime which has started putting limitations on the idea of sovereignty. This becomes very essential because as a sovereign, what is it that you are entitled to? what is the power that comes in for a sovereign, what does it entail?
        i. It entails monopoly over legitimate violence. So in HR we are talking about protecting your own citizens and also those who are not considered your citizens. So what you do to these persons was completely in your hands because no other state had a right to come and tell you what you can do.
        ii. So with the coming of HR, this unbridled power that the state has over its own citizens also started to get limited.
    c. So we are trying to resolve the problems that Arendt had mentioned like if you are a migrant or a refugee or a stateless person, then what are your freedoms.

MODULE 2

1. It was in WWI interveing period and after WWII that we started talking about HRs. After WWI, we trace it to the League of Nations, but we were here concerned only about a certain group of people and it was not something which we looked from a universal perspective.
2. The concrete emergence of HRs came due to a justification which the Allied used in WWII. The allied had to give a justification for this war against Hitler, the justification they came up with was that we have to respect fundamental freedoms. it was said by Fanklin D Rosevlt that the allied war effort as for securing 4 fundamental freedoms i.e. the freedom of speech, freedom of religion, freedom from fear, freedom from want.
    a. So the idea of protection HRs has begun. But when the war was happening, the people were not being given the governmental assistance to help flee from the Germany. it was only post the WW that the real horrors of the holocaust was found.
    b. So we had the conversation about HR as a move to justify your fight against Hitler's regime. Post war when you see the unraveling of the war and the new

charge of crimes against humanity which was put in the Nuremburg Trials, these are whre HRs emerged.

i. In crimes against Humanity, we saw individuals accountable for HR abuses and not just a state

c. With all this, we finally had the coming of the UN Chater.

3. NEEDS TO BE READ- FactSheet2Rev.1en.pdf

UN CHARTER

1. When the UN Charter was being drafted, the founding fathers of UN realized that they cannot have a repeat of the holocaust. So the primary objective of the UN was to not have another war. So they felt that if you want peace to be there, you would have to ensure something and that something would be the fundamental freedoms of people
    a. So the fundamental freedoms of people need to be ensured so that we can have peace and justice.
2. ARTICLE 1- the Purpose of United Nations
    a. *…….To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and* ***in promoting and encouraging respect for human rights and for fundamental freedoms for all*** *without distinction as to race, sex, language, or religion*
        i. So one of the principal objective of the UN is postering a respect for HR
3. BUT the UN Charter tell us that what these HRs actually are. BUT what is the significance UN Charter for HR?
    a. It is that after the war, you have internationalized the idea of HRs you have negated the idea that states can say that their internal affairs cannot be interfered with even though there would be a violation of HR
    b. By bringing HR to the international arena, you have negated the idea that we don't interfere in the idea of the domestic.
    c. So the UN charter has brought the idea of HR in the international state, thereby, lifting it out of an internal idea by bringing it up that HR is a matter of international law
    d. Further by putting it in the UN Charter, you are actually bringing the ***universal idea*** of HR
    e. Also the entire UN mechanism acts a trigger for the subsequent treaty regimes that we have on HRs. The organs of UN also start to take centre stage in this discourse of what sort of rights should be there, what sort of issues are there for realization of HR
4. The UN Charter uses words like "encouraging" "assisting", "promote". This language in connection to the idea of HR shows that no where does the UN charter create obligations on the state. It uses aspirational and pragmatic language.
5. The UN came to achieve peace and stability and the recognition that if we are unable to realize human rights, we will not be able to meet the specific purpose of the UN
    a. Thus we had ECOSOC come up i.e. the Economic and Social Council under which the commission for HR was established which was given the job of coming up with the international bill of human rights

6. Then there was a conversation that whether we should make the bill of rights binding or not. So since there was a highly contested debate, they decided to go ahead with a declaration instead of a treaty.
    a. The mandate of the commission was a Declaration and a Bill or Rights, but the commission sat first and then first framed the Declaration and finally it was adopted with 48 states voting in favour and 8 states abstaining.
7. **<u>UDHR is a declaration and it is NOT a treaty and thus it does not have a formal authority to bind member states as under a treaty</u>**

<u>4th March</u>

1. Why are we discussing HR from an IL perspective? – W are looking at the movement of HR as a movement which started off in the international sphere. it was also coinciding with the spread of liberal constitutions which had come up across the globe. This is how e viewed the HR movement.
    a. Further, many of the internal developments of HR within states is also influenced by this international body of human rights.
    b. Further the HR regime per se aspires towards to the idea of universal validity.
    c. Further most of the institutional mechanisms or organizations which are present today and which are trying to help realize HRs are creations of IL
2. All these are the reasons why we are having a conversation of the international HR framework.

<u>UDHR</u>

1. We have both Civil and Political rights as well as Social and Economic rights in the UDHR and you also have duties.
2. Apart from its above discussed significance, UDHR also has a symbolic idea. It it a declaration which was adopted without being opposed. So you see political will for this Declaration.
    a. You also have contemporary significance of UDHR in areas like freedom of movement and refugee law
    b. Further, we also have the idea of Hard Law. so this idea of the status of UDHR has been a highly contested and debated aspect. The reason we have went ahead with a declaration is because states did not want to have international obligations.
        i. However, there are people who say that UDHR does have binding status
    c. But in between this binding and non-binding, we have reached a middle point where we say that UDHR as an instrument is important. Some of its provisions can be said to have achieve IL status.
        i. UN General Assembly Resolution are non-binding, until they are specified that they are binding but UN Security Council Resolutions are binding. So what is the normative status of UNGA resolution?
3. ARTICLE 2 of the UDHR is the cornerstone on which the HR regime is based i.e. the idea of non-discrimination
    a. *Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion,*

political or other opinion, national or social origin, property, birth or other status.

   b. *Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.*

4. However, the foundation of UDHR is ARTICLE 1 i.e. all human beings are born fre and equal in dignity and rights
   a. *All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*
5. Article 2 to 27 is the enumeration of your rights and then there is Article 28 which is that everyone is entitled to a social and internation order to realize these rights
   a. *Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized*
6. ARTICLE 29 has a duty which says that
   a. *Everyone has duties to the community in which alone the free and full development of his personality is possible*
7. ARTICLE 3- right to life and liberty
8. ARTICLE 4- No one shall be held in slavery
9. ARTICLE 5- No one shall be subjected to torture
10. ARTICLE 7- All are equal before the law and are entitled without any discrimination to equal protection of the law
11. ARTICLE 9 – no person shall be subjected to arbitrary arrest
12. ARTICLE 11- Everyone has a right to be presumed innocent until proven guilty
13. ARTICLE 13- Everyone has the right to freedom of movement and residence within the borders of each State
14. ARTICLE 14- Everyone has the right to seek and to enjoy in other countries asylum from persecution
15. ARTICLE 15- Everyone has the right to a nationality
16. ARTICLE 17- Everyone has the right to own property alone as well as in association with others.
17. ARTICLE 18- Everyone has the right to freedom of thought, conscience and religion
18. ARTICLE 19- Everyone has the right to freedom of opinion and expression
19. ARTICLE 23- Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
20. ARTICLE 26- Right to education

5th March

1. The UDHR was adopted by a UNGA Resolution. so what is the position of a UNGA resolution in terms of its relevance since it is non-binding? – it can be used to demonstrate state acceptance or for CIL, it can be used to demonstrate state practice or opinion juris because if a lot state vote in favour of a resolution, it can be argued that there is opinon juris that these state believe in the obligation contained in the resolution.

2. in UNGA, all members of UN cast a vote and all these votes have an equal bearing So we are basically saying that there is consensus building coming up under the UN framework. so with the coming of the GA over the years, a number of issues challenges concerns that states have in general have been taken up and debated in the UNGA.
3. usually UNGA resolutions are recommendatory in nature but we have ICJ decisions as well delineate that UNGA resolutions can reflect state practice and *opinion juris*.
    a. There is the ***Nuclears Weapon case***, where the ICJ have said that even though the UNGA resolution is not legally binding, they could be providing evidence of *Opinion Juris*, (since there is a psychological element that we are in agreement to what we have debated in the resolution)
    b. So we would need to see how unanimously was the UNGA resolution passed.
4. Resolutions also reflect the idea of "repetition". Repetition gives us an indication of the way that whether something is now solidifying no longer into a simple recommendatory nature but to something more than a recommendation.
    a. Example- we had the Stolkholm Declaration, Rio Dclaration etc. So these declarations did a lot of repetition. like the idea of Transboundary Harm not taking place, then later got repeated in Rio. So that is the repetition.
    b. So Repetition is one way of going beyond the idea of recommendatory nature of a UNGA resolution.
    c. So **Declarations help in crystallization into CIL.**
    d. **Declarations can also help in leading upto codification of a treaty.**
5. UDHR was the foundation of subsequent binding instruments. Similarly, many declarations are infact just an attempt to get a consensus that we would be willing to go ahead with something of this nature.
    a. So they make the foundation for binding treaties. That is the other important aspect of declarations.
    b. Ex- even apart from UDHR, we have seen declarations like Stolkholm being translated into UNFCCC
    c. **So Declarations help in consensus building**
6. **Declarations also have a large amount of Normative Value**
    a. Ex- UDHR tells you what sort of an idea we are expecting out of the human rights system.
    b. Due to their normative value, even if they don't lead to a treaty, they still help you take up certain challenges. Sometimes thematic conferences take place based on a declaration which have gotten passed by the UNGA
7. If the resolution or declaration does not lead to a treaty, does it still have any significance? YES, these declarations or resolutions can still guide in coming up of national instruments.
8. FURTHER these resolutions and declarations can help to clarify certain points in a treaty. so it can act as an **interpretation tools**
9. All the above points related to Declarations and Resolutions, specifically with respect to UDHR, we have come to a consensus that irrespective of what was the thought process that had gone in making the UDHR, the idea that we don't want it to be binding has clearly changed and there is a large amount of debate saying that UDHR today is part and parcel of General International Law.
    a. The significance of UDHR si that ICCPR and ICESCR came 20 years after UDHR. So in between UDHR was reigning supreme in the area of international

HR Law prior to these convention. So in the gap, whatever was done for fostering and respecting the HR as per the UN Charter, we were basing it on UDHR

b. *Secondly*, even after coming in of ICCPR and ICESR, we keep mentioning the UDHR because both these conventions were just elaborating upon what the UDHR was saying.
c. So many scholars started saying that the UDHR is constitution for HR.
d. FURTHER states also started using UDHR for legal instruments.
    i. ***in the Hostages Case-*** the US in their memorial had said that Iran had violated certain fundamental rights of the hostages reflected in the Charter of the UN, the UDHR and the corresponding portions of the ICCPR. So the US used UDHR as well and the court in Para 91 said that
        1. *Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights*
    ii. So in this statement, we start seeing that the UDHR has certain fundamental principles which are becoming part and parcel of general international law.

10. So wrt to UDHR, we are somewhere in the middle, that some of it is binding as CIL but some of it is not binding. We cannot say that it is completely declaratory but cannot say that the whole of it is a part of General International Law.

ICCPR and ICESCR

1. The mandate of the commission was to make both the declaration and the bill of rights. So UDHR talks about both civil and political and social and economic rights.
2. When the first draft bill came, there was debates that the bill had everything together i.e. civil and political rights and also social and economic rights so it is becoming too huge.
    a. Another issue was wrt to realization of these rights since civil and political rights realization is slightly different from realization of social and economic rights realization.
    b. Fundamentally too, the ideological differences with respect to the rights was also one of the big concerns
3. What was the ideological debate/difference? – There were 2 blocs, one the western bloc and the soviet bloc and this was happening post WWII.
    a. The Western Bloc had an idea that we want capitalism and they were also having the idea that liberal democracy should be spread across the world.
    b. Further in the US, there was a debate of civil and political rights during that period BUT there was also racial inequality in US and the social and economic rights with respect to the racial discrimination were very poor. So they did not want to bring light to that.

c. But the Eastern Bloc was like we want to give equality and that is more important. So our communism ideology and our socialism is a counter to your capitalist ideas.
d. So there was one side which said that the idea of HR we mean the socialist economy and the idea of equality and the other side is saying that how are you not allowing the right to vote or have civil liberties.

4. So it was decided in the end that we will come up with 2 covenants.
    a. But this lead to the issue that when we look at UDHR, we have the idea that these HR are indivisible, but if you are splitting it, it means that you are incorporating some rights but not incorporating the others.
    b. So they tried deal with this by saying that we will split into two but we will adopt them at the same time to show unity between these two.

6th March

GENERATIONS OF HR

1. When the draft covenant was being conceptualized, there was a GA Resolution 4215, the preamble to which was asking for the inclusion of socio-economic rights
    a. PREAMBLE- *the UDHR regards man a person to whom civic and political freedoms as well as economic, social and cultural rights intuitively belong. When deprived of economic, social and cultural rights, man does not represent the human person whom the UDHR regards as the ideal of the free man*
    b. This is giving the idea that hat is the way do you conceptualize human rights. What would it entail to be a human being. So we are coming to a conclusion that we are an indivisible unit, you require the unity of both civil and political and economic rights.
    c. Preamble further says- *….and for a particular human person as a citizen, must have a full range of rights*
        i. So the full range of rights which includes civic and political freedoms as well as economic, social and cultural rights, need to be protected by the state
    d. So apart from conversations being that HR are universal and HR are something which have unity i.e. they cannot be divisibl, there began coversations of how does the state envisage HR.
        i. In this conversation, Karel Vasak tried to explain the evolution of HR or how we view HR in the form of "Generations of HR"
2. FIRST GENERATION- stated to have emanated in the late 18th century, tracing back to the American and French Declarations of HR.
    a. This talks about broadly the civil and political rights which in essence is the rights of people against the state and also called "freedoms". Ex- right to freedom from state interference including right to life, liberty, property
    b. The role of the state in securing these is to not infringe on them as it is simply freedom from the state

    c. These are conceptualized as "Negative Rights" but it would be wrong to say that it is always a negative idea as we do have the state having to do positive action to realize some of these civil and political rights.
    d. Here we are talking about classic liberalism and the idea of liberty is what we hold the most valued for in this generation. So you want protection from the state from excessive interference
3. SECOND GENERATION- it is traced to the 19th century and it is seen as a time wherein we understood rights as measures to address certain societal problems majorly coming through because of issues like unemployment or the economic downturn that had taken place.
    a. This talks about socio-economic rights. So things like right to shelter, right to clean water, food, education etc.
    b. The role of the state n securing these is that it imagines the state in a more proactive role. So the state will participate and provide a minimum of certain socio economic goods to the people, so they can ensure a minimum standard of living for everyone
    c. These are conceptualized as "Positive Rights"
    d. This generation talks more about the idea of equality. It was stemming from the socialist-marxist movement which had come up and the worker's rights movement.
4. THIRD GENERATION- it is in the 2nd half of the 20th Century.
    a. The first 2 generations are individual rights but the 3rd generation is the group rights/solidarity rights like right to self determination of nations, cultural and religious rights, etc.
    b. This requires not just a pro active role of the state but also requires cooperations across states to grant them like "humanitarian aid"
    c. This generation is more reflective of the idea of fraternity
    d. It started post decolonization, so it seen as an anti-colonial stance.
5. the first and second generation have their reciprocal covenants, so you have your international legal insturment in the form of ICCPR and ICESCR. But the 3rd generation only pre-dominantly has seen the idea of self-determination.
    a. Further the 3rd generation feature predominantly in PSNR i.e. Permanent Sovereignty over Natural Resources and PSNR was also an anti-colonial idea.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

1. ICCPR parallels a lot of rights in the UDHR and it elaborates these rights more but it has certain additional rights and also it doesn't have certain rights.
    a. Though ICCPR reflects individual rights, we do have certain rights which reflect the 3rd generation
2. ICCPR and ICESCR both lay down standards and also the mechanisms to realize these rights. Further, self-determination is a common right of both ICCPR and ICESCR. Articles 1 to 4 is similar in language in both covenants.
    a. In both the Preambles ***firstly***, you are recalling the UN Charter, ***Secondly,*** you are recognizing you UDHR

3. UDHR never specifically mentions that HRs are indivisible but the way we interpret UDHR and the circumstances post the adoption of UDHR, we are now formulating that indivisible character.

> The States Parties to the present Covenant,
>
> Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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,
>
> Recognizing that these rights derive from the inherent dignity of the human person,
>
> Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,
>
> Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,
>
> Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

4. *Part I*- ARTICLE 1 – Self Determination
    a. It is one of the provisions which is talking about collective rights
    b. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*
    c. *All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence*
        i. To most contest issue in Article 1 is the idea of self-governing and secession of non-self governing territories
        ii. India has a reservation on Article 1- we say that this idea of self-determination, we are not saying that this right is not there but we are

simply saying that this right is with respect to people under foreign domination and not otherwise because we are talking about territorial integrity.

iii. When we talk about self-determination, we will allow internal self determination but the external self determination is what has led to concerns for most states since external self-determination has been allowed only in the context of de-colonization till date.

iv. Further, another aspect with respect to Article 1 is that the human rights committee and there are 2 optional protocols to ICCPR and depending upon whether the state is party to these, things change as to whether individuals complaints can come under ICCPR.

v. BUT Article 1 cannot be invoked by an individual.

5. *Part II*- ARTICLE 2 to 5 – deals with the state obligation with respect to civil and political rights
6. *Part III*- ARTICLE 6 to 27- deals substantive rights like right to life, freedom of speech and expression and other rights
7. *Part IV*- ARTICLE 28 to 45 – deals with the mechanisms the convention is visualizing to try and do the realization of these rights in the convention.

