Chapter 2
The Crisis and the Quotidian in International Human Rights Law

Benjamin Authers and Hilary Charlesworth

Abstract This chapter considers the idea that international human rights law is both produced by and dependent upon crisis. Surveying the capaciousness, ambiguity, and constructedness of the concept, we position the relative weight given to particular rights in terms of their framing as ‘crises’. We focus on how the idea of crisis has been differently deployed in the Universal Declaration of Human Rights and in the division between civil and political rights and economic, cultural and social rights to argue for a critical engagement with the language of crisis in human rights law, and to ask how that language has shaped the value and meaning of rights discourse more generally.

Keywords Crisis · International human rights law · Universal declaration of human rights · Economic, cultural, and social rights · Civil and political rights

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2.1 Introduction

International human rights law is often presented as a product of catastrophe: the global community responding to atrocity through the regulation of states’ treatment of their citizens. Jochen von Bernstorff, for example, locates in the Preamble of the Universal Declaration of Human Rights (UDHR) a claim ‘to be the political answer to the extermination of the European Jews’. Joseph Slaughter similarly notes that ‘in our forgetful era of crisis-driven human rights practice, we might remember that the UDHR was itself composed under the sign of emergency’.

This sense that the foundations of human rights law were a reaction to crisis has continued to shape the discipline. Crises are held out as the catalyst to which human rights continually respond and through which rights are reproduced in new forms. The development of the ‘responsibility to protect’ doctrine in answer to various international crises including Somalia (1992), Rwanda (1994) and Kosovo (1999) illustrates this tendency. However, crises also justify departures from human rights principles: the idea of crisis is enshrined in many international human rights treaties through provisions for legal derogation from certain human rights guarantees in times of emergency. Certainly, the post-11 September 2001 period has been rife with concerns that the privileging of ‘security’ by many states has led to an erosion of the protections offered by domestic rights laws, with a concomitant devaluing of human rights norms internationally.

What this suggests is that crises, regardless of their specific impact on human rights laws or the extent to which they progress or constrain rights’ development, robustness, and proliferation, have come to form an integral part of how rights are conceived. Discursively enabled in international law by a spectrum of terms, including ‘atrocity’, ‘catastrophe’, ‘emergency’, and ‘event,’ a crisis-sensibility often impels discussions of the place and meaning of rights. Crises can be either situations presently unregulated by international law or ones that overwhelm the regulatory capacity of the international system to which the law must nevertheless

1 UNGA Res. 217, UN Doc A/810, 10 December 1948 (hereinafter UDHR).
2 Von Bernstorff 2008, at 904.
3 Slaughter 2007, at 74.
4 See Evans 2008.
5 This is discussed further in Sect. 2.3.2.
respond. In either situation rights’ political, legal, and often moral force comes from their imbrication with crises, either as a consequence of it or a response to it. In this chapter we consider the influence of crises on international human rights law, first by surveying the capaciousness, ambiguity, and constructedness of the term. Contemporary critics have pointed to ways in which crises have been defined and deployed for specific discursive ends,6 and our analysis engages with how representing something as a crisis gives it a particular power in international human rights law. We then examine the way the concept is deployed in the human rights system to create a field that is both generated by and dependent upon crises, wherein crises act as both catalysts and distractions in law’s production and application. One effect of this is that the absence of crisis language can make some human rights violations appear quotidian, a part of everyday life and less urgent to redress than crisis-generated rights. Economic, social and cultural rights, for example, are only infrequently depicted as the subjects of legal crisis. This separation centres on a crisis-driven hierarchy of urgency that has had pervasive consequences, casting economic, social and cultural rights issues as potentially deferrable (notably by rendering them subject to progressive realisation), and artificially distinguishing between categories of rights in a manner that makes little sense for their substantive protection.

The aim of this chapter, however, is not to argue that a heightened crisis-sensibility be uniformly applied to rights issues. Rather, we seek to highlight the multiplicity of uses to which the language of crisis has been put in international human rights law and to emphasise that this language, which can both prompt action and obscure responsibility for harms, has been central to how rights are valued and given meaning.

2.2 What is a Crisis?

The word ‘crisis’ had specific connotations in Ancient Greek law, theology, and medicine. It is derived from the Greek verb kríno, whose meanings include to decide, to quarrel, to judge, and to separate (as into part or divorce).7 In law, it meant arriving at a verdict or judgment; thus Reinhart Koselleck observes that “‘crisis’ was a central concept by which justice and the political order … could be harmonised through appropriate legal decisions’.8 The legal premise influenced the religious use of the term in an eschatological linking of apocalypse with divine judgment.9 And the medical meaning comprised a determination about the progression of illness and whether or not there was the possibility of a relapse.10

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6 This is discussed further in Sect. 2.2.
7 Koselleck 2006, at 358.
8 Ibid.
9 Ibid., at 359–360.
10 Ibid., at 360.
Today, crises are ubiquitous and Koselleck laments the modern loss of precision and rigour in uses of the term. Nevertheless, ‘crisis’ still evokes the sense of ‘inescapable pressures for action’—of a critical time requiring a decisive intervention. The temporal span of a crisis may be short or long, it may change everything or it may change nothing, but the implication that a crisis marks a significant juncture in which a choice must be made has continuity with its ancient roots.

Beyond this element of decision, however, the meaning of crisis is both powerful and difficult to pin down. Colin Hay has observed that the word suggests ‘a moment of objective contradiction yet subjective intervention’, a definition that emphasises how critical the story accompanying a crisis is. For Hay, crises are ideological constructions ‘through which the disaggregated experiences of failure become “narrated”’. He suggests that ‘in as much as they abstract from the events they purport to explain and ascribe to them significance and meaning’, crises are acts of interpretation whose imposition invokes particular responses to an incident. This characterisation is illustrated in Chris Russill and Chad Lavin’s analysis of the multiple accounts of crisis circulating in responses to post-Hurricane Katrina New Orleans. Their study emphasises the centrality of human agency—especially of government and the media—to determining the nature of crises. The success or failure of a reaction is dependent on the way the story of the event is told: ‘[t]he identification of a crisis always projects a possible response, and requires narratives of these responses to resonate culturally.’ This process of interpretation broke down spectacularly in New Orleans from the Louisiana and federal governments’ perspectives, as bureaucratic failure and incompetence became the dominant popular narrative of how the ‘crisis’ of Hurricane Katrina was handled.

In the terms of the theme of this volume, categorising something as a crisis can act as a catalyst or a decoy; it can prompt change or deflect it. Certainly, a pervasive cultural narrative exists about crises’ capacity to lead to often radical social and political alteration. Despite cynicism about the ways states deploy the language of crisis, significant faith in crises’ capacity to produce large-scale change persists amongst social progressives. Drawing on analyses of the Great Depression that emphasise its manifestation of the failures of capitalism and the increased governmental intervention in the economy that followed, Adam Harmes has suggested that ‘crises occupy a special place in the progressive imaginary; [indeed] at times, they may become a substitute for political strategy.’ Harmes is

11 Ibid., at 397.
12 Ibid., at 370.
13 Hay 1995, at 63.
14 Ibid., at 68.
15 Ibid., at 64.
17 Ibid., at 16.
18 Harmes 2012, at 217.
sceptical of the possibility that crises can produce sweeping political change in the contemporary neo-liberal period. Nonetheless, he argues that crises do still present opportunities for reform, albeit on an ‘issue-by-issue incremental’ basis. More expansive understandings of the galvanising abilities of crises also persist: indeed, as we discuss below, international human rights law frequently sees itself acting in response to crises, a belief notably reflected in the genesis of one of its foundational documents, the UDHR.

Crisis can also be deployed in ways that uphold the status quo. Hay points to the United Kingdom in the late 1970s where the Conservative Party was able to produce a crisis narrative of ‘an overextended and ungovernable state in which trade unions were “holding the country to ransom”’. By ascribing a coherent causality to a variety of disparate events, the Conservatives presented Britain as being in a crisis that needed a particular form of management, one that only they could provide. In such situations the function of crisis is to control and defuse disruptive change, but the proliferation of crises can equally obscure failures of the political or economic order. Rendering the problems of certain systems, for example those of global market capitalism, radical instead of persistent can position those failures as anomalous and so shield the system from more holistic critique. Thus Eric Cazdyn contends that such structures react pre-emptively to predicted crises, reinforcing the economic order rather than modifying it. The consequence is, Cazdyn argues, that we now live in a state of ongoing crisis.