10th March

1. We consider external self-determination only in the context of decolonization wherein you are saying that you yourself will now become a sovereign entity. It is not considered outside the colonial context since the integrity of sovereign nation is important and if we say that external self-determination is valid outside the context of decolonialism, then it can pose a threat to the sovereignty of such a nation
    a. But internal self-determination is allowed since it allows for a state to say that we will not have interference from any other state.
    b. Self-determination involves the ability to have an autonomy to deal with culture, economy and social context of our own i.e. to govern ourselves.
    c. Thus in internal self-determination, how it translates within a country's context i.e. an already existing sovereign unit is like you would try and consider giving some form of autonomy to minorities, like linguistic minorities, or cultural minorities, your indigenous people, the whole federal structure. So you are giving a sort of autonomy which short of complete independence to ensure that carving out of a new state does not happen.
2. The issues which might come with Article 1 are issues like self-governing of indigenous people, land rights of indigenous people, etc.
3. ARTICLE 2 to 5- we see various obligations on states in this like
    a. **ARTICLE 2** -*to respect and to ensure to all individuals within its territory and subject to its jurisdiction* ***the rights recognized*** *in the present Covenant,* ***without distinction*** *of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
        i. It is telling us that a positive obligation is placed on the state to take proactive measures to ensure and to eliminate any form of discrimination.

ii. In ICCPR, although most substantive rights are for individuals, but there ae some substantive rights which are there for citizens only. So barring the idea of rights being meant for citizen, non-discrimination is to be followed as per Article 2 and 3. Ex- voting rights
iii. We also find that the state has been given the duty to incorporate these rights and ensure their realization for individuals.

b. **ARTICLE 2(3)**- *Each State Party to the present Covenant undertakes:*
   i. *(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have **an effective remedy**, notwithstanding that the violation has been committed by persons acting in an official capacity;*
   ii. *(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;*
   iii. *(c) To ensure that the competent authorities shall enforce such remedies when granted*
      1. So it is placing a duty on the state to provide effective legal remedies vis-à-vis this article. There is ofcourse monitoring mechanism as well in PART IV but when we are looking here at the type of obligations and duties that have been called upon each contracting state to ICCPR, we say these above provisions are ensuring that nations are starting to incorporate these HR provisions in their own domestic jurisdiction and also offer effective legal remedies.
      2. So thus we are ensuring realization of these HRs.

c. **ARTICLE 3**- *the **equal right of men and women** to the enjoyment of all civil and political rights set forth*
   i. this is also specific to non-dsicrimination but specifically with respect to gender
   ii. **ARTICLE 26**- it provides for non-discrimination before the law.
      1. *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status*

d. **ARTICLE 4**- *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*

i. derogation is permissible in times of emergency. it has 4 qualifiers,. ***firstly,*** the public emergency must threated the life of the nation. ***secondly,*** the extent must be strictly to the requirement of the exigencies, ***thirdly***, the measures must not be inconsistent with other obligation under IL, ***fourthly***, measure should not discrimination solely on the state grounds.

e. **ARTICLE 4(2)-** *No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision*
   i. So it provides that even in public emergency, no derogation from these Articles can take place.

f. So we are dealing with the idea of non-discrimintion, equality and the idea of non-derogation from these right in emergencies, although certain rights can be derogated even in emergencies.

4. ARTICLE 6 to 27- Substantive Provisions
   a. **ARTICLE 6-** *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life*
      i. There is a negative obligation on the state to not interfere in the life of the individual and further there is a positive obligation as well dealing with the idea of protecting your life. So a facet would be, how would you protect your citizens right.
      ii. So this obligation of right to life is both negative and positive.
      iii. What would you consider as a violation of a right to life, when is an individual dead and when is an individual alive. IF someone is kep aliv on ventilator, is that person alive? To a large extent these questions are kept on domestic law.
         1. The more serious question is when do you consider the person to be alive, at conception? or if not at conception, then at which month?
      iv. This right is no derogable as per Article 4, but it is not absolute as the safeguard against arbitrary deprivation of life but it doesn't say that life cannot be deprivated at all.
         1. Exceptions could be self-defence or a conflict sitation i.e. in armed conflict, taking away of rights can be allowed
   b. **ARTICLE 6(2)-** *In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court*
      i. It is not asking countries to abolish death penalties, but rather asking them to limit the instance in which the are giving the death penalty
5. ARTICLE 7- No Torture or to cruel inhuman or degrading treatment or punishment.
6. ARTICLE 8 – No Slavery
7. ARTICLE 9 – No subjection to arbitrary arrest or detention
8. ARTICLE 12- right to movement and freedom to chose residence

9. ARTICLE 15- No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed
10. ARTICLE 16- Everyone shall have the right to recognition everywhere as a person before the law.
11. ARTICLE 18- right to freedom of thought, conscience and religion

11th March

1. Article 6 to 11 are substantive rights with respect to body autonomy. so we are talking about life, liberty and security of an individual
2. Article 12 and 13 talks about freedom of movement and the rules for states to expel aliens from the state
3. Article 14 to 16 deal with how a person needs to treated by the judicial system. So things like retrospective punishment, right to be recognized etc
4. Article 17 to 22 deal with fundamental freedoms related to speech, expression, religion, thought, and also freedom of association including trade unions
5. Article 23 and 24 deal with family union
6. Article 25 deals with political association
7. **ARTICLE 27** - *In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*
    a. Article 27, normally speaking is an individual right for person to participate in culture etc, HOWEVER, it can also be interpreted to mean that it is a group right protecting the community of individuals.
    b. Post the 3rd generation of rights, w have started interpreting 27 in that group category but a bare reading of this is still an individual right
8. **Final Clauses in Treaties-** they deal with provision like coming into force, reservations, dispute resolution, signing, ***withdrawl*** etc
    a. ICCPR does not have an withdrawal clause, the reasoning that the Human Right Committee is saying that once a party has ratified it, they are limited to denounce it as a whole.
9. PART IV – so we are placing obligations on states, then we are talking about the substantive rights, and now we are talking about realization of these human rights.
    a. PART IV is setting up a treaty body which is called the **Human Rights Committee**. We also have a similar committee under ICESCR which called the **Committee of Economic Social and Cultural Rights.**
    b. There are other treaty bodies for other treaties as well.
    c. You have independent experts who are part of the HRC. they are supposed to global representatives but in the HRC, the people who are representing are in their personal capacities but they are from across the world. So you are not politically motivated.
10. WHAT DOES THE COMMITTEE DO? –

a. Getting periodic reports from stats. So states who re party to the ICCPR have to submit the reports to what they have done to give effect to the substantive rights they have accepted. These reports are revied by the HRC
b. HRC comes out wit general comments which are recommendatory in nature regarding the interpretation of the treaty. the HRC is also supposed to assist states by laying down points regarding what are the supposed to be doing (like laying down the exact countours of the right to life).
    i. So these general comments help give effect to the provisions mentioned in the covenant.
    ii. The comments mention both substantive as well as procedural provisions.
c. There are 2 optional protocols to ICCPR. so parties to ICCPR can accede to these protocols as well but it is not mandatory.
    i. OPTIONAL PROTOCOL 1 is for individual complaints. if a state is party to this protocol, it is allowing individuals, to make communications to HRC to make complaints. BUT these complaints must have exhausted everything domestically. BUT this is not open to state which have acceded to the OP1.
        1. Further the HRC will be only looking at specifically to the ICCPR. So you would have to go to the HRC with a specific provision of the ICCPR
    ii. OPTIONAL PROTOCOL 2 deals with abolition of death penalty. it allows for reservation allowing execution in time of war, pursuant to a conviction of the most serious crime.
        1. So states party to this will be saying no to death penalty.
d. Finally states can also go against other states for violation of ICCPR, that would also be handled by the HRC.
e. So the HRC does the above 4 tasks

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. Apart from the difference in the nature of the rights, the ICESCR places an obligation to follow it only in so far as a state can but this qualification is missing in ICCPR
    a. There is also progressive realization in ICESCR which is not there in ICCPR as it deals with immediate realization
        i. This progressive realization is also putting a negative obligations on states not to go back
    b. ICESCR are more like aspirational in nature and therefore are different from ICCPR.
    c. In ICCPR, we are looking at freedom from fear and in ICESCR, we are looking at freedom from want.

12th March

1. We have both negative and positive obligations coming through for both ICCPR and ICESCR. In one side ofcourse, there is more negative and more positive in the other but that doesn't mean that there is an absence of the other.
    a. the question of how much resource allocation is required for the implementation of these rights is also present in both strands.
2. Further if we look at the provisions of both these covenants, we get to the understanding that the states do the obligation of protecting and fulfiling all the substantive rights provided in these covenants.
3. **ARTICLE 6** – right to work is given. Now here the obligation on the state would be to not deny work opportunities on the basis of categories. So there is an idea of a negative obligation as well as a positive obligation since there is an idea of protection i.e. the state needs to ensure that private organizations should not do something which goes contrary to the covenant.
4. **ARTICLE 7**- right to just and favourable working conditions including the remuneration, fair wages, etc
5. These 2 conventions have a binding obligation only if they have been ratified. ALSO, all three i.e. UDHR, ICCPR and ICESCR are outlining the fundamental HR which are universally recognized, they are providing a global standard AND are also giving you a blue print to work domestically for realization for the HR.

GENERAL COMMENT 26 on ICCPR for WITHDRAWL

1. PARA 1- *The International Covenant on Civil and Political Rights does not contain any provision regarding its termination and does not provide for denunciation or withdrawal. Consequently, the possibility of termination, denunciation or withdrawal must be considered in the light of applicable rules of customary international law which are reflected in the Vienna Convention on the Law of Treaties. On this basis, the Covenant is not subject to denunciation or withdrawal unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty*
    a. though it is not mentioned in the treaty, unless we can establish that the parties had thought of a withdrawl from the treaty, pursuant to VCLT, only then you can withdraw
2. It further says that parties did not admit to the possibility of denunciation as under ARTICLE 41(2), the state is permitted to withdraw its acceptance of the competence of the Committee to examine inter-State communications by filing an appropriate notice. This means that there is withdrawl allowed from other things and the non-inclusion of a provision for withdrawl from the treaty is not a mre oversight
3. They further say that treaties made near ICCPR have this withdrawal clause but only ICCPR does not have it. So they are saying that this is not an oversight.

CUSTOMARY INTERNATIONAL LAW

1. A treaty is binding to the parties of the treaty but if something is established as CIL, then it automatically binds everyone. if a state denounces a particular treaty i.e. withdraws from it, it may still be bound by certain provisions of the same if those provisions reflect a CIL
2. 3rd parties don't have obligations to a treaty but there are certain circumstances where they can get obligations like in *erga omnes obligations*, their parties may become impacted by a treaty to which they are not a party
    a. Article 38 of VCLT- treaties may become binding on 3rd states through international customs
3. Which HR actually fall under CIL?
    a. Torture, Slavery, Genocide, and Right to Life. Further, they have reached jus cogens status
4. Many of these CIL are civil and political rights, there are not a lot of Social and Economic rights which can be tangibly said to be CIL
    a. This is because CIL is formed through state practice and *opinion juris*, but many western states still favour civil and political rights more

GENERAL PRINCIPLES RECOGNIZED BY CIVILIZED NATIONS

1. GP is formed by presence in domestic legal regimes through the world. the functions of GP was to ensure that a situation of non-law is not there i.e. no situation of an absence of law.
    a. The court is supposed to be doing deliberations and for situation, where you might not have any law or treaty or any CIL, the court would not want to say that the cannot do anything
    b. So to avoid that, we have GP
2. There are 2 debates on what can be considered as GP
    a. ***First***, is that they are derived from national ecosystem, and you are going to be doing a comparative analysis of all jurisdictions to figure out what rules are there for you to consider that this is equally accepted by all jurisdictions
        i. Further this is a domestic jurisprudence and not all domestic legal policies could have a tangible impact on an international legal system. So transposition of this also has to take place to the international legal system.
    b. ***Secondly-*** international legal system is also a legal system, so some rules may evolve within that international legal system itself. (this one is contested). Something which become so intrinsic to the international legal system, that is also considered to be a GP.
        i. Ex- Principle of Sovereignty, Idea of Consent Jurisdiction i.e. we will not have a court which will mandate a mandatory jurisdiction for a state.
        ii. Ex- principle of Dignity.

17th March

3. Sometimes it becomes difficult to determine whether a principle is a CIL because of Opinio Juris. So people say that many of these practices can still form part of GP.
4. one of the challenges is that when we talk about GP, is that we do not agree and we don't have this in our domestic system, then it becomes an issue. in CIL we look at SP and OJ

and there is a concrete way of finding it. BUT for GP, we do a comparative analysis all across the board.
    a. For CIL, we have consistent objector but that needs to take place at the inception of the CIL but for GP we don't have that form of a counter
5. So a state can come and say that we are not bound by treaty. you can also say that even if we have something comparable in our domestic legislation, we oppose the idea of it having a similar side of action in your international legal sphere
    a. That is why we have difficulty finding out which principles can be recognized as GP. Ex- Right against Self Incrimination, Good Faith etc.
    b. Also the idea of dignity can be touted to be understood as a GP of IHRL and International Humanitarian Law

(look at subsidiary sources and soft law from reading)

RESERVATIONS IN HR TREATIES

1. VCLT tells us that what are reservations, how do you make a reservation and the effect of the reservation.
2. There was a the reservations case and the reservations case became the bedrock for the VCLT and now we have the treaty as the final focus on reservation.
    a. ***ICJ Advisory Opinion to Reservations to Genocide Convention-*** there were parties who had made reservations to the Genocide Convention.
    b. The convention did not have a clause allowing for reservation, then there are treaties which allow for certain parts of the treaty to have reservations but not all articles of the treaty. However the Genocide treaty did not have any mention that whether it allows or disallows for reservations.
    c. Now when we are talking about a treaty, all parties to the treaty can be bound by the provisions of the treaty. BUT if you allow a state to make a reservation, you are allowing that state to become party to the treaty contigent on the fact that thy are not bound by a particular provision.
    d. If you are allowing states to make reservations, you will start allowing for separate legal orders with respect to the same legal orders.
    e. So the question was whether we should allow states to make reservations. If you do not allow the states the make reservations, then the states might say that they are not party to the whole treaty which would make it an issue to be a treaty to be universal.
    f. Earlier there was a hardline approach. If 15 states are party to a treaty and 1 wants a reservation, all the other 14 would have to agree with the reservation and only then the party would be allowed to have a reservation. So then state 1 has 2 options, either accept the whole treaty to leave the treaty.
        i. This was the approach before the genocide convention but in this case the opinion of the ICJ was a more flexible. They did not go with the stance that if a state wants to go for a reservation, then every party needs to accept it.
    g. It was held by the court that even if a convention contained no article on the subject of reservations, it did not follow that they were prohibited. The character of the convention, its purposes and its provisions must be taken into account.

    i. As regards the effects of the reservation in relations between States, the Court considered that a State could not be bound by a reservation to which it had not consented. Every State was therefore free to decide for itself whether the State which formulated the reservation was or was not a party to the convention
3. There is also the "Guide to Practice on Reservtion on Treaties".

18th March

RESERVATIONS CASE

1. QUESTIONS
    a. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others
    b. If the answer to question I is in the affirmative what is the effect of the reservation as between the reserving State and:
        i. (a) The parties which object to the reservation?
        ii. (b) Those which accept it?
    c. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:
        i. (a) By a signatory which has not yet ratified?
        ii. (b) By a State entitled to sign or accede but which has not yet done so?
2. ANSWERS
    a. QUESTION 1- State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose the Convention; otherwise that State cannot be regarded as being a party to the Convention
        i. The court did a balancing act, they balanced the idea of states being allowed to make a reservation and tried to ensuring as much participation without undermining the integrity of the convention by stating that a reserving state would be allowed to be a party to a treaty, thereby allowing for increasing the number of participants as long as that particular reservation is compatible with the object and purpose of the particular treaty
    b. QUESTION 2-
        i. (a) if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;
            1. So a state can object on the ground that the reservation is going against the object and purpose of the treaty. This is a normal ground in situations where the treaty does not mention about reservations. Thus if the treaty has mention that you cannot make a reservation that can also be a ground of objecting

2. Ma'am- BUT is there a possibility that the state can make an objection even if the reservation is in line with the object and purpose of the treaty? – YES, state could have different ideas like different political beliefs etc so make objections to reservations which are compatible with the object and purpose of the treaty
3. So the objecting state can consider the reserving state to not be a party to treaty. So between these two countries, the treaty is not in force. BUT there have been changes in the way VCLT envisions the legal effect of the treay between the reserving state and the objecting state.

ii. (b) if, on the other hand, a party accept the: reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving state is a party to the Convention

c. Question 3 is not important for the syllabus

1. Sovereignty is already allowing you that whether you want to become a party to the treaty or not. NOW post that we are on the question that whether a state can have a small modification to a part of the treaty or not. Even for this, as a sovereign nation we say that a state should be allowed to decide whether or not they would like to be bound by any orall parts of the treaty.
    a. So the idea of sovereignty lies on the foundation of the permissibility of the states to make reservations in the first place

VCLT

1. DEFINITION- *"reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;*
    a. It is a unilateral action and it is made at a specific time i.e. signing, ratifying, accepting, approving or acceding to the treaty
    b. You can exclude the full provision or modify it.
2. WHEN CAN MAKE (**Art. 19**) - *A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:*
    a. *(a) the reservation is prohibited by the treaty;*
    b. *(b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or*
    c. *(c) in cases not failing under subparagraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.*
3. *Understandings and declarations*- understandings are less formals than reservations. They could mean to say that "I interpret this provision to mean this" OR "I interpret the scope of this provision to be XYZ". They do not have a sort of legal effect that the reservation has on state obligations.
    a. So it becomes difficult to understand that the unilateral statement was s reservation or understanding.

19th March

1. A reserving state is not bond by the provision it has incorporated a reservation with respect to but the accepting state is bound by the entirety of the treaty. BUT the accepting state, vis-à-vis the reserving state would only have to followed the provision reserved by the reserving state ***only till the extent of modification***
2. LEGAL EFFECT (**Art. 21**) - *A reservation established with regard to another party in accordance with articles 19, 20 and 23:*
    i. *(a)* ***modifies for the reserving State*** *in its relations with that other party the provisions of the treaty* ***to which the reservation relates to*** *the extent of the reservation; and*
    ii. *(b) modifies those provisions to the* ***same extent for that other party*** *in its relations with the reserving State*
        1. This is with respect to the accepting state
    b. *2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.*
        i. The changes will come one with respect to the other states and the reserving states BUT there will not be any change amongst the other states *interse*
    c. *When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.*
        i. This is with respect to the objecting party. In the reservations case, the answer was given that the objecting state could consider the reserving state not to be a party at all to the treaty. So the treaty was not considered to be enforced between these both reserving and objecting parties completely.
        ii. BUT under VCLT, incase the objecting state does not have an issue with the treaty coming into force, in that case, the provision, vis-à-vis the reservation will not apply between the objecting and the reserving state
3. Once a reservation or an objection has been given, withdrawl is also possible at any time ***unless the treaty provides otherwise.***
    a. Consent of a State which has accepted the reservation is not required for its withdrawal.