Crisis occur when things go right, not when they go wrong. In other words, crises are built right into many systems themselves; systems are structured so that crises will occur, strengthening and reproducing the systems themselves. The boom-bust cycle of capitalism is only one of the more obvious examples of this logical necessity. Both contingent disasters and necessary crises, therefore, are linked in the way that their breakdown in relations is built back up again by a different set of relations within the same system. On this account crisis is essential to our political, economic and social structures, working to enable, sustain, and reproduce them. In doing so, crisis can also protect these systems from scrutiny. Because crises are understood culturally as unique, they are the consequence of anomalous actions and events, rather than inherent. Human actors and natural forces produce moments of crisis that can be responded to; the less individuated and cyclical systems that are at the root of those failures are presented as beyond fault and ultimately to be protected. Crisis derives its power from its continued denotation of an anomaly, then, even as it has (inconsistently) become a norm.

‘Crisis’ is malleable and ambiguous, a generic term for a type of transition, one framed by particular urgency. A crisis can be exceptional, predictable, repetitive,
and possibly even perpetual.\(^{22}\) Politically, a crisis can manifest the failure of a particular strategy, and provide resolve to start on a new course. It might also justify a trenchant defence of the *status quo*, an argument that it is best to ‘stay the course’. In its constant reproduction, crisis rhetoric is simultaneously undermined and reinforced, rendered both commonplace and startling. The proliferation of the term and its multivalent meanings in contemporary discourse undermine its effectiveness as a discrete, descriptive category; and yet somehow the conceptual synonymy between crisis and exceptionalism is also constantly reinscribed. Crisis retains power as an analytic term to describe events and can speak to occasions that are both radical and reiterative. It is precisely its lack of definition that gives the idea of crisis its discursive force.

### 2.3 The Crises of International Human Rights Law

International law largely orients itself through crises, reproducing in the field many of the potentials and limitations described above.\(^{23}\) In particular, the tension between the uniqueness and repetition of crises make it a staple of legal analysis. Martti Koskenniemi, for example, has described how lawyers control the perception of events as crises by demonstrating their analogic similarity with other events. He writes:

> One memory I retain vividly from work in the [Finnish] Foreign Ministry is that for the political decision-makers, every situation was always new, unprecedented and very often (and not least for that very reason) a crisis. It then became the legal adviser’s task to calm down that decision-maker by explaining that situations of a similar type had arisen last year, five years ago, 30 years ago and that far from being singular or unprecedented, the situation … was in fact part of a recurrent pattern and could therefore be treated in the same way as ‘we’ had done with those previous cases.\(^{24}\)

For Koskenniemi, the role of the international lawyer is to defuse political crises by reducing their exceptionality; the lawyer’s province is to produce order through familiarity. Law is seen to provide abstract principles that resolve apparently new problems through reference to how their previous iterations (factually distinct but legally similar) were managed. Reducing their capacity to disrupt, international law renders crises part of the international legal order.\(^{25}\) Koskenniemi points out, however, that the opposite process can be equally effective in legal argumentation—that is, the contention that a particular case does

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\(^{22}\) Hay rejects the idea of perpetual crises, as the endless deferral of decisive intervention that this would require would quickly become catastrophic, causing complete chaos and thus engulfing the crisis. Hay 1995, at 63.

\(^{23}\) See Charlesworth 2002.

\(^{24}\) Koskenniemi 2011, at xviii.

\(^{25}\) Johns et al. 2011, at 3.
not fit any established patterns and should be treated as unique.\textsuperscript{26} Here, crisis becomes productive and creative, and the idea of crisis proves as malleable in the realm of law as it is in political, economic, and popular discourse.

\subsection*{2.3.1 Crisis as Catalyst}

Within international human rights law, times of crisis are frequently constructed as generative, with particular events acting as prompts to and legitimations of action. The UDHR, for example, announces itself as a response to evil, with crisis as its history and context. In the UDHR’s Preamble the recognition of the universality of human rights is immediately followed by the evocation of past atrocity:

\begin{quote}
Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.
\end{quote}

This clause frames the Declaration as embodying a break from the violence of the past and a turn to human rights for the future. Here the crisis is embodied in ‘barbarous acts’ that, despite being unnamed, are generally associated with the First and Second World Wars. Thus Richard Goldstone describes international human rights law as springing from global alarm at the Holocaust:

\begin{quote}
The shock to the conscience of humankind triggered by the Holocaust gave rise to the realization that it was necessary for the law of nations to protect individual members of the human race … [First realised in the Charter of the United Nations, the international protection of human rights] was followed in 1948 by the Universal Declaration of Human Rights. In a silent but obvious reference to the Holocaust one reads in its preamble of the ‘disregard and contempt for human rights’ which resulted in ‘barbarous acts which have outraged the conscience of mankind’.\textsuperscript{27}
\end{quote}

Early drafts of the UDHR, produced after René Cassin was asked to revise the articles proposed by the Secretariat to the UN Commission on Human Rights, are more specific in their description of the atrocity precipitating the Declaration. Cassin’s first draft opened with the assertion that ‘ignorance and contempt of human rights have been among the principal causes of the sufferings of humanity and particularly of the massacres which have polluted the earth in two world wars’.\textsuperscript{28} The Working Group of the Drafting Committee (of which Cassin was a member, along with Eleanor Roosevelt, Charles Malik, and Geoffrey Wilson)\textsuperscript{29} submitted a revised Preamble, with a slightly differently-worded clause: ‘that

\begin{footnotes}
\item[26] Koskenniemi 2011, at xix.
\item[27] Goldstone 2009, at 48.
\item[29] Ibid., at 3–4.
\end{footnotes}
ignorance and contempt of human rights have been among the principal causes of the sufferings of humanity and of the massacres and barbarities which outraged the conscience of mankind before and especially during the last world war.\textsuperscript{30} In both drafts the crisis in the protection of human rights came about in the context of global warfare, producing, the drafters argue, a unique violation. The UDHR is cast as a response to this catastrophe.

The UDHR Preamble’s invocation of ‘barbarous acts’ operates in concert with the immediacy of the following clause that ‘it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’. The reference to past violations of human rights here acts as an aspirational response; it is a crisis that can only be answered with international human rights law unless open rebellion is considered a legitimate response, something that the Preamble clearly seeks to forestall. In this, perhaps, we can see the logic of generalising the reference to ‘barbarous acts’ in the Preamble, although we might simultaneously agree with the criticism levelled by some Communist states at the failure to condemn Nazism and fascism explicitly in the UDHR.\textsuperscript{31} De-coupling the Declaration from identifiable historical events was, Glendon notes, an attempt to increase its universal relevance.\textsuperscript{32} Cassin later recorded his agreement with this approach, observing that ‘the United Nations refused to lower the Declaration to the rank of resentment turned toward the past’.\textsuperscript{33}

This disassociation from the specifics of the past is, however, unsatisfactory as a strategy for acknowledging atrocity; it has also not succeeded in its aim of universalising the Declaration by reducing the interdependence between it and the Holocaust, as the ongoing scholarly tendency to draw connections between the two indicates. The Declaration remains tethered to a particular past crisis, the Holocaust, which serves as the justification for how the UDHR seeks to legally contain and manage new crises. Joseph Slaughter describes a ‘tacit acknowledgment’ in the UDHR of both the failures of the developmental model of European Enlightenment thought and a return to its promises in the Declaration’s ‘progress narrative’, ‘its anticipation of humankind’s triumph over “barbarous acts which have outraged the conscience of mankind” through “the promotion of universal respect for and observance of human rights and fundamental freedoms”’.\textsuperscript{34} Crisis is mobilised in legitimating the new instrument, serving as the reason it came into being while also justifying the UDHR’s anticipatory, legalised response to future crises. The Holocaust precipitates the Declaration’s novel means of understanding human relations through human rights, constituting the international human rights

\textsuperscript{31} Charlesworth 2008.
\textsuperscript{32} Glendon 2001, at 176; see the amendments proposed by Australia at UN Doc. A/C.3/257.
\textsuperscript{33} Quoted in Glendon 2001, at 176.
\textsuperscript{34} Slaughter 2007, at 15.
legal regime in response to crises of the past while also shaping it as a response to the crises of the future.

Read through crisis, the UDHR is both an answer to the ‘disregard and contempt for human rights’ of ‘barbarous acts’, and a prescription for a new and internationalised understanding of rights. Indeed, the UDHR explicitly articulates the discursive terrain in which rights can be realised. Article 28 states that ‘[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.’ This includes the necessity for an ideological shift on the part of its addressees:

> every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. 35

In the rights that it sets out and the human landscape it requires for their realisation, the Declaration constructs a means for the protection of human rights. In doing so, the crises of the (now generalised) past are seen to be part of the framework of rights themselves. Contingent upon atrocity, rights solidify in the forms of international human rights law’s response and, as a consequence, have cohered in the institutions of the UN.