RESERVATIONS IN HR TREATIES

1. The reason why we have debates about reservations in HR treaties is because of the character of HR treaties. There are proponents who say that we should not permit reservations to HR treaties at all and interestingly there are higher number of reservations in HR treaties.
    a. Judge Alverez in his dissenting opinion in the Reservations case goes into this idea of why HR treaties have a different character.
    b. To a large extent when we are talking about treaties, we are looking at interstate obligations and towards each other. Like in trade treaties, or access to some resources, you will give benefit to some other state. BUT in HR treaty, it is dealing with more of your domestic conduct rather than interstate obligations.
    c. So you are placing limitations on the state in HR treaty. In other treaties, you have lesser reservations because you don't ant to put reservations since someone else might put a reservation also and that might negatively impact what you wanted to

achieve from that treaty. This does not happen in HR treaties as HR treaties do not have very tangible reciprocity.

i. Thus there is also a debate that whether VCLT can be used for HR treaties in terms of reservations, since the reservations in VCLT were made looking at the context of reciprocity, which not tangible in HR treaties. So can VCLT be used to discuss reservations in HR treaties.

d. There is also a difference in the way the content of HR treaties is spelled out. In many cases, the provisions which come out in HR treaties like in the international bill of human rights, you are articulating some fundamental norms that an individual should be having. So many times, you are not having concrete formulizations that we should do X or Y.

i. Ex- we say right to life, but then there needs to be more specification that all does right to life entail, how do you ensure right to life, what do you mean by right to life, what sore of an obligation arises on a state when we say we will realize right to life.

ii. So you have more normative statements being articulated in the HR treaties.

2. HRC General Comment No. 24- *Such treaties, and the Covenant specifically, are not a web of inter-State exchanges of mutual obligations. They concern the endowment of individuals with rights. The principle of inter-State reciprocity has no place.*
    a. This is how the HRC is trying to define the character of HR Treaties.
    b. You might say that a particular state is not fulfilling its promises under a HR treaty but that does not allow for a reciprocal idea of you also not fulfilling the HR treaty.
3. FURTHER, the other issue with reservations in HR treaties is that the idea of HR is considered to be universal, then if you are permitting reservations to HR treaties, then you are undermining the universal character of HR by allowing states to make reservations on HR treaties.
    a. So the core idea of HR being universal and then allowing HR to come through is against the idea of HR being universal
    b. So many people are proponents that sovereign nations say that we have a right to make reservations but not to HR treaties. BUT interestingly many HR treaties themselves allow reservations.
4. So there are reasons like undermining of universal character of HR, the character of HR treaties is completely different in nature than other treaties, VCLT will not be able to help us due to the non-reciprocal nature of obligations, etc why reservations should not permitted in HR treaties.
5. BUT why SHOULD reservations be permitted in HR treaties? –
    a. Firstly, it is for larger acceptance of HR treaties, as a state might say that currently they do not have the capability to realize HR, so they are putting in some reservations till the time they have that capability and accepting the rest of the treaty. If this is not allowed, then the state might not accept the treaty altogether.
    b. So we know that the reservation cannot be against the object and purpose of a treaty. And thus permission of reservation in HR treaties might not be a bad thing as it will allow for universal acceptance of the treaty.
    c. HRC does monitoring of the HR treaties, so when a state plans to put in a reservation to an HR treaty, they ask the state that whether it has a plan in place which would lead to achieving of the withdrawal of the reservation at a later point of time.

    i. So at this juncture, they should go ahead with the reservation but withdraw it later
6. So there are two sides, one side says reservations is going to undermine the entire HR regime because of the legal effects of reservations BUT the other side is saying that reservations are made by states who are actually serious about human rights because of ideas like I want to be part of it and I am really invested in the idea of HR and I am using my reservations to help me demarcate how can I go about it
7. So the debate about legality of reservation in HR is still there but the balck letter of the law is that you **<u>can</u>** have reservations in HR treaties because irrespective of whatever you might consider to be the character of HR treaties where you are trying to say that HR treaties are talking about fundamental HR norms, etc, in the end reservations are based on the idea of sovereignty, allowing the states to make reservations.
8. Who decides whether a reservation can be made a permissible reservation or not? – treaty bodies, like HRC, do the monitoring etc and many of these bodies have been looking at the reservations made to the treaties and deciding whether the reservations are actually permissible.
    a. Permissibility in the sense of object and purpose or even whether the treaty itself allows of reservations.
    b. NOW, courts are given the power to decide about the reservation of treaies but are treaty bodies competent to decide about the permissibility of the reservation? – this will depend upon the treaty itself to give competence to the treaty body regarding whether or not the body can do it.
9. Para 3.2 of Guide to Practice on Reservation on Treaties- It provides who can assess the permissibility of reservations:
    a. The following may assess, within their respective competences, the permissibility of reservations to a treaty formulated by a State or an international organization:
        i. *Contracting States or contracting organizations*
            1. Bearing the idea of sovereignty, each state can make an assessment of their own with respect to a particular reservation.
        ii. *Dispute settlement bodies*
            1. This would be mentioned in the treaty itself like ICJ or some other organization.
        iii. *Treaty monitoring bodies*

<u>20th March</u>

1. So, *firstly,* the beneficiaries of HR treaties is not other contracting states but your own citizens. But the promise internationally that the states are making is that we will fulfil our promise as we have given vis-à-vis he treaty itself and towards our own citizens
    a. *Secondly,* most of these promises are not reciprocal in nature so you cannot refuse to fulfil your own promises by stating that another contracting party is also not fulfilling its promises

<u>Dissenting Opinion of Judge Alverez</u>

1. in the main opinion, reservations we held to be permissible, but Alverez first goes to the evolution of IL itself and how things have been evolving and he mentions certain treaties with certain characters.
2. He further says that the character and the significance that the UNGA places also becomes important as he goes ahead in the opinon
3. *In this respect, this law includes within its domain four categories of multilateral conventions, three of which were formerly unknown :*
    a. *(a) those which seek to develop world international organization or to establish regional organizations, such as the European organization which is of such great present-day interest ;*
    b. *(b) those which seek to determine the territorial status of certain States ; such conventions have existed in Europe since the beginning of the xixth century, and have constituted what may be called "European public law" ;*
    c. *(c) conventions which seek to establish new and important principles of international law ;*
    d. *(d) conventions seeking to regulate matters of a social or humanitarian interest with a view to improving the position of individuals*
4. He says that the first 3 categories is something which we have known about earlier as well but the 4th category is something which is new.
5. *The new international law, reflecting the new orientation of the legal conscience of the nations, condemns genocide- it condemns war-as a crime against civilization,*
6. The above 4 categories have characteristics which differentiate them from ordinary multilateral conventions
    a. *they have a universal character; they are, in a sense, the Constitution of international society, the new international constitutional law.*
        i. *They are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights,*
    b. Ma'am- So you are playing on the idea that most of these treaties are for the benefit of the individual and are trying to have a universal character.
        i. In most treaties, you have some sort of rights conferment on the states but these treaties are more towards putting in obligations on states, rather than rights.
        ii. So these multi-lateral conventions are markedly different from others and they are trying to build this idea that these sorts of multilateral conventions are coming in from a more human angle to it and more general character on which you are trying to build a foundation of a new international legal order.
7. He thus says that due to the nature and the manner in which these conventions have been formulated, they constitute an indivisible whole and thus they should ***not be subjected to reservations*** as it would be against their purpose i.e. general interest and social interest.
    a. Thus there are 2 fold arguments, first that reservations would be against the purpose of the treaty and second that the treaties are such that you cannot severe the obligations from one another since the entire treaty form the contingent whole.
8. How do we deal with advocates that we should admit reservations to such treaties? – he says that the advocates say that reservations need to be allowed or else states would not sign these treaties.

a. He goes into the manner in which treaties are evolved. The contents of the treaty are made by the states themselves. Before signing and ratifying the treaty, we have the adoption of the treaty i.e. the General Assembly adopts the text of the treaty and then you put it up for signing and ratifying.
b. He says that *It would be inadmissible that an instrument approved by the Assembly of the United Nations and designed to form one of the foundations of Our international life could be destroyed, or even shaken, by the independent action of one or more States, which actually took part in drawing up the conventions concerned*
c. He further says that to avoid the difficulty of states not signing these treaties, *conventions of the kind referred to above. ought to be established in their essential points without going into details, so that they can be accepted by the greatest possible number of States*
    i. So he is hinting towards framework treaties, where you are going to the essential points and not going into the details. Ex- Environmental Treaties.

9. He then says that if at all we are talking about reservations or its permissibility, I needs to be specifically outlines in the treaty itself.
    a. He further says when we are talking about reservation and allowing for reservations, we need to outline exactly what sort of legal effect the reservation will have.
    b. So he is going against the idea that you can have reservations when the treaty itself is not mandating it. The only way you have reservations to such treaties is when the treaty is mentioning it.
10. So finally he says that the answer ot QUESTION 1 is that *if the reservations proposed by a State are not accepted by one or several others of the States parties to the convention, the reserving State is not to be considered as a party to the convention.*
    a. However, in the advisory opinion, we had said that as long as it is not going against the object and purpose, the reserving state still retains its position as party to the convention.
    b. *If the reservations are accepted by the majority of other States, then the convention is transformed, and another convention takes its place; the States which have not accepted the reservations are not parties to the new convention.*
        i. Having a reservation which is accepted by many is transforming the convention itself into something else altogether. So it no longer the same convention which was adopted in the first place
    c. *Finally, if the reservations are accepted by certain States but objected to by others, then there is no convention at all*

24th March

1. As per the reservation case, If a state is found to be reservation which is found to be impermissible i.e. against the object or purpose, that state is not a party to the treaty. This effect of an impermissible reservation became a hot topic for debate in terms of HR treaties. The concerns in this aspect are as follows:
    a. One issue is trying to ensure universal status of HR across the globe as there will not be participation by reserving state who makes the impermissible reservation

b. So the argument was that even if the state makes an impermissible reservation, we should keep the state bound to the treaty without the effect of the reservation i.e. severability.

2. Guide to Practice on Reservation on Treaties –
    a. Para 3.1 - **Permissible reservations** – same as Article 19 of VCLT
    b. Para 3.1.5- **Incompatibility with object and purpose**-
        i. *A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the raison d'être of the treaty.*
    c. Para 3.1.6- **Determination of object and purpose** –
        i. *A reservation is incompatible with the object and purpose of the treaty if it affects an essential element of the treaty that is necessary to its general thrust, in such a way that the reservation impairs the raison d'être of the treaty.*
    d. Para 3.2- **Assessment of permissibility** – written above
        i. It says that the following may assess "within their respective competencies". Thus the treaty bodies would assess the reservations within their competencies.
    e. Para 3.2.1 – **Competence of a Treaty Body to assess permissibility** –
        i. *A treaty monitoring body may, for the purpose of discharging the functions entrusted to it, assess the permissibility of reservations formulated by a State or an international organization.*
        ii. *The conclusions formulated by such a body in the exercise of this competence shall have the same legal effect as that deriving from the performance of its monitoring role.*
            1. So they can give an assessment and the left effect of it would be the same as the monitoring role. So we would have to see the treaty which has created the treaty body. If the treaty says that the assessment would be binding, then it would be binding.
            2. So whatever legal effect that we are intending to be created would be crated through the treaty itself
    f. Para 3.2.2 - **Specification of the competence of treaty monitoring bodies to assess the permissibility**
        i. *When providing bodies with the competence to monitor the application of treaties, States or international organizations **should specify**, where appropriate, the nature and the limits of the competence of such bodies to assess the permissibility of reservations. For the existing monitoring bodies, measures could be adopted to the same ends.*
    g. Para 3.2.3 - **Cooperation of States and international organizations with treaty monitoring bodies**
        i. *States and international organizations that have formulated reservations to a treaty establishing a treaty monitoring body are required to cooperate with that body and should give **full consideration to that body's assessment of the permissibility** of the reservations that they have formulated.*

        1. So due consideration needs to be given to the assessment of the treaty body
    h. So treaty bodies CAN assess, But what will be the effect of the assessment, that needs to be looked in the treaty itself depending upon the power of the treaty body. Can it be made legally binding?
        i. But regardless of the treaty powers, due consideration needs to be given to the assessment by the treaty body.
3. If the provision on which the reservation is made is also a part of CIL, then the state may say that they are no bound by the treaty due to the reservation BUT the state will still be bound by the CIL
4. Consequences of an Invalid reservation as per the Guide to Practice
    a. Para 4.5.1 - *A reservation that does not meet the conditions of formal validity and permissibility set out in Parts 2 and 3 of the Guide to Practice is null and void, and therefore devoid of legal effect*
        i. Formal validity is the procedural things like it is supposed to be written
        ii. So the reservation is without any legal effect.
    b. Para 4.5.3 – **Reaction to an Invalid Reservation** –
        i. *The nullity of an invalid reservation does not depend on the objection or the acceptance by a contracting State or a contracting organization.*
            1. So state A cannot say that State B had accepted my reservation to create a legal effect to the reservation which is invalid
        ii. *Nevertheless, a State or an international organization which considers that the reservation is invalid should, if it deems it appropriate, formulate a reasoned objection as soon as possible*
    c. Para 4.5.2 – **Status of author of invalid reservation**
        i. *When an invalid reservation has been formulated, the reserving State or the reserving international organization is considered a contracting State or a contracting organization or, as the case may be, a party to the treaty without the benefit of the reservation, unless a contrary intention of the said State or organization can be identified*
            1. So if the state who had said yes to the treaty contingent to the validity of the reservation, only then it would be held to be a non-party in case of an invalid reservation. So the state would have to make their intention clear that I would not be a party without the reservation.
            2. If this intention is not made clear, the state would be held to be a party without the effect of the reservation

25th March

OTHER CORE HR TREATIES (APART FROM INTERNATIONAL BILL OF RIGHTS)

1. We have the **International Convention on the Elimination of All Forms of Racial Discrimination**

a. ICCPR and ICESCR have a cornerstone idea of non-discrimination, but in this treaty, it is specifically talking about non-discrimination in the context of racial discrimination.
b. So this is a reaction to a specific treaty to a specific challenge i.e. racial discrimination.
c. it defines the concept of racial discrimination-**Article 1**- *In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life*
    i. So it can be the distinction, exclusion etc, based on colour, race descent, which has the effect of impairing recognition, enjoyment etc.
d. **Article 1(2)** - *This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.*
    i. So the state can discriminate between citizens and non-citizens
    ii. The question is that could states make distinction between non-citizens? Can a state say that we will allow migrants from State A,B and C but not state D? o can you give preferences to some non-citizens but not other non-citizens.
e. Similarly, we have a **Convention Against Torture.** This is also to deal with the specific issue of torture

2. We also have treaties which deal with the protection of certain vulnerable group for a variety of reasons, maybe historically, socially, economically. So these groups require more protection
    a. So we understand that refugees, children, women etc. which might require higher protection
3. Then there is the **Genocide convention**. It declares that Genocide is an international crime.
    a. It places the obligation on the contracting states is to prevent genocide from taking and punish those responsible for genocide
    b. It states that those who are part of the government or are working on its behalf will not be able to invoke the immunity from the genocide to escape punishment

26th March

CONVENTION AGAINST RACIAL DISCRIMINATION

1. ARTICLE 2 - *States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination*
    a. *(a) Each State Party undertakes **to engage in no act or practice of racial discrimination** against persons, groups of persons or institutions and to en sure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;*

b. *(b) Each State Party undertakes **not to sponsor, defend or support racial discrimination** by any persons or organizations;*
c. *(c) Each State Party shall **take effective measures to review governmental, national and local policie**s, and to amend, rescind or nullify **any laws** and regulations which have the **effect of creating or perpetuating racial discrimination** wherever it exists;*
    i. So all las and polics need to be reviewed to see if any of these are perpetuating racial discrimination
d. *(d) Each State Party **shall prohibit and bring to an end**, by all appropriate means, including legislation as required by circumstances, **racial discrimination** by any persons, group or organization;*

2. ARTICLE 4 – State shall declare an an offence punishable by law all dissemination of ideas based on racial superiority or hatred,
    a. State shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination
    b. *Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination*
3. Further we also see that there is a treaty body which has been establish and we have compulsory state reporting to the treaty body i.e. ***Committee on the Elimination of Racial Discrimination***
4. The above are the various state obligations as mentioned.

CONVENTION AGAINST TORTURE

1. PREAMBLE - *Having regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment,*
    a. So w are recalling UDHR and ICCPR where it says that no one shall eb subjected to torture. But these conventions do not define torture
2. ARTICLE 1 - *For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*
    a. We include both mental and physical suffering.
    b. However, it says that it does not include pain and suffering which are incidental to lawful sanctions.
3. ARTICLE 1(2) - *This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application*
    a. So if a national legislation or international instrument has a widr definition of torture, that would be applied

4. ARTICLE 2 - *Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.*
5. ARTICLE 3 - *No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture*
    a. Refugees are people who are fleeing prosecution and thus you cannot send these people back to territories where we there is danger of torture.
    b. Return is when you send the person back to person where he came from, Expel is just expelling the person from the country, irrespective of where the person came from.
6. ARTICLE 14 - Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible
    a. So the convention also talks about rehabilitation of victims of torture
7. There is also compulsory state reporting to the treaty body established under i.e. ***Committee against Torture***

CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCES

1. ARTICLE 1 - *No one shall be subjected to enforced disappearance.*
    a. No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance
2. ARTICLE 2 - *"enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.*
3. ARTICLE 3 - *Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice*
    a. So ED is by the state, but even if it is without state support, it needs to be investigation and prosecution. So if someone says that my relative has been abducted or arrested in your state, the state is obligated to figure out what is the fate of this person and what happened to this person.
4. ARTICLE 4 - *Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.*
5. ARTICLE 16 - *No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.*
    a. So when w see non-refoulment, it is there in the refugee convention but we see this principle in other conventions as well. So if an individual comes to your country and states that in his country, there is history of abduction, arrest etc, then that person cannot be sent back

6. There are administrative obligations as wel like maintenance of register and records of liberty of all persons, further this ensures right to information about the individuals.