It is striking that the preambles to the UDHR’s progeny, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 36 and the International Covenant on Civil and Political Rights (ICCPR), 37 have a more bland and bureaucratic than crisis-driven flavour. The rhetoric of crisis is present, however, in a number of other international instruments. The Preamble to the Rome Statute of the International Criminal Court (Rome Statute), for example, calls for the international community to be ‘[m]indful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity.’ 38 The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) cleaves to a lower-key crisis of inequality, noting in its Preamble that, despite instruments that prohibit it, ‘extensive discrimination against women continues to exist’. 39 The Declaration on the Rights of Indigenous Peoples refers to an ‘urgent need to respect and promote

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35 UDHR, Preamble.
37 1966 International Covenant on Civil and Political Rights, 999 UNTS 171 (hereinafter ICCPR).
the inherent rights of indigenous peoples’ in its Preamble. The language of exigency in these latter two instruments does not attach itself to a specific incident; rather, the discourse of crisis is invoked by the scale of the harm that they reference in general terms.

In texts like these, human rights law emerges as a response to crisis: crisis acts as a catalyst for normative development. Crises are seen to provide the impetus for substantive change, a means for rethinking existing protections and formulating new methods. The language of past catastrophes can thus legitimise the law, presenting human rights as the utopian means of representing a collective future and as a symbolic and practical response to harm. At a deeper level, the crisis-response pattern explicitly elaborated in international human rights law instruments also imbues the discipline with a sense of failure. In its repeated inability to prevent events described as crises from occurring, the law fails to uphold its promise of protection, proffering instead a self-reflexive (re)turn to its own norms and their reiteration in treaties and conventions. Crisis repeatedly appears as a catalyst for international human rights law, and the discipline’s responses to this characterisation speak simultaneously to its potency and ineffectiveness in answer.

2.3.2 Crisis as Distraction

Crises can distract. Any account of a crisis will be partial, and the discipline of international law tends to concentrate on a single event or series of events, leading to abridged and decontextualized narratives of ‘what happened’. Thus, Jan Herman Burgers has criticised the accuracy of framing the UDHR as directly attributable to the Holocaust because it ignores the broader historical genealogy from which the language of human rights was drawn.

Moreover, crises typically generate swathes of information that overwhelm judgment and hobble analysis. As W. J. T. Mitchell notes of the events of 11 September 2001, that historical moment produced an ‘information overload’ that made ‘it very difficult to get any clear, distinct, or compelling message through. Only the simplest messages, generally conveyed by images, have any hope of making an impact’. Crisis, in this instance, signalled the limits of effective representation, with references to ‘9/11’ becoming metonymies for a series of complex events ‘drowned in a flood of rhetorical figures and stark oppositions.’

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42 Burgers 1992, at 448. See also Moyn 2010.
44 Ibid., at 567–568.
The language of crisis can also devalue human rights through treaty provisions allowing derogations in time of emergency. While some rights are established as non-derogable (genocide\textsuperscript{45} and the right to be free from torture and associated practices,\textsuperscript{46} along with a number of provisions in the ICCPR\textsuperscript{47}), many treaties feature clauses that use the crisis-derived language of emergency to justify undermining rights in the name of state preservation.\textsuperscript{48} In such cases, crises can distract from normative assertions of the primacy of human rights, legitimating their derogation in favour of other, apparently competing, interests. Law determines the nature of such derogations, but they nonetheless exist as potential—and legal—constraints on the scope and applicability of rights in specific circumstances.

For example, Article 4(1) of the ICCPR provides that:

\begin{quote}
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.\end{quote}

The capacity for derogation here is not absolute. As the UN Human Rights Committee has noted, ‘not every disturbance or catastrophe qualifies as a public emergency which threatens the life of the nation’\textsuperscript{49} for the purposes of Article 4. The Committee has also stated that the measures derogating from the Covenant must be both ‘exceptional’ and ‘temporary’.\textsuperscript{50} While emphasising the limitations that this places on the capacity for derogation, the language of the exceptional is integral in creating the circumstances wherein states might legally breach human rights. Establishing a ‘public emergency’\textsuperscript{51} at law implicates crisis in two intertwined ways: it constructs the situation calling for derogation as a crisis, but it also sees the derogation itself in the same light, constructing it as limited and unique.