So in all the above conventions, apart from state obligations, there are aspects of criminal law, along with administrative obligations and access to information for realization of these convention.

CONVENTION ON RIGHTS OF CHILD

1. The preamble provides that who do the child needs to be protected - *the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth*
    a. All civil and political rights and economic and social rights have been placed here in the context of the child. So there are ideas of protection of the child.
2. ARTICLE 1 - *a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier*
3. ARTICLE 8 - *States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.*
    a. So the child needs to have an identity and he needs to have a nationality.
4. There are also obligations like the child needs to be registered immediately after birth.
5. The child also not be separated from their their parents against their will. If the separation occurs, the state shall resepect the right of the child to maintain personal relations and direct contact with the parents
6. The above rights are in addition to the civil and political rights and social and economic rights as provided in the convention
7. There are other rights like
    a. right against discrimination of any child irrespective of their parents' race, nationality etc
    b. Right to life
    c. Obligation on Sate parties to ensure to the maximum extent possible the survival and development of the child
    d. right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds
    e. Right to be heard of the child in any judicial and administrative proceeding if the issue at hand would impact the child
    f. Obligation to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse

1st April

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

1. There were 2 important questions which were formulated for the protection of human rights of women
    a. is that are we supposed to have a legal system where we treat men and women equally OR are there certain fundamental gender differences which require us to treat the man differently
    b. To answer this we had the core idea of non-discrimination where we say that one of the categories on the basis of which discrimination is prohibited is sex.
        i. So we ae saying that tere should not be discrimination or women or men (both) on the grounds of gender (symmetric protection)
    c. The other idea is that because of the inherent structural, religious, cultural modes which are present in the society which are putting women in a vulnerable position.
        i. The symmetric protection might obscure the the structural problems hich are present in countries. Thus we would require asymmetric protection
        ii. This asymmetric protection is provided in CEDAW at it provides for both de jure and de facto protection since you need something more than de jure equality.
    d. The idea of symmetric protection or formal equality is that you have provisions in the law which treat men and women equally i.e. whatever is available to men is available to women. EXAMPLE of this is that there was a law in Mauritius where foreign wives of men for residence automatically but foreign husbands of wives needed to apply for residence This was held to be discriminatory by the HRC as there was not an identical treatment
        i. BUT the idea of asymmetric equality or substantive equality, we understand that there are additional hurdles which a woman might over come to be on equal footing as men and thus they require additional protection over and above symmetric protection. Ex- Domestic Violence Laws in most countries are gender neutral
    e. Under the International Bill of Rights, we have that we should not discriminate on the basis of sex. BUT in many cases, we realize that the discrimination against the other gender is not a legal question at many instances, it is not a question of law but rather structural, religious and cultural issues which will not be realized. So we are looking at de fact disparities which exist on the ground.
        i. So CEDAW is putting 2 obligations on the state, first is of dejure equality and second is hat if there are cultural or religious practices placing impediments on women to realize the de jure inequality, you need to take steps to break those structures.
2. ARTICLE 1 - *For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*
    a. So this is the definition of discrimination
    b. The scope of convention is ALL women i.e. young/old, married/single, able/disabled, indigenous, immigrants, migrants, refugees, etc.

3. ARTICLE 2 – it provides the core obligations that the contracting stats have taken up - *States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women*
    a. *(a) To **embody the principle of the equality of men and women** in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;*
    b. *(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;*
    c. *(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination*
    d. *(d) to (g)*
        i. So they are first condemning discrimination against women and then taking legislative and administrative actions for elimination of discrimination against women. So this is the core obligation of the contracting state parties.
4. ARTICLE 11 – elimination of discrimination in employment by providing
    a. (a)The right to work;
    b. (b) The right to the same employment opportunities,
    c. (c) The right to free choice of profession and employment,
    d. (d) The right to equal remuneration,
    e. (e) The right to social security,
    f. (f) The right to protection of health and to safety in working conditions
5. ARTICLE 11(2) – elimination of discrimination on grounds of marriage or maternity by providing
    a. (a) To prohibit dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;
    b. (b) To introduce maternity leave with pay
    c. (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities
    d. (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them
6. ARTICLE 13 – elimination of discrimination in areas of economic and social life
    a. (a) The right to family benefits;
    b. (b) The right to bank loans, mortgages and other forms of financial credit;
    c. (c) The right to participate in recreational activities, sports and all aspects of cultural life
7. ARTICLE 15 – State to give equality before law to women and men

So we are tackling both direct and indirect discrimination.

2nd April

MODULE 3- REGIONAL TREATIES

1. One is who are these treaties open to. This number is limited. FURTHER in these treaties, regional considerations are taking place for issues which are there only in that region like shared values, shared customs etc.
    a. ALSO consensus building becomes easier in regional treaties to see that what shall be the content of these treaties as you might have shared history, values, etc.
    b. ALSO since it is regional in nature, we also see better monitoring and better enforcement mechanisms coming in. so you have treaty, you will also have commissions and you will also have courts forming the entire structure of a regional human rights regime
    c. ANOTHER advantage of regional Human Rights treaty is that governments have a strong incentive to promote and protect human rights within their region, as severe violations of people‘s rights can lead to conflicts and destabilize neighboring countries
2. These regional treaties have the substantive framework that you have the treaty founding upon some of the rights and apart from that you have the other institutional mechanisms which might be in the form of courts.
    a. These treaties also have monitoring systems.
    b. Also, these treaties might have a rapporteur system

EUROPEAN REGIONAL REGIME

1. It deals with the **European Convention for the Protection of Human Rights and Fundamental Freedoms**
    a. It largely has civil and political rights
    b. It is the earliest regional human rights convention
2. When you become a party to ECHR, you retain your independent political domestic framework, you retain your courts, etc, BUT when you become a party to this convention, somethings are happening
    a. FIRST, you are committing to certain shared understandings. So all the countries in that region are saying that we share a particular understanding of Human Rights, so we are committing ourself to this shared understanding and shared standard which is being articulated in the treaty
    b. HOWEVER, with respect to the implementation of this treaty, unlike what happens in most universal agreements where most states are not agreeing or signing up to allow for the decision of their HRC to become binding, BUT here we are not talking about the recommendatory nature coming through in this treaty. That is why the European Regime is considered to be the most authoritative in nature since here you can directly approach the court.
        i. So state which are party to the treaty, needs to ensure that their domestic laws are in tandem with the treaty AND an individual (rather than a state) can approach the court for realization of these rights and this decision shall be binding on the state.
        ii. The only caveat is that you need to exhaust all your domestic remedies
    c. You will go to the international court if you feel that either the state is unable to protect your human rights OR you feel that the state itself is the perpetrator for violation of human rights

3. The convention has rights like Right to life, Prohibition against torture, Prohibition of slavery, Right to liberty and security, Right to fair trial, Freedom of thought, conscience and religion, Freedom of expression, right to privacy etc.
4. We also have the **European Social Charter**
    a. This deals with a lot of social and economic rights
    b. However, we have the jurisdiction of the court only with respect to the convention and not the charter.
5. European court of HR exercises mandatory jurisdiction with respect to the UCHR and the decisions create binding legal obligations for the states.
    a. ***Dudgeon v. United Kingdom***, the European Court of Human Rights held that Northern Ireland's criminal laws prohibiting consensual sex between consenting adult males violated the right to privacy under Article 8
        i. Thus states cannot use local cultural preferences as a general excuse for failing to protect the rights stated in the ECHR.
    b. There is also a jurisprudence on detention in ECHR and also related to protection of children and women rights
    c. These regional treaty like ECHR supplement and complementing the International Bill of rights and it cannot say that we are now not bound by the universal treaties
    d. There is also the doctrine of interpretation. If we are looking at treaties and we are trying to understand that what does this provision do, we look at other provision of the teaty, the preamble etc to look at the intent when we conceptualized this provisions.
        i. BUT in HR we are talking about progressive realization. So the ECHR has started using the idea of "**evolutive interpretation**", so unlike looking at the intention when the provision is drafted, they look at the provision as in the present time and what it means for the society as such.
        ii. So they have used the idea of the convention being a living instrument.
    e. ***Tyrer vs UK-*** It was about state inflicted corporal punishment, in this case they came up with the doctrine of the ECHR being a living instrument.
    f. So ECHR has not relied on the "Travaux" for interpretation of the traty
6. The Council of Europe was established in 1949 in the wake of World War II.
    a. The purpose of the same was to being reconciliation in European countries and promote HR
    b. It formulated the ECHR in 1950 which was established for protecting and promoting HR.

3rd April

INTER-AMERICAN HUMAN RIGHTS REGIME

1. It deals with the Organization of American States in 1948 which has endorsed the American Declaration of the Rights and Duties of Man which is non-binding declaration.
    a. It established the Inter-American Commission of Human Rights in 1959.
    b. In 1969, OAS adopted a binding regional treaty, the **American Convention on Human Rights**
        i. The ACHR established the Inter-American Court of Human Rights

        ii. Only states and the Inter-American Commission on Human Rights can submit cases to the Inter-American Court of Human Rights, however, which means that the Commission is the gateway to the Court for individuals who wish to file complaints against their governments
    c. The ACHR also talks about civil and political rights, however some social economic rights are also provided in this like Article 26
    d. Currently 24 out of the 35 members of OAS are parties to the ACHR
    e. The Court has established precedents related to involuntary disappearances, treatment of people with mental disabilities, homeless children, undocumented migrants, and women in detention.
        i. However, only a few number of cases have been fully implemented
2. Both the court and the commission have been accorded competence with respect to matters related to the fulfilment of the commitments by the state parties to the American Convention.
    a. The commission has a dual role. It came before the convention so it has a role as per the convention and as per the OAS as well.
    b. As an OAS charter organ, the commission has jurisdiction over all OAS members, whether ot not they have ratified the convention or not
        i. BUT as a convention organ, it has jurisdiction only to the state parties to the convention
    c. The commission came in before the convention but when the convention came in, we gave the commission the competence to the implement to the convention BUT that does not mean that the competence the commission had vis-à-vis the OAS has gone away.
3. ROLE OF COMMISSION UNDER THE CONVENTION - ARTICLE 41

The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:

a. to develop an awareness of human rights among the peoples of America;

b. to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;

c. to prepare such studies or reports as it considers advisable in the performance of its duties;

d. to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

e. to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;

f. to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and

g. to submit an annual report to the General Assembly of the Organization of American States.

4. ARTICLE 1 – States to respect the freedoms and rights recognized in the convention without any discrimination for reasons of race, color, sex, language,
5. ARTICLE 26 – **progressive development -** *The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.*
6. Other rights are provided like right to life, right to humane treatment, freedom from slavery, right to personal liberty, right to fair trial, freedom of thought, religion, expression etc.

5th April

1. Not all states party to the OAS are party to the convention but contrasted to the African Union, all party to the regional organization are party to the convention.
2. So the criticism was that the OAS were not looking much into the indigenous communities and gender discrimination. They were looking more in military conflict but not in this. This was one of the criticism of the court, but today we have looked at more holistically at the rights.
    a. The court deals with both contentious and advisory jurisdiction. Individuals have no formal standing with respect to this court unlike the ECHR where individuals have individual standings.
    b. However, the commission looks at the complaints by all i.e. the individuals, or the NGOs and the commission may direct these cases to the court as well if it feels necessary
    c. The court is open the advisory jurisdiction of not only the state parties to the convention BUT ALSO the member states of the OAS.
        i. The idea of the advisory jurisdiction is to promote the awareness of HR and that is why it is open to even non-member parties of the convention.
3. The commission is under the OAS charter as well as the convention, thus it has jurisdiction over all members of the OAS irrespective of those being parties to the convention.
4. Further, we need to look at the idea of information. Most of the times, we are hampered that we cannot tell the people who can take action what the problem or the issue is. So apart from formal channels, you can keep track of when and what information is being sought and how that would help.
    a. So information sharing is a mandate to the parties to the convention, but since the commission is open to petitions of NGOs, groups, etc, so you are allowing for that representation.
5. Further, there is an idea of exhaustion of local remedies. So you can file a petition after exhaustion of these remedies. But there might be a situation where there is no local remedy or the state is hindering you from exercising that local remedy.
    a. So the commission says that when there is a no local remedy, the state needs to clearly specify that so that the commission can step in to investigate that matter

1. African Union is a successor organization, the original organization was Organization of African Unity.
    a. There is a move to bring about a African Code of Justice but the required 15 ratifications are still required. BUT there is still a court which is present
2. We have the African Charter of Human and People's Rights (*Banjul Charter*) which entered into force in 1986 and apart from that we have the African Court of Human and People's Rights and finally we have the African Commission on Human and People's Rights.
    a. So we have the chart, the court and the commission.
3. The earlier two conventions we saw looked at civil and political rights predominantly, BUT in the Banjul Charter deals with all 3 generations of rights. The reason for enumerating all 3 rights is due to the regional consideration of Africa
    a. There is the idea of colonialism, self-determination, etc which were the regional consideration which lead to the incorporation of these rights.

7th April

1. The regional consideration for all 3 generations of rights of Africa were firstly, there was a removal of the shackles of colonialism, there was exploitation of resources by the colonizers, so when these countries achieved independence and the solidarity came in, it lead to specific articulation of self determination.
    a. Permanent Sovereignty over Natural Resources was an economic principle which evolved and it relates to the right to development as the idea was that 3rd world countries could only develop if they had Permanent Sovereignty over their own resources and use that for their own development.
    b. There was this understanding that FIRSTLY, we were under colonial domination for a long period of time AND one of the impacts of colonial domination was the exploitation of our natural resources and the realization that for development similar to the first world, we require control over our own natural resources.
    c. It was in this scenario, it was required that we required PSNR and we need to establish our sovereign territory within which we have our resources.
    d. ANOTHER regional consideration in the Banjul Charter was the strong understanding of non-interference because you have just come out of colonialism so you do not want any interference from any where, this lead to non establishment of a court for a long period of time.
        i. So there were 2 reasons for no establishment of the court- FIRST was that we do not want interference. SECOND was that African countries were more focussed on mediation and they were not adversarial in resolving their conflcits
    e. Further the idea of group rights comes about due to the fact that the countries thought that we want to do nation building which is more important for us than individual human rights realization.
2. ARTICLE 23 –
    a. *All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organization of African Unity shall govern relations between States.*

    b. *2. For the purpose of strengthening peace, solidarity and friendly relations, States parties to the present Charter shall ensure that:*
        i. *(a) any individual enjoying the right of asylum under Article 12 of the present Charter shall not engage in subversive activities against his country of origin or any other State party to the present Charter;*
        ii. *(b) their territories shall not be used as bases for subversive or terrorist activities against the people of any other State party to the present Charter.*
            1. So this clause for terrorist activites also show the regionl consideration while drafting the charter
3. ARTICLE 19 - *All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another*
    a. So we see the idea of prohibition against domination
4. When the charter came in, the only mechanism the African union had was the commission
5. The charter talks about all 3 generations of rights BUT there is a lot of emphasis on duty as well in the charter, so the idea of right as well as duties is here.
    a. There was a criticism that the Charter did not pay that much emphasis on gender. After the criticism, we now have the rghts of women through the protocol to the charter.
6. The next step after the charter was the coming up of the court
    a. The commission was there before the court and it was there for promotional and educational purpose and it did not exactly have a mandate that could lead to true resolution of disputes. They are more of a recommendatory body and it is not that much power as the OAS commission.
    b. The commission's work has been mainly to create awareness in Africa with respect to rights
    c. BUT the court has the jurisdiction which is both advisory as well as contentious. The advisory jurisdiction is broad than the contentious jurisdiction as any member of the AU, even though they are not part of the protocol which establishes the court can ask for an advisory and even bodies which the AU recoizes like NGO etc an ask for the advisory jurisdiction
    d. In AU, all member of the AU are party to the Banjul Charter and I European Region as well, all members of the COE are party to ECHR but that is not the case in ECHR.
        i. There is a difference between EU and COE, we are here talking abou COE. Also there is a difference between the ECJ which is working under EU and also the European Court of HR, which is also a different entity. ECJ looks at EU law but the ECHR is on the implementation of the Eurpean Convention of Human Rights.
7. The formation of the court is through protocol because of the fact that the time of formation of the charter, we were not thinking about the court.
8. AU constitutive document is more powerful that the OAU as the AU has been given the additional power of _____ (check from reading)

ASIAN HUMAN RIGHTS REGIME

1. In the Asian region, we see overwhelming ratification of CRC and CEDAW but with respect to other treaties like ICCPR, ICESCR etc, we find that many core HR treaties have

not been ratified by countries OR if they have been ratified, there have been reservations which have been taken to provision of the treaties.

    a. This is with respect to the universal HR treaties, BUT regionally we have the ASEAN, but that does not encompass all the Asian countries.
    b. We have not been able to come up with a particular regime in Asia – we get a sense that we have a heterogenous region and it is difficult for us to come to a solidarity. Homogeneity lead to certain amount of integration and trust building and in some situations the Asian community ahs come together as well but to have that continuity, the way other regions have stablished, we have not been able to establish that in Asia.
    c. Asia is a huge landmass and there is a lot of cultural differences. So to try and bring all of that under a regional system which would be able to look at everyone's needs is a challenge.
    d. ANOTHER reason why there is no regime in Asia is that the many countries in Asia are there which are challenging the idea of huma rights in a number of directions due to the consideration of state sovereignty. HR places a limitation on the idea of sovereignty and in the Asian region, we have the strong identifying characteristic of the idea of non-interference and we have concerns regarding the western conception of ideas of sovereignty.
    e. We have sub-regional systems in Asia, but not a whole regional system in Asia.

2. When we talk about HR, we first see them as an imposition against our sovereign authority, then we see this conceptualization of HR is seen as a western product and it does not take into concern out Asian values. This is how HRs are conceptualized in Asian.
    a. This is also seen in how treaties have not been ratified in Asia.
    b. However, we also see that in many states, the core rights idea, that is no something which Asian states are completely against BUT the specific rights like freedom of speech and expression, freedom to assemble etc, these are where we see the most resistance.
    c. So the whole gamit of rights is not something which the Asian system is in favour of.