\textsuperscript{45} Human Rights Committee, General Comment No. 29: States of Emergency (Article 4), UN Doc.CCPR/C/21/Rev.1/Add.11, 31 August 2001 (hereinafter General Comment 29).

\textsuperscript{46} 1987 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Article 2(2).

\textsuperscript{47} Listed in Article 4(2) of ICCPR.

\textsuperscript{48} These include Article 4 of ICESCR, Article 15 of the European Convention on Human Rights, 213 UNTS 222 (hereinafter ECHR), and Article 27 of the American Convention on Human Rights, 1144 UNTS 123 (hereinafter ACHR).

\textsuperscript{49} General Comment 29, at 3.

\textsuperscript{50} Ibid., at 2.

\textsuperscript{51} The European Court of Human Rights has described this as ‘an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed’. Lawless v Ireland, ECHR, No. 332/57, 1 July 1967, para. 28.
Thus, crisis legitimates the undermining of rights not only because international law explicitly allows for such limits, but also through a glossing of the legalised violation of rights as exceptional, a rhetorical turn that masks that the capacity for derogation is in fact entrenched in law itself. Rather than being novel, international law in fact ensures that derogation is potentially repeatable.

Outside the context of formally declared emergencies, ideas of crisis have also been deployed to whittle away human rights protection. The post-11 September 2001 ‘war on terror’ has generated a self-sustaining state of abnormality wherein the language of crisis has justified extensive infringements of rights. Counter-terrorism measures have eroded human rights norms including the freedom from torture and cruel, inhuman, or degrading treatment, the right to liberty and to a fair trial, and the right to non-discrimination. Another aspect of this erosion has been the redefinition of the human rights canon to give priority to the preservation of individual security.

A focus on crisis restricts international human rights law through its inattentiveness to persistent patterns of discrimination and violence. Crisis imbues some human rights violations with drama, making others recede drably into the background. This in turn affects what it seems possible to achieve through human rights discourse. The next section examines this phenomenon in the distinctions drawn between categories of rights.

### 2.4 A Crisis-Driven Distinction Between Rights

The complex interweaving of crises and international human rights law is illustrated in the standard division between two categories of human rights—civil and political rights on the one hand and economic, social and cultural rights on the other. While crises are often associated with breaches of civil and political rights, violations of economic, social and cultural rights are rarely understood in the same terms. The crystallisation of these classifications has endowed civil and political rights with

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52 For a comprehensive discussion of the relationship between international human rights and states of emergency, see Gross and Ní Aoláin 2006, at 247–325.
53 For example, arguments that the Convention against Torture and relevant provisions of the ICCPR lack extraterritorial applicability, the use by security agencies of information obtained from torture (and a paucity of investigation and accountability when allegations of this are made), practices involving ‘enhanced interrogation techniques’ and ‘moderate physical pressure’ that attempt to redefine the parameters of torture, and attempts to relax the rule of non-refoulement. See Sheinin 2010, at 592.
54 For example, practices of secret and unacknowledged detention and concerns over the right to a fair trial in military and special courts that include a lack of judicial independence, the provision of proper counsel to the accused, and the selective sharing of evidence between prosecution and defence. Ibid., at 593–594.
55 See ibid., at 955.
urgency, while the latter have become quotidian and less susceptible to redress. The language of crisis has thus created and sustained a hierarchy among rights.

The UDHR was based on a global survey of constitutional provisions dealing with human rights and included civil and political as well as economic, social and cultural rights. During its drafting, the Soviet Union worked to ensure that economic and social rights were given comparable status to civil and political rights. This was based on a commitment to the state as responsible for central planning and caused some consternation at the time, particularly among Western countries who favoured a model of rights consistent with free markets. Third World states had separate concerns about their capacity to deliver immediate protection for economic, social and cultural rights. Tension over the inclusion of economic, social and cultural rights was eventually diffused by a proposal by René Cassin to insert a *châpeau* provision for these rights, which became, after significant amendment, Article 22 of the UDHR. It provides that ‘[e]veryone is entitled to realization of the economic, social and cultural rights enumerated below, in accordance with the organization and resources of each state, through national effort and international cooperation.’ Eleanor Roosevelt, who was influenced by Franklin Roosevelt’s inclusion of freedom from want among his four ‘essential freedoms’, finally persuaded the United States to accept such rights in the Declaration on the basis that it was not a binding instrument.