ASEAN

1. It was not established in the context of HR. it was mainly established for peace and stability in that region and then today it is for economic cooperation.
    a. So it is talking about political security, social and cultural community and economic integrity. This is what is ASEAN set to do
2. One of the major emphasis of ASEAN is that of Sovereignty. It is emphasizing national security and out of this emphasis, the outcome is that we will not do any sort of interference with each other.
    a. So non-interference is a hall mark of this particular association.
    b. So now slowly and steadily, they started saying that we should have a common ground or consensus on the idea of HR. So based on this, ASEAN has a commission and there is a normative instrument i.e. the ASEAN declaration.
3. The ASEAN Declaration reflects most of the rights which are provided in the UDHR. It has taken the rights discourse from UDHR and reflected that in the declaration.
    a. It also adds things like idea of clean environment, peace, water, sanitation etc.

b. It also has certain drawbacks due to which it has been criticized as the idea of state sovereignty was prioritized and this is a limitation of the declaration.
    i. Further rights like rights of indegenous people, freedom of association etc which are not mentioned in this declaration.

4. COMMISSION – it was established to try and promote HR, bring awareness and bring consensus. They want to have consensus building to try to work for a regional realization of rights in the ASEAN region.
    a. One of the issues with the commission is the members of the commission. In Commissions in other regions, the members represent themselves in an individual capacity, thereby when they are looking at situations of HR violations, they are looking at them in their individual capacity. BUT here when we are talking about a commission, they are representative of the state.
        i. So the mechanism of ASEAN is not that powerful as that in other commissions
    b. Another issue is that there is no court. we just have the commission. In all other regions, we have courts.

9th April

1. The ASEAN Human Rights Declaration provides for the right to development. Whether right to development is infact a right. This itself is a question. Ex- when we talk about coal, countries say that their citizens have human rights which need to be taken care of and we need to meet the demands of our people.
2. LIMITATIONS OF ASEAN DECALRATION- most of the UDHR rights have already been provided in this declaration, but we still see a number of criticism associated with this instrument.
    a. Article 7 states that "*All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis.* ***At the same time, the realisation of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds***."
        i. So it puts a caveat leads to a fear of undermining of universal values.
        ii. We also need to see the real world events that are happening in Asian region, regarding some of these issues. These regional considerations have come in the form of Article 7.
    b. ARTILCE 8 – "*The human rights and fundamental freedoms of every person shall be exercised with due regard to the human rights and fundamental freedoms of others. The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of national security, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society"*
        i. Restrictions can be imposed using domestic laws of the nation. So there is a possibility to restrict the human rights in multiple situations. Natinal

Security, Public Order, Public Health etc are not defined anyone. So we do not have a standard o what do these terms mean.

ii. Further this paragraph is in the general provision, so it covers all the rights provided under all the paragraphs of ASEAN Declaration. It is not associated to a particular right or freedom.

iii. So the first sentence gives a universal character to HR.

c. So we see that liberty has taken a backseat to economic development. There is alo the idea of non-interference and territorial sovereignty. When the declaration mentions the regional considerations of the state per se i.e. we are not going to interfere how you would look into it. So we are going to give you broad based general provisions basically saying that w are not saying that HR are not important BUT these restrictions apply and these restrictions could extend to things like public order, public safety, public health etc.
    i. Morality is also something which is there for a number of issues in a number of Asian states.

d. ASEAN when they came out, the fundamental principle which they recognized was state sovereignty and non-interference and we carried that through even when we adopted the declaration.
    i. So even though the Declaration mirrors rights of UDHR, these general provisions highlight the principal idea state sovereignty and allowing for exceptions and regional considerations

e. Another issue in ASEAN is that there is no court system in ASEAN. So we lack that mechanism. We have seemed to brin in Normative instruments in place and some amount of mechanisms coming through. BUT the court system is not there and this comes back to sovereignty etc.
    i. Ex- most Asian countries have not signed the Additional Protocol of HRC which allows the individuals to directly approach it under ICCPRs

3. To holistically have a regional HR framework for the entirety of Asia is problematic because of the disparities which we see throughout Asia.

SAARC

1. South Asian Association for Regional Cooperation. It was founded in 1985 for regional progress and development in South Asia. It was more of a goal to further economic integration.
2. MEMBERS - Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.
3. SAARC was not a regional system meant to deal with HR. it was initially conceptualized for economic integration BUT things have changed as we have adopted certain specific regional treaties to address certain specific problems like child care, or human trafficaing
    a. EX- SAARC Convention On Preventing And Combating Trafficking In Women And Children For Prostitution
    b. EX- SAARC Convention On Regional Arrangements For The Promotion Of Child Welfare In South Asia

    c. EX- SAARC Social Charter – it promotes poverty eradication, women empowerment, youth mobilization, Human Resource development and some amount of protection and promotion of universal HRs
        i. BUT the highlights with respect to this charter is with respect to Child and Women Rights and it also deals with development rights
4. MECHANISM – We don't exactly have an institutional mechanism for the realization of HR. *Firstly,*, the regional instruments which have come up under SAARC are also not comparable to the other regional instruments, although these instruments are still focussing on HR. It does take focus of certain aspects of HR realization.
    a. The most concrete effort that SAARC has shown is in the field of women and child rights and something in the lines of trafficking.
    b. Other concrete realization has been with respect to the right to development. But we do not have a broad based HR instrument for promotion and protection of universal HRs like other regional associations
    c. BUT it is a very important organization as even though the instruments do not exist, the potential for SAARC to do something in the South Asian region is something which is very dominant.
    d. Thus the regional implementation r promotion of HR in asia is a work in progress
    e. HOWEVER, though we don't have a comparable regional system as in EU BUT many of the Asian countries have very strong rights domestically and many on the other hand have a bad reputation.

15th April

INDIA

1. How is HR realization done in India – *firstly*, you can go to the judiciary, especially for realization of FRs. *Secondly,* there is also an institutional machinery i.e. National Human Rights Commissions
2. Narima's Article and also the Periodic Report to be read
    a. Nariman's Article tells us about that we have a reservation on a provision of the ICCPR with respect to compensation being claimed for violation of HR by state.
    b. Nariman then then talks about the judiciary had provided for in an adhoc manner about giving compensation in situations where a particular right has been violated. But we do not have a concrete stance that if X happens, then you can claim compensation
3. When we look at HRs in India, we have the constitution as well a number of legislations. The legislations help in relaization of HRs
    a. The protection of Human Rights Act provides the idea that you are going to designate sessions court etc that they will be looking at only human rights cases, predominantly for crimes (i.e. the sessions court)
    b. This is in addition to the NHRC
4. We need to see that how national constitutions across the globe have incorporated in their constitutions, rights which are generally considered to be HR.
    a. In most national constitutions, a set of civil and political rights are being placed in their constitution thereby allowing for justiciable rights, but there are very few

constitutions which have gone ahead and provided for social and economic rights, but there are such constitutions.

b. So we need to see how well is a state placed in realization of HRs. So one of the ways is that understanding of HRs has been incorporated in our domestic legal framework. However, the example which most states state is by saying that we have codified it within out constitution

5. NORMATIVE FRAMEWORK
    a. When we talk about the substantive part of the HR, we se that the major provisioning of HRs in India is in FRs. The court has taken recourse to bring in HRs by reading them in Article 21.
    b. The idea so right to privacy etc which is established in the HR framework, have been brought under Article 21
    c. Nariman in his article, talks about the provisioning of Article 21 – The first question was that whether it is a positive right or a natural right. In ADM Jabalpur, the Article 21 was suspended during Emergency and the sole dissent was that Article 21 had merely codified the a natural right and it cannot be taken away.
        i. The HC were enforcing this natural right but when it came to the SC, the judges took the position that it is a positive right which has been guaranteed by the constitution
    d. Due process and Article 21– read from Nariman Article.
    e. Nariman says that when we are talking about the right to life and liberty, especially during the emergency Era, wherein we had hope that the courts would help us but in the end it was the legislature which came through for the protection of life and liberty saying that in case of a emergency, the FR of right to life would be protected
6. We are honouring the core idea of HR, firstly, through our constitution with FR being justiciable rights. AND we also have DPSPs, which were earlier held to be a guiding tools for state policy but a number of DPSPs are coming under the expansive understanding of Article 21 itself
    a. THEN we have the legislations. In context of HRs, we have the Human Rights Act.
    b. We have this legislation to establish an institutional machinery in India for the protection and promotion of HR in India. This is done through NHRC and the State HRC
    c. It defines HRs as *"human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India;*
    d. When we came to the Asian set of Regional Protection of HR, we see that it is not as strong as the other regions because of the lack of normative frameworks as well as your institutional machinery.
        i. Thus one of the ways to bolster HR was to do it by bolstering HR domestically of each of the nation
        ii. There is the **Paris Principles** which state that we will be having these institutional mechanisms in all of these countries and these mechansims will work for the promotion and protection of HRs and India was a party to this PP.
        iii. So we are talking of independent institutional mechansims trying to ensure the protection and promotion of HRs.

7. India is a dualist nation, but what have we done to ratify the ICCPR and ICESR. We are internationally bound by the treaty once we have ratified it. If a state which is party to the convention finds that we are not in compliance with the convention, they can take action.
    a. What happens in a dualist nation when we don't have an enabling statute. Ex- we have the recent aircrafts act, uder which it provides for India meeting the commitments it has made internationally.
    b. India is party to a number of international conventions which have an impact on aviation. We have ratified the Chicago convention but for that to have an effect here, we need to have an enabling legislation. When we have done the ratification, the enabling legislation might completely copy paste the whole treaty or it might take only a few of the provisions of the treaty.
    c. So with respect to our commitments to ICCPR and ICESR, we have tried to have out HR act, to try and show internationally, that we have domesticated HRs.
    d. READ PERIODIC report to see how we have incorporated HRs in India.
8. We also have specialized legislations for protection, promotion and realization of rights of individuals who require more protection like protection from child marriage.
    a. So we have constitution, specific legislation, institutions and then also specific institutions to cater to specific requirements the NCW. Or the national commission for minorities.

16th April

1. Internationally when we talk about Human rights, we talk about firstly, substantive law i.e. the sources including customs, treaties etc. Then we also talk about the mechnsims at play like the ICJ and the treaty bodies.
2. From a domestic perspective, when we talk about HR in India, we need to look at the legal framework as well as the institutional framework that we have.
    a. We have tried to strengthen both the legal and the institutional framework in India as the years have gone by.
    b. For the legal framework, we see the constitutional rights , specifically FRs.
    c. In domestic situations, the best way for realization of HRs has been to bring them into positive law. When we talk about constitution, we have a hierarchy between FRs and other constitutional rights. So the FRs that we have enshrined in our constitution is stemming from our understanding of realization of Human Rights and that is why we have said that FRs is a subset of HRs. (like India made a choice of not keeping the right to property as a FR)
3. In NHRC, the complaint can be by the victim or by someone on behalf of the victim and the court may also sometimes direct that this issue needs to be looked by the NHRC.
    a. The complaint would eb - *(i) violation of human rights or abetment thereof; or (ii) negligence in the prevention of such violation, by a public servant;*
4. FUNCTIONS OF NHRC

(b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

(c) visit, under intimation to the State Government, any jail or any other institution under the control of the State Government, where Demons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmates and make recommendations thereon;

(d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

(e) review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures;

(f) study treaties and other international instruments on human rights and make recommendations for their effective implementation;

(g) undertake and promote research in the field of human rights;

(h) spread human rights literacy among various sections, of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;

(i) encourage the efforts of non-governmental organisations and institutions working in the field of human rights;

(j) such other functions as it may consider necessary for the promotion of human rights.

17th April

(Did not attend)

21st April

INTERNATIONAL HUMANITARIAN LAW

1. IHL seeks to mitigate the effects of war and violence. We are trying that by setting up some principles and rules which are
    a. There to try and spare person not directly involved in hostilities.

    b. There is also limitation against violence against people directly involved in combat i.e. combatant by limiting the type of weapons used in wars.
        i. You idea is to overcome the enemy state but not completely destroy it.
2. IHL came up building upon Rousseau's idea that war is between 2 states and once an individual is not fighting the war, that person is a mere civilian and thus they should not be subjected to individual suffering. It is only once a person is fighting on behalf of the state that the person shall be subjected to the effects of war.
    a. The common feeling arose is that if the civilian did not pick up arms, then you are supposed to give them humane treatment
    b. Further when there is a wounded soldier, you must be provide aide to them, be it a friend or fore.
    c. So a certain feeling arose, that a person, be it friend or foe, needs to be protected because that person is not involved in warfare. So certain situations arose where there was a requirement of providing humane treatment.
        i. We are waging war to overpower the enemy natin but not completely destroy the enemy nation
3. IHL is a branch of Public IL. There is an idea of WHEN can a war be waged in IL. There are 2 ideas ***in bello AND Ad Bellum.***
    a. Jus Ad Bellum means the law applicable to recourse to armed conflict. Jus in Bello is law applicable in armed conflict. So IHL is Jus in Bello
    b. War has happened, but you need to give your own people a valid justification for war since they are laying down their resources and lives for the state. So the war needs to be *just.*
    c. So the ideas of just and unjust wars started taking place. The idea is that if a state is unable to justify its war, you might be able to get support from other nations.
    d. War also started being used as a means for conflict resolution but the devastation in the wake of war was immense, so the international community started to feel that we cannot continue to have such a situation. So we did have principles earlier that when can a state wage war against another and when can the other state retaliate.
    e. However, the UN Charter said that there will inevitably be disputes amongst the state, BUT it came up with peaceful methods of resolution of disputes and thereby providing that there should be **prohibition of use of force**. This prohibition is specifically mentioned in the UN charter.
        i. It says that international armed conflict should not happen, BUT it does not say that there should be prohibition ***within*** the state. So civil wars might still take place.
    f. The UN charter talks about a prohibition of use of force, but there is not a complete prohibition of use of force. There is an exception of self-defence.
        i. Further the use of force is prohibited for certain ends like territorial integrity, political independence and other purposes of the charter. SO you can use force FOR the purposes of the charter
            1. The UN itself can authorize the use of force against the state who is in violation of its commitment under the UN charter.
        ii. All these are *Ad Bellum* rules.
4. Does IHL also deal with the legality of the use of war?

a. IHL works in situations of armed conflict. IHL DOES NOT go into when the war can be waged. It is AFTER the war has been waged that IHL starts operating.
b. IHL also does not also look into the reasons of why the war has taken place. Legality or illegality of war does not affect the application of rules of IHL.
c. The rules of IHL are same for the aggressor and the defender. There is a conflict happening and therefore we need to limit the effect of the war.
    i. We limit this BY
        1. Giving protection to certain categories of individual AND
        2. Limiting the ways or modes of warfare
d. IHL rules will place same obligations on both parties. The defender cannot say that I will use excessive force since the other party was the aggressor.
    i. So obligation of IHL is on both parties AND ALSO protection arising out of IHL is also the same on both parties.

21st April (2nd Class)

1. There are 2 ideas in IHL
    a. One is the protection idea
    b. Second is the type of weapons being used
        i. Both are premised to mitigate the effects of arms conflict. The overwhelming idea is the protection of human dignity, even in the times of war.
2. IHL is also part of public international law, so the sources of IHL is under Article 38 of ICJ
    a. IHL does not deal with internal disturbances and non-international armed conflict.
3. IHL is not concerned about the legitimacy and justification of war, that is why it is applicable to all parties of the war.

HISTORICAL DEVELOPMENT OF IHL

1. Lieber and Henry Durant are the fathers of IHL.
2. When we talk about modern IHL, we are looking more from the European experiences where we start seeing the codification of already pre-existing ideas
    a. The idea is that to alleviate the circumstances of war so that after the war we can go back to the cities. If entire cities are destroyed, then after the conflict, there is a chance of resurgence of conflict.
3. There was a catalyst for the first codification in the form of the Geneva Convention in 1864 i.e. Battle of Solferino (2nd war of Italian Independence). 2 things happened after the battle
    a. First it became a catalyst for the codification of the IHL and Second there was the formation of the International Red Cross
    b. Henry Durant wrote a book called Memory of Solferino
        i. When Durant witnessed the battle of Solferino, he witnessed 3 things.
        ii. FIRST, He saw that a number of people are wounded, and no one wanted to treat them. So there was insufficient medical personnel on the ground

iii. SECONDLY, even if you have medical personnel, there is no protection for these personnel.
iv. THIRDLY is identification of the medical personnel i.e. how do you identity them
v. So for Durant, this became concretized in the formation of the International Red Cross
vi. So Henry proposed for the formation of a voluntary relief society. He also said that there needs to be an international treaty to protect medical personnel and we also need to have symbols for identification of these personnel.
    1. This finally lead to the crystallization in the form of the International committee of Red Cross in 1863 and the first Geneva Convention.

4. Rousseau's idea of why we need protection in war is that "War is in no way a relationship of man with man but a relationship between states in which individuals are only enemies by accident, not as men but as Soldiers"
    a. War is a relationship between states and not as individuals. So therefore, once they lay down their weapons, they become men and thus their lives must be spared.

FIRST GENEVA CONVENTION

1. With the proposals of Durant, we had that we need to start doing something for the wounded soldiers. It talks about the protection of the wounded without ***any distinction***.
    a. So you will not treat only your friends, but even enemy combatants would be protected.
2. The convention also talked about the inviolability of the medical personnel. You are not supposed to target medical personnel
3. Further it talked about a distinct emblem for the medical personnel.
4. So this is your first codification of the rules of engagement
5. The First Geneva Convention we are protection wounded soldiers and medical personnel. In the Second we protect wounded personnel in sea, the Third is Prisoners of War and Fourth is the civilians. So these are the 4 Geneva Conventions.

22nd April

SOURCES of IHL

1. Geneva Conventions deal with protection of certain categories of people and Hague looks at methods of warfare etc. So they developed independently.
2. There are 3 sources – Customs, Treaties and the General Principles (i.e. GP)
    a. Apart from these, there is the subsidiary sources
3. When we talk about treaties, we talk about the 4 Geneva Conventions and Hague
    a. Geneva is about the people affected by the war and Hague is about the modes and methods of war.
    b. There was a split in the branches of IHL, that the Geneva went into protection but the Hague was with respect to mode and means of warfare BUT there is a merger which has emerged overtime.

        i. We have seen the additional protocols come in to the Geneva Convention which has started to not only regulate the rules with respect to the wounded but also has started to reaffirm the rules on methods and means of warfare.
4. The advantage of having a treaty in IHL is that relative to CIL, treaty is more precise but CIL might be ambiguous. So you can clearly specify the rules of engagement clearly.
    a. FURTHER, the scope of the applicability of the treaty is also mentioned in the treaty itself i.e. where are these rules supposed to be applied.
    b. However, even though the treaty is relatively unambiguous, still questions of interpretation are not excluded from these treaties.
        i. We understand how treaties come about. There is a lot of careful negotiation which goes in the drafting process. BUT even after the adoption of the treaty, we see a number of states making either a reservation or an understanding with respect to the treaty.
        ii. So questions of interpretation are not precluded but rather the treaty is supplemented with reservations and understandings
5. CIL is advantageous is that it is a dynamic source. It evolves pertaining to the circumstances that have gone in state practice evolving.
    a. Unlike treaty where there is careful negotiation and deliberation, CIL is dynamic and could lead to more concrete realization of rules
    b. FURTHER, if a state is not party to a convention, but the principle in the convention is part of CIL, the state will still be bound by the principle
    c. FURTHER, IHL has a lot of focus on the codification of International Armed conflict and there is not a lot of push for non-international armed conflict. So CIL plays an important role in situation of NIAC since there are less treaty rules.
6. For GP – there is no universally accepted definition of GP but these are principles which have been recognized by nations domestically. So we see that this principle is being recognized by everyone, So we consider it to be applicable in IL as well
    a. BUT there needs to be a transposition which needs to take place since we need to start making it applicable in an international legal system rather an domestic legal system
    b. GP may also merge through another idea i.e. in the international legal system, itself certain principles may evolve particular to that particular system. This is another way of deermining GP
    c. Specifically for IHL, there are ***elementary considerations of humanity***- so everyone has an obligation which is stemming from this general principles. Based on this principle, the ICJ in a number of cases like the coffer channel case or even the Nicaragua, being obligated under humanitarian priciples
        i. Example- in the coffer channel case – There is an IHL obligation that states must give notice of maritime minefields. This obligation is applicable in both wartime and eace time. This was brought into the context, stemming from the GP of elementary considerations of humanity
        ii. When we talk about common Article 3 – it is binding in any armed conflict, irrespective of the legal classification i.e. irrespective of international or non-international armed conflict. So Common Article 3 expouses humanitarian principles which are stemming from the elementary considerations of humanity

iii. We also have ICTY, which again talked about elementary consideration of humanity and stated that we need utilize this prininciple for interpreting and applying rules vis-à-vis internation ahumanitarian law. So when we are not sure that what this rule means, we have to use the GP of ECH to make that interpretation

d. There is another GP for IHL i.e. the ***martens clause*** i.e. "*Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience*."

i. This clause developed in the Hague Convention of 1899. So population ad Belligerents will remain under the protection of IL as they result from the usages among civilized people, laws of humanity and requirements of public conscience

ii. So when we have a densely codified structure telling us what to do and what not to do in a conflict, there is a general tendency or an assumption that what is not expressly prohibited by these rules would be permitted. So Martns clause is going against this assumption as the overall conscience of humanity needs to prevail

CORE PRINCIPLES OF IHL

1. There are principles like distinction i.e. to distinguish between civilian and military population at all times.
    a. This principles is a cornerstone of IHL and it arises from the recognition that a legitimate objective of the state is to simple weaken the military forces of the enemy and thus some sort of protection needs to be given to the individual who are non-combatants and thus obligating this distinction.
2. There is also the principles of proportionality and also the principle of necessity.
3. There is also the principle of unnecessary suffering.
4. There is also the principle of humane treatment.

23rd April

1. PRINCIPLE OF DISTINCITON – there needs to be a distinction between combatants and civilians.
    a. IHL tries to mitigate the effects of war. This is done by putting obligations on the parties of the war. You are placing a responsibility that you have a military objective to weaken the enemy.
    b. BUT the moment the hostilities seize, the common citizen should be able to go back to their daily lives. So you have started to recognize in IHL that the only legitimate objective in a state of war is ONLY to weaken the military power of the other side.
        i. So in achieving this end, we need to give protection to the civilian population.
        ii. So we need to at all times of the conflict need to distinguish between civilians and combatants.

2. This principle of distinction segways into the principle of **precaution**.
    a. In this, you are placing a duty on BOTH parties to avoid, prevent and minimize to as much as possible the infliction of incidental death or destruction on person who are protected from direct attack. So you don't directly attack the non-combatant, so you need to take as much precaution that such incidental death or destruction does not take place.
    b. So the attacking party needs to take precaution that they do not harm the other side's citizens BUT the defending party as well needs to take precaution that their own civilians are not harm. So the defending party needs to evacuate etc. to ensure that the civilians are not harmed
3. The principle of **proportionality** – When we talk about minimizing the effects of warfare, it means that you cannot be like we are protecting citizens but we are going all out against the military. So IHL does make a distinction i.e. our idea is just to weaken the military and override the military forces. If that can be achieved by getting rid of 3 bases, instead of 15, you do that.
    a. How do you decide what your military objective would be, that is factual. BUT just because you can destroy all bases, does not mean you should do it.
    b. When you finally decide to attack the area, you need to recognize, what force you would be using. Can it be excessive, can you use a less excessive force which would minimize incidental harm but still achieve your military advantage or trying to get this area would lead to excessive incidental harm. So we might have to refrain from actually attacking this area.
4. The principle of **unnecessary suffering under IHL**
    a. In the St Petersberg Declaration of 1868 "**Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight."**
    b. states *that the objective of war is to weaken the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;*
        i. That for this purpose it is sufficient to disable the greatest possible number of men;
    c. So the idea is to weaken the military forces and not have complete destruction and annihilation. So we are just trying to weave in humanity and human dignity in a situation where we don't see it ordinarily. So we understand the necessaity of conquering your enemy forces and that can be done simply by weakening your military forces.
        i. You need to disable the military personnel and not necessarily killing them. So you are asked not to us such weapons which cause more than disabling since these goes against the laws of humanity.
    d. So you are saying that you will not adopt projectiles etc which will cause superfluous injury and thus limiting the type of weaponry that is to be used in war.
    e. So this principle of unnecessary suffering is dealing with the type of weaponry being used.
    f. So it both that your military objective can be achieved by either simply disabling your military personnel or if you want to kill them, kill them in a human fashion

24th April

1. Apart from the development of the ICRC and First Geneva Convention, post the suggestions of Henry Durant, a parallel development was the coming up of the ***Lieber code***. This code was a domestic instrument and was one of the instruments governing the code of conduct for the American Civil War.
    a. Even though it was a domestic instrument but what was laid down in that code still influences the development of modern IHL

FIRST GENEVA CONVENTION

2. It was the "*Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*". It was laid down in 1864. The GC which is enforced today i.e. the 1949 one has replaced the 1864, 1909 and 1949 conventions pertaining to the same idea.
    a. There is a use of the word armed forces in the title of the convention and it does but it does not use the word "armies" which signifies that non-institutional combatants are covered as well. So you are reflecting a large scope of protection which this particular convention would apply.
    b. Any organized resistance movement needs to be protected in this

SECOND GENEVA CONVETION

3. It was the "*Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*" It adapts the provision of the first convention and applies it to Maritime war. It replaces the 1907 Hague convention

THIRD GENEVA CONVENTION

4. It was the "*Relative To The Treatment Of Prisoners Of War*" – it is a detailed code related to treatment of Prisoners of War.
    a. Looking at the experiences of WWI and WWII, we felt that we need more protection for PoWs. Ex- in 1929, the convention applied to members of armed forces who had been captured by the enemy. BUT then it was felt that you are excluding PoW status for those who had surrendered So thus the 1949 convention detailed these aspects.
5. IHL applies to both international armed conflict and non-international armed conflict, BUT in non-international armed conflict, we don't have the idea of PoW.

FOURTH GENEVA CONVENTION

1. It was the "*Convention relative to the Protection of Civilian Persons in Time of War*". The reason for the 4th Geneva Convention to come up was a direct consequence of your WWII.
    a. There were occupied territories in WWII. So you start seeing weaponry being used which lead to mass civilian casualties, further in a number of places, occupation has taken place, so you have left a number of civilians without any help since the enemy power has taken control of your territory
    b. When you have no protection, you start to see deportation, hostage etc.
2. So the focus was to protect civilians from arbitrary armed action. There are provisions related to treatment of civilians in occupied territories and also we have conversation in relation to who we consider as alien in a conflict area.

We see that all these Geneva convention have some articles which are same. Like common Article 2 and 3

Application of the Convention

ART. 2. — In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Conflicts not of an international character

ART. 3. — In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

We have dense treaty codification for IHL but we do not have much for non-international armed conflict. So for the situation of non-international armed conflit, it is CIL which is important nad ICRC has come up with a study and has listed varius rules applicable to NIAC. With respect

to treaty law, we have AP II and Common Article III of the Geneva Conventions which guide you on NIAC (but there is not a lot of ratification of AP II)

1. ARTICLE 2 – it says that the convention is not only applicable to the cases of declared war but also be applicable to any other armed conflict since there might be situations where states might not recognize the armed conflict and might try to absolve themselves from the application of the Geneva Conventions.
    a. But this article deal with armed conflict between 2 states.
2. ARTICLE 3 – This came in from a very strong push from Red Cross. Before AP II, it was the only Article which talked about NIAC
    a. The pressure was there because there was a lot of violent fallouts from NIAC. States were not in favour of this since conferring protection in cases of NIAC, there was a fear that this would confer protection and legitimacy to rebel groups.
    b. BUT the common Article 3 is some kind of compromise between the 2 positions. So the idea was that certain very fundamental principles or ideas of humanity need to be considered in a situation of non-international armed conflict. So a specific list has been put in CA 3

28th April

1. We have seen the type of armed conflict that was happening, and we see in the Geneva Conventions as well that they were adapting to the situations of armed conflict and thus we are trying to extend the protection
    a. Around 1950, the idea of self-determination came in, pursuant to which we saw liberations conflicts. So AP I alos applies to International Armed conflict but when it spoke of armed conflict, it started extending it to people fighting against colonial domination or alien occupation or racist regimes.
    b. So freedom struggle etc was not adequately addressed in the Geneva convention framework and that gap was required to be filled. This is where the AP I came in. **BUT** we need to understand that we are still talking about ***international armed conflict and not NIAC***
    c. They however said that the protocol will not have an effect on the legal status of the parties to the conflict. What they are simply trying to do is trying to bring in the application of the Geneva Convention and the AP to try and ensure that the humanitarian aspects of warfare is actually being done.
        i. So we are saying that legal status of the parties does not change but when there is a conflict, the AP I and Geneva convention become implemented. This is what they are trying to do.
    d. That is why they also had a relaxation on the definition of Prisoner of War as well. PoW status was given evne to people engaged in national liberation.
    e. However there is not a lot of ratification to AP I and AP II.
2. AP II – it is talking about NIAC. The reason for it coming up for was that Common Article 3, which also talks about NIAC trying to ensure that fundamental rights are protected during any warfare, irrespective of its nature being international or noninternational armed conflict
    a. So there was advocation tha there needs to be something more concrete to talk about NIAC. So thus we have AP II

b. Where does AP II apply – there was a push for rules and regulations to be in place for NIACo the ground that we are seeing a number of these conflicts come up and thy are non-international in nature, so we should have some rules of war and protection in place
    i. BUT there was also pushback against such rules saying that having such rules will have an effect of state sovereignty, especially in state which had become newly independent, since they are already fragile and there will be internal situations which might be in the nature of NIAC
c. The scope of application is armed conflict not covered in AP I and "*which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*".
    i. So it is between the state's armed forces and either dissident armed forcs or an organized armed group
    ii. Both these dissdents or groups must be under responsible command, exercise control over parts of the states territory
d. The reason for such qualifications was to ensure that AP II applies to conflicts of a certain degree of intensity. So thus it doesn't apply to situations of internal disturbances, riots or isolated acts of violence.

3. We don't see a number of countries party to AP II, india is not a party to AP I or APII but there is an aspect of CIL that roots which are present in CIL and governed NIAC, will become applicable irrespective of India being party to it.

APPLICATION OF IHL

1. War vs Armed Conflcit – The Geneva Conventions talks about Armed Conflict, but earlier we used to use the term war. The reason for the same is that this is a situation of formal declaration of war between states. The thing is that there were a number of instances where hostilities took place where you did not use the formal terminology of war.
    a. Further there is an establishment of UN which brought in the prohibition to the use of force. So any state declaring war would be in violation of it's obligations under the charter except in self-defence.
2. Common Article 2 provides that we are looking at situations of war as well as armed conflict where there is no formal declatation of war
3. Laws of War vs IHL – IHL is considered to be a narrower by some people which relates to the humane aspects of war and you are talking about a regime which is there to regulate the treatment of prisoners, etc, it also includes how it talks about the caring for the wounded, civilians etc. However, the people who make this distinction and say IHL is narrower exclude the bit about IHL regulating the means and mods of warfare.
    a. However, today, we talk about both. General understanding is that IHL means verything regarding not only the protective umbrella but also mode and means of warfare.
    b. So laws of armed conflict nad IHL are used interchangeably, but there are people who do make certain distinctions, saying IHL is narrower in scope as it is only involving the protective framework.

29th April

(Did Not Attend)

30th April

1. Is IHL applicable to non-sate actors? In an NIAC, you have state on one end and non-state actors on the other. That is why states are reluctant to say that this is an armed group as they do not want to give legitimacy to the other side.
    a. NIAC might also involve 2 non-state parties, and thus IHL was wanted to be applied to non-stat actors. However, the wanting of IHL to be applied to non-state actors is different from the possibility of the same being applied to non-state actors.
    b. Common Article 3 and AP II involve application to non-state actors.
2. How do you become subject to IL? – UN has been called a subject of IL in the *Reparations Case*, in which there was an individual working in UN who suffered an injury. So the question was that whether an organization has the capacity claim reparations.
    a. So it was allowed on the idea of international legal personality. So if you have International legal personality, you can be subject to International Law
    b. The debatable aspect is whether the entity has that international legal personality
3. Thus the question become, would you like to confer International Legal Personality to non-state actors in the state of conflict.
    a. One of the issues is that if you say that the entity has ILP, then you are legitamizing their claims and secondly, specigically in the case of NIAC, the use of force in the state's territory is a sovereign right. The legitimate use of force is in the domain of state. Thus are you giving the non-sate actor the legitimate authority to use force?
    b. Practically we want the applicability of IHL, so we have started giving "partial legal personality". I am not legitimating these groups BUT I am ensuring that they get obligated under IHL.
4. So specifically in the context of IHL, anyway non-state actors are not parties to the treaty. Only states are parties to treaty. So if we are talking about application of to non-state party, we are talking about CIL which are making it obligatory.
    a. HOWEVER, there might be situations where the state themselves might enter into agreements with non-state actors which apply. In that case, that agreement will apply to these non-state actors.

NIAC

1. NIAC has replaced terms like civil war, insurrections etc. We are using NIAC to give an idea of different types of conflicts. So different varieties of conflicts which are taking place between state and non-state actors is what we are stating as NIAC.
2. One of the bigeest issues with NIAC is the opposition by the state to recognize the conflict as NIAC. The reason is that once the conflict is recognized as NIAC, as you want that the non-state actor is termed as illegitimate and under the authority of the state and you use your entire legal machinery to stamp the conflict down
    a. Further IHL is not applying since you are not considering it to be an NIAC, but IHRL is still applying.
        i. One of the issues with IHRL is that we have broad terminologies where we can suspend IHRL like national security, public morality, etc
        ii. Another practical issue is that, when the state is immediately using force, the immediate realization of IHRL is not there.

    b. Thus generally, the try between a conflict between state and non-state actor or 2 non-state actors is the application of IHL and not let the state say that this is not the situation of NIAC.
3. Because of these hindrances, there is an issue with respect to applying IHL generally to situation of NIAC and finally there was an agreement which led to common article 3.
    a. CA 3 has come as a response to questions of applying IHL to a situation where you have non-state actors who are party to a conflict
    b. CA 3 simply states the application of IHL in situations of armed conflict which are not in international character. So there is a broad scope to determine what is NIAC
        i. The positive of this is as it is broad based under standing of NIAC and you are putting some minimum obligations on people involved in such NIAC
        ii. BUT the challenge to the same is by not defining NIAC, its application becomes a subject of challenge, especially when states have a reluctance to recognize NIAC
        iii. So there is a challenge with resepct to sovereignty of states i.e. states saying that we have utmost control within our territory and second opposition was the definition of NIAC, would you consider an internal disturbance to be an NIAC? So finally we have this compromise provision coming through in CA 3.
4. When we are talking about classifying such a situation of violence within a state's territory, we are saying that there must be some situations in existence for the conclusion that this can be classified as NIAC.
    a. AP II lays down specifically points where it will be applicable (as written above).
    b. However, commentaries have laid down that for an conflict to be called an NIAC, a certain threshold of intensity needs to be met to ensure that sporadic acts of violence or riots is not considered as NIAC
    c. AP II prvodis that FIRSTLY, there needs to be an organized structure to the non-state actor. SECONDLY this non-state actor needs to be in control of some territory.

1st May

1. Earlier, the core idea was that the subject of IL was states, but with time, there is an expansion of subjects of IL. We earlier had the idea of state sovereignty and no intference from anywhere. The only time where we see the application of IHL to a situation of internal conflict was where another stat starts to give legitimate recognition to the belligerent group
    a. Now we have specific treaty law towards NIAC, that time when this kind of recognition happened, all and very treaty law which looked into laws of war would be applicable
2. So post WWII, it marked a gradual expansion of the rights and obligations to more than individuals which was exemplified by your post war trials. So it was then though that we need to bring in application of IHL to internal armed conflict
3. Why is there a need to distinguish IAC and NIAC if IHL is applied to both?
    a. The reason for the same is the applicable treaty law to both of these situation. For NIAC, only CA 3 is applicable. When we started, we only had one law of war that awas applicable to the state. The development has lead to a situation where in we are bringing in the application of IHL to internal armed conflict. So there is a

question that why are we not using all the rules of war that are present in IHL even to an NIAC.

b. The reason for the distinction is for states opposing that idea of IHL being applicable to NIAC. HOWEVER, today there is a erosion of distinction between IAC and NIAC
    i. First we have the IAC meant only stat parties, then we had the movement for bringing in the whole corpus of IHL for any conflict, even internal situation, which did not pan out. So now there is different application of treaty laws.
    ii. So now today, 2 things have happened, one is the application of CIL which states that all rules of IHL applicable to armed conflict should also be applicable in an NIAC,
        1. Seocndly, even in the case of treaty law, in newer treaties, they are not making a distinction between what sort of conflict is in exitence, whether it is NIAC or IAC.
    iii. Thus this distinction is being eroded but at the moment, because the core treaty i.e. Geneva Convention, very concretely made the distinction between the application of its rules. The reason was this is that states doe not want to compromise their sovereignty, certain rules related to protection of civilians or PoWs, are application to rules governing IAC, are not applicable to NIAC.

4. Application of CIL to a situation of NIAC – they said that the rule of IHL, applicable to IAC concerning the protection of civilians, as well as certin means of warfare, also apply to NIAC.
    a. So the stringent distinction between rules applicable to IAC and NIAC is stemming from Treaty law, but in CIL, there is a growing consensus that any and all rules of CIL applicable in IAC is also applicable for NIAC.
    b. The rationale of ICTY in this was due to state practice and elementary considerations of humanity, would make is preposterous that weapons prohibited in in IAC could be used by states to put down rebellions by their own nationals in their own territory.
    c. Taking course of elementary considerations of humanity, they justified the reasoning for application of CIL to NIAC. ICRC has a repository for the rules applicable on NIAC as CIL.

CRITERIA FOR EXISTENCE OF NIAC

1. Treaty wise, it is CA 3 and AP II. CA 3 tells u broadly any conflict of non-international character would be NIAC. Most of the fleshing out of what is NIAC is coming out of state practice, opion juris, jurisprudence of case laws etc.
    a. According to *Tadic Case,* NIAC was defined by the ICTY appeals chamber as a situation of protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.
    b. So the elements of NIAC are is that it should be proracted i.e. it must be going on for some time and it should not be a one-off instance. BUT in a situation, a 36 hour conflict was also though of an NIAC.

    c. Parties to a NIAC as per this definition is either a government authority or organized armed group or 2 armed group. So atleast one party neds to be an organized armed group.
2. Article 8(2)(d) of the rome statute provides that "*Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature*"
    a. So we see that for the for the criteria of NIAC, they are including the above situations. So you cannot bring claims of war crimes against this situation
3. FURTHER, generally the classification of NIAC is post facto when it finally goes to the courts. It can also be recognized as an NIAC by the state itself and also by other states, especially in situations of spill over i.e. people are leaving and going to other states. ICRC may also categorize a situation as NIAC
4. So one of the party to an NIAC need to be a non-state party. Seocndly, there needs to be some amount of protracted armed violence. Further there needs tobe organized armed groups, so the non-state group needs to have certain level of organization and a command structure which might involve existence of a a headquarter, disciplinary rules, etc. There also need to be the ability to recruit and train individuals, you have the ability to do planning and coordinating these attacks, Lastly, there needs to be control over territory in the state
    a. These are certain factors provided by ICTY decisions to determine whether a situation is an NIAC
5. Normally, these groups have a political purpose, but under IHL we do not have a requirement that these groups need to have an aim or purpose of a political nature, for it to be considered an NIAC.

INTENSITY

1. In NIAC, intensity is an important criteria to determine that whatever disturbance or violence has been going on has an level of intensity. So the threshold of intensity is higher in NIAC, than IAC as in IAC, in some kinds of situations intensity might be irrelevant as well
2. There is the *Herdinage Et All case,* where the ICTY looked at a number of indicative factors to figure out organization and intensity.
    a. The number of casualty, the duration, the number of confrontations, the material destruction, the types of weapons and other military equipments used (this is an important point as we said we need to have protracted violence and in many cases it is said that it was for a short duration but the intensity was so high due to the weaponry being used), further the number of forces, the type of forces, the number of civilians and also the involvement of UNSC may also be a show of intensity, etc.
    b. These are all factors which are looked into for intensity
3. There was an Inter-America commission of HR case, which said that a 30 hour confrontation between the military of the state and a group of soldiers was an NIAC

GEOGRAPHICAL SCOPE OF NIAC

1. There are 2 questions when we talk about the geographical scope of NIAC. *Firstly,* whether IHL would be applied to the entirety of the state, irrespective of whether

violence actually takes place? As per *Tadic,* it applies to the whole state, but there is pushback with this stance.

2. *Secondly,* can the NIAC and the application of IHL extend beyond the boundaries of one state? There might be a situation, the non-state actor might be present in a number of states and there is a spilling over, but the conflict may still be between the state and the organized group.
3. Further, if a violence is taking place at 2 different places, then do we consider it to be NIAC by taking an aggregate of both conflicts or do we se that in place A, it is NIAC, but in Place B, it is not NIAC.

5th May

1. If there is a large territory, and the conflict between a state and non-state actor, in a part of the territory, then would IHL apply to the whole territory? According to *Tadic,* IHL applies to the entirety of the territory governed by the 2 parties.
2. When the non-state actor is operating in mor than one state, we need to see whether IHL applies outside the boundaries of the one state.
    a. There is challenges like presence of non-state actor in different states, even though the parties might be the same. We see that are there same NIAC or there are different NIACs?
    b. In NIAC, the threshold of intensity is higher to consider something to be NIAC. There must be sporadic acts but are we considering the whole thing to be the same conflict? Or do we consider them to the be separate NIAC? There is no answers to these.
3. CA 3 is very expansive and to flesh out what will fall under the confines of CA 3, we have CIL and jurisprudence since AP II has very specific parameters to consider what is NIAC and when does it apply.

AP II

Article 1 — Material field of application

1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of applications, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.
2. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

1. The exclusions are clearly provided under Article II.
2. It becomes applicable when there is a higher threshold in AP II than in CA 3. Some thing which were just considerations in CA 3 have been made mandatory in AP II. Example- the

Control over territory is just a consideration which is taken into accout when we are looking at organization in CA 3 but it is mandatory in AP II.

a. So firstly the group must be organized and they MSUT exercise control over the territory.
b. Secondly, one of the parties necessarily needs to be a non-state actor.
c. We also look at intensity in NIAC
d. CA 3 says that NIAC can be btween state and NSG or 2 NSG, but AP II is clear that it applies only when there are government forces against an NSG. So conflict between 2 NSGs would not be covered in AP II.
e. There is also a difference between AP II and CA 3 that since we are talking about a NIAC between a territory of a party between its armed forces and armed groups, that means that when a 3rd state intervenes in this internal conflict which the consent of the state party, AP II will not apply but CA 3 would apply.

3. So there might be situatin be CA 3 is applying and AP II not applying due to the higher threshold provided in AP II.
    a. One of the reasons for this higher threshold is that states did not want to bring in IHL to something which they normally see as belonging to their own jurisdiction of national laws.

FOREIGN INTERVENTION

1. Today we see a number of foreign intervention in NIAC. Do we say that when there is a state intervenes, does an NIAC transform into an IAC?
    a. This depends upon that firstly IAC is between tow states, so the first thing to be seen is that the foreign intervention by the state is on whose behalf. Is it inerventing on the side of NSG or the state.
    b. Suppose the state intervening on behalf of the NSG. Then in this case, there is a possibility of a **mixed conflict happening**. You have an IAC between the foreing state and the state and the NIAC subsists between the state and the NSG.
    c. This kind of a situation happened in *Nicaragua.* Whether the action of Us against Nicaraguan forces would be considered under the rules of IAC but the conflict between Nicaraguan Rebels and the state of Nicaragua would be under NIAC.
    d. So an IAC may develop but it does not mean that the subsisting NIAC will change
2. Level of involvement of foreign state – at what level of involvement by the intervening state would raise the internal conflict to the international conflict. There is a difference of opinion between ICJ and ICTY

6th May

1. State is responsible for the official acts of its agents. A state can be said to be held liable if it is an internationally wrongful action. So the action and inaction which are unlawful under international law, which have been directly committed by the state resulting in damage to the another state, this is where we hold the state responsible. Ex- breach of treaties or damage to property of the state like shooting down a civilian aircraft.
    a. In the Nicaragua case, the US laid down mines in the internal and territorial waters of Nicaragua

2. State is an abstract entity, so under IL, a state cannot be held responsible for all actions of its nationals. So we are looking at the activities of ***organs of the states*** to determine state liability.
3. ARTICLE 4 of Responsibility of States for Itnernationally Wrongful Acts

Article 4
Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

4. Article 4 is telling us that when certain entities are acting or non-actingin a manner, we are attributing it to the states.
    a. **Attribution** is a legal fiction in which we have assimilated the acts or omissions of the states to the states itself. And thus we are rendering the state liable for any damage that might have resulted out of these actions.
    b. **Article 4 defines the organs** whose actions can be attributable.
    c. So in the case of a state intervening with their own armed forces in an NIAC, it becomes easy classify the situation as an IAC.
5. There are times when we are doubtful that the persons who are committing these acts under IL are not organs of the state. So if the state has send some money to the NSG and the NSG used the money to perpetrate the violence, which the NSG would otherwise without the money would not have been capable to do so.
    a. So can we attribute the violence of the non-state actor to the foreign state.
    b. Here we see Article 8 of ILC

Article 8
Conduct directed or controlled by a State

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

6. So actions of persons and group of persons, who are not the organ of the state can also be attributed to the state. THIS can be done *firstly* when the person are acting on the instructions of the state and *secondly*, when it is under the control of the state carrying out the conduct. So the question is with respect to the second i.e. when are the actions of the person under the control of the state
    a. Commentary of ILC Article 8- *Such conduct will be attributable to the State only if it directed or controlled the specific operation and the conduct complained of was an integral part of that op eration.*
7.

a. Nicaragua case – For the installation of mines in territorial waters of Nicaragua, the court held that Although it was not proved that the US military took direct part in the operations, the US agents participated in the planning, direction and support of the operations. Thus the imputability of the actions to US was established
    i. Further, it was not established that the US created the Contra forces but it was established that it financed, trained, equipped and armed the FDN, which was a part of the force.
    ii. Further, it was held that the relationship of the contras as well as the US could not be such that the contras could be called an organ of the state as there was not a total dependence of the contra on the US. However, a partial dependence could be inferred. However, there was no evidence to show that the US exercised such degree of control so as to justify the contras acting on its behalf
    iii. Thus the contras were held to be responsible for their own acts.
    iv. *For the United States to be legally responsible, it would have to be proved that that State had **effective control** of the operations in the course of which the alleged violations were committed.*
b. Ma'am- So it was alleged that the acts of financing, training, equipping etc could not be said to mean that there was effective control over the group.
    i. So to prove that the contra's actions were attributable to the state, you have to prove that the state had effective control over these military and paramilitary actions which the group was carrying out.
    ii. Only then can be say that these actions were attributatble
    iii. **So we don't not want general overall control, we want specific need to show the effective control of the operations carried out by the state.**

8. ***Tadic Case –*** Yugosalavia started breaking up in the 1990s and Bosnia-Herzegovina broke up which was mostly made up of Bosnian Muslima dn in the northwestern part, there were serb-orthodox people. These serbs created Republica Srpska which had separate municipalities which were controlled by political leaders. One of those leaders was Tadic and he started going door to door and capturing people who looked Bosnian Muslims and started putting them into camps. One of the camps was in Prjidor where there was tortur, sexual assault and eventually people were killed. In 1995, the Security Council passed its resolution and the ICTY was formed and one of the problems that court had was to determine whether to prosecute Dusko Tadic for crimes against humanity or for war crime and for it to be a war crime, there would have to be an application of the Geneva Conventions to the conflict nad there would hav to be some recognition of Repulica Srpska, which had automated itself as part of the Serbian Part of the Bosnia-Herzegovina.
    a. The Trial Chamber 2 held that "we find that an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed group or between such groups in a state"
    b. So armed conflict would exist as soon as 2 recognized sovereign armed forces collide with each other. But if there is a state armed group and an non-state amed group, then there need to be an armed conflict which would be protracted in nature
    c. IHL applies from the initiation of such conflcits and extends beyond the cessation of hostilities until a general conclusion of peace is reached or in case of internal

conflicts, a peaceful settlement is achieved. Till this time, IHL applies to the whole territory of the warring states i.e. Bosnia and in the case of an internal conflict, the area under the control of a party, whether or not actual combat takes place.

d. The appeals chambers modified the trial chambers judgment by adding war crimes to Tadic by stating that Scope of application of Article 2 and Article 3 of the Geneva Convention would apply to NIAC as well.
e. Another aspect was that the Sprska got help from Serbian Armed forces and the Tial Chambers held that the moment NIAC is subsumed by an Internaational Armed forces presence, you can treat it simultaneously as coming within Article 2 and 3 of the first convention as well as IAC and the appeal chamber upheld this judgment
    i. The idea was that there was a move to create this NIAC in to a IAC between the independent Bosnian Forces and forces of Republic of Srpska and the Serbian Forces. BUT the skirmishes which were there did not meet the gravity requirements between the ICTY.

9. The above decision needs to be distinguished from the decision of ICTR in Jean-Paul Akayesu wherein it was held that NIAC can also occur superiously and IHL will generally apply over the area but it can also occur in pockets.
10. In the Nicaragua case, we have figured out that we need effective control and not total control for attribution. But in Tadic the question was when can we say that the action of a group of person can be said to be attributed to a state. In this point, the trial chamber said that it would depend whether the non-state group belongs to a party within the meaning of Article 4 the ILC.
    a. They further say that the actions of the non-state actors, whether it will be attributed to the state under the law of state responsibility would depend upon the test of **overall control**. They felt that Nicaragua was too strict a threshold to determine attributability.
    b. They said that "*The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organising, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts*."
    c. So Tadic says that we don't need effective control over specific operations but we simply need general control over the actions. The state has given finances, training, epquipments etc and the actions which the group has done will be considered actions attributable to the state regardless of whether any specific instructions by the controlling states for the commission of each of the acts has been given or not.
11. So finally the ***Bosnia vs Serbia Case*** came up where the court said that when we are talking about state responsibility, we reaffirm our test of effective control and not of overall control as we had mentioned in Nicaragua. They said that for attribution, there are 2 tests i.e. Article 4 and Article 8 of the ILC draft articles. Tadic stated that this group "belongs" to the state. The idea of belonging to the state is a different test i.e. the test saying that this group is a defacto state organ.
    a. So when it is a defacto state organ, we are not looking at direction control idea which is present for Article attribution

b. When we say that this particular group belongs to the state saying it is a "efacto state organ", in Article 4, if it's a defacto state organ, its action, inactions are attributable to the state. We don't need to show that the state had direct control over the actions of the group. This question of control only arises in the context of Article 8 where it is not considered a state organ.

21st May

1. MIGRNAT – there is no specific definition. The definition is through antional legislation. There might be something which is specific in nature which is defined like economic migrant.
    a. People on the move internally and externally both are migrnats
    b. Depending upon domestic law, you might be migrant for going for 2-3- years, or for a job.
    c. Migraion can be forced or voluntary, no geographical limit (country to country, region to region, city to city)
    d. Certain categoris of Migrant in ITL -Ecnomic Migrant, Traffic Migrant etc- so certin legal recognition for certain catgories of migrants
2. Asylum Seeker – some is fleing a country for fleeig persecution,
    a. In many countrys till the time a person is not granted asylum, he is though of refugee
    b. The rights of refugee are only given only when you are determined as a refugee, till the time the determination process is ongoing, you can seek asylum (as non-refoulment and general pricnipls of Humar Rights)
    c. Post you determination you might not be considered to be a valid refugee, but the state still might give you protection.
    d. So anyone can seek asylum and the power of granting asylum is with state
3. Refugee – We look at the Refugee Convention 1951 and UNHRC statute
    a. A refugee in IL is as per the criteria of 1951 conventio and 1967 protocol.
    b. Refugee is a cross border movement. Movement within a country is not a refugee.
    c.

COVNETION AND PROTOCOL

1. Tell who is is a refugee aong with terms of cssation and exclusion
2. Cessation – it is either you return back to the country of origin, or you take another country's nationalization
3. Lgal Status of a refugee- their rights and obligation including the right to be protected against forcible return or rfoulment to a territory where their lives or freedom would be threatened
    a. Non-rfoulment means you are protected frm forcible return
4. It states their rights and obligations – it governs with the internation of the states with the rufugee

WHO IS A REFUGEE

ARTICLE 1 OF THE CONVENTION

For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization; Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of para-graph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, national-ity, membership of a particular social group or political opinion, is out-side the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protec-tion of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national

So there are 2 categories of refugees and there were other instruments for refugee protections which were prevailing

1. The convention is saying that we are not saying that those people who were recognized as refugees under the earlier conventions are not refugees anymore. So the first category of refugee is those who had a refugee status in other conventions
2. The second is the para 2, which has various elements
    a. There needs to be a well-founded fear of persecution
    b. The persecution neds to be on reasons of race, religion, nationality, membership of a particular social group or political opinion
    c. Is outside the country OR habitual resident
        i. You are not considered a refugee when you are outside the country, but not inside country.
    d. because of this fear you are unable or unwilling to get protection of the country OR to return there
    e. all of these events must be a result of events occurring before 1st January 1951
        i. this date shows that we have give a temporal limitation
        ii. It is liimtied to the events and not the date on which individual leaving the country or the individual becoming a rfuge

ARTICLE 2 – events occurring before January 1951 means that

1. *events occurring in Europe before 1 January 1951"; or*
2. *"events occurring in Europe or elsewhere before 1 January 1951", and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.*
    a. So there is a temporal limitation of 1951 and geographical limitation i.e. Europe. So you are trying to limit your self.
    b. There was feeling that you will have this for a short duration and not for a long time.
    c. The 1967 protocol – there were other situation due to which refugee were flowing and there were other regions where there was refugees. So the 1967 protocol removed the limitations. The UNHRC statute also lays down the definition of refugee and that also does not take into account the limitation

WELL-FOUNDED FEAR

1. There is an objective and subjective element to it.
2. Objective element is based on supportive of your situation, so acts would come in
3. Subjective would be the state of mind i.e. the idea of apprehension and you are feeling threatened for your life.
    a. When you do refugee determination, and say that I have been persecuted, the determination is done on both subjective and objective element
    b. The PROBLEM si that there is a difficulty of assessing the subjective element as it is not based on objective evidence. FURTHER this fear is also based on personality, something might be fearful for me may not be fearful for another .
4. If I am doing refugee determination, I will look at the statements made and I will look at the conditions prevailing in the country. BUT I will not evaluate the conditions in the country like why did this condition bring in, will it end, etc. YOU JUST LOOK AT WHETHER THE CONDITONS ARE PREVAILING. Whatever factual situation is determined from the country needs to show some serious threatening of harm.
    a. You will not be waiting till the last moment. There must be some serious threat to harm
5. Both these criteria need to be simultaneously fulfilled.

PERSECUTION

1. In IRL, some people have taken the dictionary meaning of persecution but generally persecution means that there is some serious harm which is there AND there is a failure of the state to protect
    a. So the harm can be by the state or by any one else.
    b. Ex- if someone harms you, you go to the police. So when harm is being done by non-state actor, you go to the police. IF the state is unable to protect you from this, there is also persecution
    c. The serius harm to threat to life and freedom but there is no concrete definition
    d. So the state might directly do the harm, or if ther are non state actor, either the government cannot protect you (due to war or economic reasons etc) OR will not protect you.

DEFINTION OF WELL FOUNDED FEAR OF PERSECUTION - *SO a reasonable fear of persecution is when a person reasonably anticipates that remaining/returning to the country may result in some form of serious harm which the government cannot control or will not control*

Shivkumaran expart (R v Secretary, Home Dept), 1988 HOL

1. The fear is not of instant danger arising out of instant presented danger
2. It is constant and sustained infliction of serious harm
3. What would happen if the person goes back to his country at the tiem of determination
4. The refugee needs to demonstrate reasonable degree of likelihood that he will be persecuted

GROUNDS

1. The refugee convention provides ground on the basis of which persecution should be there i.e. *race, religion, nationality, membership of a particular social group or political opinion*
2. RACE- So you are being targeted because of these ground. Racial discrimination is under CERD and Article 1. So you might have to relate to other international instruments for determination under refugee law. Based on race, colour, descent, national or ethnic or ethic origins, social construct
    a. Sometimes Race is a from the morphological perspective but sometimes it might be a social construct i.e. the persecutor might think of you belonging you to a group but you might identity youself belonging to that group,
3. RELIGION – Oldest basis of discrimination – Art 18 of UDHR and ICCPRS -everyone shall have freedom of thought, sonscience, belief- where such right is hindered
    a. There is freedom to hold AS WELL AS not hold a particular religion.
    b. Ex- there is a persecution of a particular religion on the basis of a practice, you have fled country A and arguing with country B because country B says that you could've avoided persecution by simply not practicing that practice. So Article 18 also talks about practice your religion, so to say that you could've avoided persecution only on the basis of avoiding the practice
4. NATIONALITY – not limited the citizenship, includes origins and members of particular *ethnic, cultural linguistic groups,* not necessary that those persecuted be minority. So nationality has been used in a loose sense
    a. Ex- national of B is in State A, and there is persecution of B, but when B is trying to go back, he is not allowed. So right to return is also there, and thus B can go to C state
5. POLITICAL OPINION – Article 19 UDHR & ICCPR – freedom of though an expression. Opinion that is actual or a perceived threat to Stat or its machinery may be rightly or wrongly ascribed and it is not necessary to show wuthorities knew of his opinion before he left the country
    a. A political refugee would mean someone who seems ot have pressed his opinion which can acutally OR may be perceived to go agains that state, so the state goes ahead and persecutes this individual.
    b. Further persecution can also be held against individuals who are not showing political opinion. Abstaining might also lead to persecution

c. The point is that when these expressions are made, they are threated and repressive measures may be instituted for the opinions.
    i. When you have had repressive measures, like not being allowed to write in a news paper, you could the thought hat there is a perceived that, that in the future, there might eb a serious threat to life. So it could be like this is one of the stages for persecution
d. You also don't need to show that the state is aware of the political opinion,

6. SOCIAL GROUP- you are having a membership of a oscial group -not clear why this was included – protecting individuals not otherwise covered by other grounds like group with no confidence in groups' loyalty to the government and groups' activities threat to existence of state
    a. The debates were that we are protecting known forms of persecution and to ensure that in the future, new forms of groups are protected, this was added
    b. This has become a useful group to bring GENDER in this because gender is not included in rfugee convention explicitly.
    c. WHO MIGHT BELONG TO A SOCIAL GROUP – there needs to be common immutable charachtersitics
        i. Firstly, there should be innate and unchangeable charachteristics, like gender, linguistic background
        ii. Secondly, you have voluntary membership for reasons so fundamental that they should not be allowed to foresake their association
            1. So this is so fundamental to you that at no point you can ask that individual to leave th association
        iii. Assocaition with a former voluntary status
            1. Ex- persecution against capitalists, because you have nt been doing anything right now, BUT once at a time you had been associated with an association.
    d. GENDER- you are trying to bring in gender through this social group criteria.
        i. In a number of cases, it becomes difficult to attribute the harm that is suffering to the state.
        ii. Ex- someone is doing mass discrimination against a geneder, and the state just sits back and look, could in this situation you say that persecution has happened? Like in a state of Afghanistan? Or in a state of war, the soldiers commit rape, then depending upon the structure of the army, attributability might be there and it might be called persecution.
        iii. Thus the challenge in gender is attribution to the state something which is done as a private harm. Harm can be faced by a lot of individuals, but to rise to a status of refugee status is difficult. In many cases, gender harm has been though to be in a private domain, but then sometime privat harm might enter a public domain like than in Afghanistan.

OUTSIDE THE COUNTRY OF NATIONALITY

1. Here nationality refers to citizenship.
2. Strict rule- a national should b outsid of the country of his nationality, international protection does not run within the territory, until you are out of the country,)

3. The fear of persecution should extend to the whole of the territory (unless it happens in part but it is unraosnable to expect him to take refuge in another part)
4. Refugee Sur place- not necessary that you should left the country owing to persecution, it can also be that you left peacefully but something happened and not you cannot go back. This is also covered.

STATELESS PERSONS

1. Who don't hav a nationality and the are outside the country of former habitual residence
2. So for stateless refugees, what is important is country of habitual residence
3. Not all stateless psos are automatically refuges, reasons under the 1951 convention have to be fulfilled which are examined in realtion to state of former habitual residence
4. If a stateless erson has more than one state of habitual residence, the 1951 convention does not require that he satifies the condition with respect to all previous habitual residence

Unable or owing to such fears is unwilling to return to it

1. Covers both situation of inability nad uwillingness
2. Unable- indicates situation where refugee cannot return owing to conditions beyond his control -i.e. the state will not allow return
3. Unwilling- voluntary decision to not return irrespect of whether state is willing to host you or not

RIGHT AND OBLIGATIONS OF A REFUGEE

ARTICLE 2 – available only to those who have ben determined as convention refugees.

7. 3 applicable standards of treatment
    a. Atleast as favourable/same treatment as accorded to their national (acces to courts, education etc)
    b. Not less favourable that that accorded to aliens generally (acquisition of movable and immovable property housing etc)
    c. Most favourable treatment accorded to foreign nations (Ex right to association)
        i. So most favourable treatment to refugee amongst foreigners.
8. General obligation is Article 2
    a. Specific Rights is right against non-dsicrimination
    b. Basic civil and political rights including freedom of thought of movement and freedom from torture and degrading treatment
    c. Basic socio-economic and cultural rights including access to medical care, education, housing
    d. Right against refoulement (Art. 32 & 33)
    e. Subject to national security and public order – any proceedings and decision reached subject to due process.

26th May

1. Right against refoulment is important

    a. The triggering of these substantive rights ar when the person have been recognized as a “refugee” but over the court of years, before the formal recognition of the person as a refuge i.e. when it is an asylum seeker, then also the principle of non-refoulment gets triggered
2. It is a fairly recent ideas that stats ought not to return persons to other states in certain circumstances where you are carving out certain individuals against who cannot decide to not let them stay in you territory.
    a. In the Early Mid-19th Century, there was a concrete ides not to return political offenders.
    b. In the Aliens Act of 1905, there were certain individuals like religious and political offenders who were not be forced to return to the state where they face threats
    c. LON- we will not force individuals to states where there right to life is under threat
    d. The 1933 Refugee Convention – first time where it was specifically enumerated that contacting parties will not remove resident refugees
3. There were tensions on the right to be granted asylum –
    a. Right to free movement today includes the right to leave and the right to come back and intnal movement. The asymmetry is that the other state might not allow you o enter.
    b. Right to seek asylum vs Right to be granted asylum – does the right to asylum means that you cannot only seek asylum or would you be definitely granted asylum.
    c. Principle of non-refoulment is that you cannot send the person back, so is it obligating the state to grant asylum.
4. ARTICLE 33 - *No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
    a. You are not supposed to expel or return the refugee to the frontiers of territory where his life and freedom is threatened.
    b. So the principle of non-refoulment is only available for only refugees alone, because if you don’t fall within the ambit of threat on account of race, religion etc, then the state is not obligated to apply the non-refoulment principle.
    c. But the development is that even without the recognition of the individuals and asylum seekers, yet to be recognized as a refugee can seek non-refoulment
5. ARTICLE 33 -*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.*
    a. The reason of this para is to give discretion to sovereign power. No state cane be obligated to keep someone who might be a problem for the existence of the state itself. So an exception is formulated.
    b. Further in cases of mass influx, just because there is a lot of people does not mean that you will not accpe thtme.
6. Non-refoulment is talking about non-return, so does it mean non-return or simply rejection as borders. If you are rejecting from the borders, then your non-refoulment is not triggered. So to overcome this, you interpret non-refoulment as rejection from border + return
    a. Further migrants will not get this protection

b. Then there will be a mix i.e. migrants and refugee both will come but just because a person has arrived with a migrant population, that will not make the refugee lose his rights
c. Further you are fleeing persecution, your entry might be illegal to another state and the state has powers to prosecute people who have illegal entry. BUT for a refugee who is fleeing, illegal entry of the refuge will not lead to prosecution.

7. Other points
    a. Non-refoument I the right of the refugee to be protected against forcible return or refoulment
    b. No forcible return (refoulment) to the frotiers of territories where the refugee's life or freedom would be threatened on account of the reasons states
    c. Refoulmet is also prohibited explicitly in the convention against tortur, 4th Geneva Convention or impliedly in UDHR(Article 14), ICCPR(Article 7), ACHR (Article 22.8)
        i. CAT says that you re not supposed to sent back the individuals to a place where they will be tortured. This does nor depend upon the refugee status of the individual.
        ii. Article 7 of ICCPR is right against torture.
            1. So even if X is not determined to be refugee, then if X can show that he will be tortured, he can claim non-refoulment
    d. Such wide acceptance seems to make prohibition of refoulment as part of CIL – implying that even though a sate may not be a party to the refuge convention, must respect the principle of non-refoulment.
        i. Most of the people believe it that no-refoulment is CIL but under CIL, the scope of principle of non-refoulment is contested i.e. who all and under what circumstances should be given the protection of non-refoulment
        ii. India is not a party o Refugee Convention and 1967 Protocol, no domestic law on refugee, UNHCR office is there is in India.
            1. Th UNHRC office is there in India because the UNHRC is a UN organization and since India is a party to the UN, they can establish an officer here even though India is not a party to the Refugee Convention.
    e. So non-refoulment can be triggered in india, if it is considered as CIL and under other coventions
8. Other Points
    a. It applies to all who "seek asylum" and not only if the person is determined as a refugee
    b. Reservation to Article 33 is not allowed but there are exceptions like national security and public order which may be determined by host nation.
        i. There is a dividd opinion that whether the scope of the threat is restricted to the danger to host nation OR to other nations as well

CLIMATE CHANGE AND MOBILITY

1. Economic concerns, disability on grounds of gender, Climat Change, sexual orientation etc are not covered under Refugee convention

2. Can you make asylum claims on the ground of climate change? – ***Ioane Teitota vs New Zealand-*** plantiff had already moved to newzealand from Kiribati, the authorities wanted to deport him back to his home. He wanted to claim refugee status on grounds of climate change and he was denied domestic remedies. So he went to HRC and said that his deportation would be violation of Article 6 and 7 of ICCPR.
    a. He argued that there is a rise of sea level, there is a land crises, water problem, occupation. So you are creating a threat to my life by deporting me back.
    b. The HRC said that the obligation of the state to protect life extends to reasonably foreseeable threats which can result in loss of life. Environmental degradation, climate change, and unsustainable developments constitute some of the pressing threats which can lead to loss of life.
        i. IT incurs the positive obligation on state to ensure that loss of life does not take place due to climate change
    c. The HRC acknowledged the link between severe climate change induced conditions and the potential violation of right to life.
    d. BUT the HRC placed the threshold in which Article 6 very high. So they did not deny Asylum on grounds of threats due to climate change, but the threshold of the committee were stated to be very high
    e. The HRC accepted that Kiribati cold become submerged in water as a result of climate change, but they said that the state still has 10-15 years for that risk to be realized
    f. For the ground that there is difficult to access water, there needs to be imminent threat of no access to water.
3. Thus an individual who does not fall under the refugee convention will not let go of their Human Rights Protection.

CESSATION OF REFUGEE STATUS

1. We have always thought of refugee protection to be a temporary thing. But they have specifically enumerated when have you ceased to become a refugee.
2. You might have come as a group BUT cessation is to be applied on an individual basis.
3. ARTICLE 1(c)-
    a. He has voluntarily re-availed himself of the protection of the country of his nationality; or
    b. Having lost his nationality, he has voluntarily reacquired it; or
    c. He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
    d. He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
    e. He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
    f. Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

EXCLUSION CLAUSES

1. The convention does not apply to persons who are
    a. Receiving assistance form other UN organs/agencies excluding UNHRC
    b. Before being made refugee, granted nationality by the receiving states
    c. Any person against whom serious reason to suspect
        i. Committed crimes against peace, war crimes, or crimes against humanity
        ii. Serious non-political crimes outside the country of the refugee
        iii. Guilty of acts contrary to the purposes and principles of UN
2. You want to hold the refugee accountable, protect the host country and extend the protection to people though guilty of war crimes etc.
3. The responsibility lies with the state to prove this exclusion clauses, fair hearing and due process needs to be conducted

GLOBAL COMPACT ON REFUGEES

1. GCR is an interantioal instrument which was development in the background of growing conflict, environmental degradation, migratns, displacement and push back against refugees and migrants
    a. States having proximity were having burden and high number of refugees. Some states were disproportionately being burdened by refugees
    b. The answer to this was not adoption of draconian measures or revisiting the international refugee protection regime
    c. So in September 2016, all 193 members of UN Adopted the New York Declaration for Refugees and Migrants
        i. So there was a declaration and not a binding instruments.
    d. The declaration called for both an intergovnmental process or negotiations to develop a global compact for safe, orderly and regular migration and a consultative process led by UNHCR to develop a global compact on refugees
        i. The declaration provided for migration due to climate change as well.
        ii. The call was taken to develop 2 different compact. FIRST is on migration. By doing irregular movement, they said that we are doing unsafe movements as migrants are trying to feeling the place, so they may be exploited. Human Rights violations can take place due to the perils etc. So the migration needs to be same
            1. The SECOND compact is on the idea of refugees
2. WHAT DOES IT DO
    a. It is not legally binding
    b. The aim was the ease the pressure on host countries by strengthening the resilience of refuges and their host communities hrough greater development cooperation
        i. Figure out the root cause of movement and eliminate them
    c. It promotes responsibility sharing with host countries by focusing on solutions in expanding opportunities for resetlle ment and other slutions
        i. We need to have international cooperation for refugees so there should be burden sharing. Lik resettlement in other 3rd countries which might accomodate refuges.
        ii. No state can us the excuse of not having adequate resources to refuse refugees

d. Fosstering the necessary conditions for refuges to return to home country in safety and dignity
    i. This kind of going back would be in light of non-refoulment. But it is critized as it might include safe conditions to go back even when the persecution has not ended but it is less than satisfactorily safe
e. There will be aglobal Refugee forum every 4 years at the ministerial level. The forum would provide states and other actors to make pledges to mee the goals of the compact as well as update and report back on them
    i. Other state actors can come in so there are private entities as well
f. Impact dependent on how states domestically incorporate the elements of the GCR

3. CRITIQUE
    a. Ambiguity in the nature of obligations
        i. Indian is not party to any international insturments and we also don't have a domestic legislation but we are a member of the UN. We are host to a lot of refugee populations.
    b. Re-affirm existing legal framework and its non-binding nature
        i. It says that we are based on international legal frame work, but at the same time it is no-binding. So are we saying that we are simply reaffirming what is already exsiting?
    c. Burden Sahring – the compact envision private entities which will strengthen and develop in host nations and origin nations. BUT we have seen that private entities have negative impacts on human rights like wage disparity, and labour law violations
        i. Burden sharing is being repeated BUT it is not mentioned how to do it. So it lessens the protection framework. So it showing that you are more concerned about the host nations than the refuges.
    d. States not being party ro refugee convention, there are no new obligations from the compact itself.
        i. The GCR is not offering any obligation which is not derived from the convention
        ii. India takes a lot of pride in that we have been host to a lot of refugees. BUT for some flows offer protection and for some we don't offer protection. So we have offered protection but a person is not guaranteed protection. So it is on our generosity.
        iii. So India has said we cannot be bound to give the protection although w have given it voluntarily.
    e. Ad-hoc and uncertain climate of protection
    f. GCR unable to provide access to protection
        i. It says that the certainty about access to protection is a challenge, BUT it does not tell us how should provide for it

4. Just because it is not binding does not mean it can make serious changes to the refuge regime.
    a. We say that we want ot continue with refugee protection BUT we have started to dilute the legal regimes and it is also of no help to country not party to the RC. AND because of this refocusing to protection of host nation, state practice on this could lead to evolution of a different jurisprudence leading to dilution of rights.

b. Since it says that we are based on the Hard Law, and since we are shifting out focuses, subsequent state practices might lead to evolution of a different protection.