At the time of its adoption in 1948, the assumption was that the UDHR would be developed into a single treaty. This aspiration held until 1952. Cold War politics contributed to the compartmentalisation of the two categories of rights in the human rights covenants. However, this politics may not have been as significant as the role of Third World states in promoting economic and social rights. Roland Burke notes that ‘[f]or Asian, Arab, and African states faced with seemingly insoluble under-development and poverty, economic and social rights held an immediacy that was missing from Western, and indeed communist, rhetoric.’

During the drafting of the Covenants, delegates from the Third World pursued economic and social rights energetically, resisting moves to water down the language referring to these rights. Eleanor Roosevelt responded that the term ‘rights’ should be ‘confined to those that could be realized in the very near term, with the requisite resources plausibly available.’ She later modified this position to contemplate economic, social and cultural rights if it were understood that they would be progressively realised. In the end it was the Indian delegate, Hansa

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58 Ibid.
59 Ibid., at 116–117. See also Dennis and Stewart 2004, at 477–480.
60 Glendon 2001, at 42–43, 186–187. The other freedoms were freedom of speech and expression, freedom of worship and freedom from fear.
61 Burke 2012, at 428.
62 Ibid., at 432.
63 Ibid.
Mehta, who proposed a division of the Human Rights Covenant into two instruments, following a similar logic to that of Roosevelt in insisting that economic and social rights were neither justiciable nor capable of precise definition.\textsuperscript{64}

The fight to preserve the integrity of the Human Rights Covenant was lost in February 1952, but this did not deter Third World countries from emphasising the centrality of economic, social and cultural rights. Burke has chronicled a shift beginning in the 1960s from economic and social rights as essentially individual rights to also seeing them as belonging to the community and the state. This way of looking at economic, social and cultural rights was sometimes deployed to justify forms of authoritarian modernisation and development from the top down, impinging on individual rights.\textsuperscript{65} By the 1970s and the end of the decolonisation era, Third World interest in the language of economic, social and cultural rights had given way to notions of development and redistributive justice between the North and South, alongside the strengthening of the recognition of these rights as individual rights as well.\textsuperscript{66} Policies that promoted foreign aid and assistance appeared to respond to the crisis of underdevelopment in the Third World more adequately than the language of rights. And this was also more politically palatable to the aid donors, as the North’s deep resistance to the attempt to marry the language of rights and development in the 1986 UN Declaration on the Right to Development shows.\textsuperscript{67}

The early debates over the status of civil and political rights on the one hand and economic, social and cultural rights on the other continue to shape international human rights law. The rights set out in the ICCPR are often deployed to respond to crises of governance. An example is the invocation of the right to be free from torture and the right to bodily integrity in response to the images of torture and abuse of prisoners by the US military at Abu Ghraib prison in 2004, which became a symbol of the illegitimacy of the US-led occupation of Iraq.\textsuperscript{68} While these rights are certainly applicable, the occupation implicated the full spectrum of human rights, but violations of the economic, social and cultural rights of Iraqis have received little attention. The rights set out in the ICESCR are typically analysed as rights that apply in a quotidian context, situations of unexceptional daily life that are easily swept aside in times of crisis or emergency. The construction of a barrier wall by Israel in the Occupied Palestinian Territories illustrates this. Israel justified the wall as a crisis-driven security measure to prevent attacks on its population. The associated violations of the economic, social and cultural rights of the Palestinians, through limiting access to their land,

\textsuperscript{64} Ibid., at 434. Mehta’s view was not shared by representatives of other Third World states, who were keen to retain a single instrument. See, for example, the speech by the Pakistani representative, Abdul Waheed, quoted in ibid., at 435.

\textsuperscript{65} Ibid., at 436–441.

\textsuperscript{66} Ibid., at 441–442.

\textsuperscript{67} UNGA Res. 41/128, 4 December 1986. See Donnelly 1985.

\textsuperscript{68} E.g. Constitution Project 2013.
to water, to schooling, to medical care, were regarded as a matter of temporary inconvenience. On occasions, violations of economic and social rights attract the rhetoric of crisis, particularly in relation to famine and natural disasters, but the sense of crisis dissipates the longer the situation endures.

The distinction between the two categories of rights, and their relevance to apparent crises, is reinforced by the legal expression of the associated implementation obligations. Article 2 of the ICCPR imposes an obligation on states parties to ‘respect and to ensure … the rights recognized in the present Covenant, without distinction of any kind’ to all persons within their jurisdiction. It requires that parties ‘take the necessary steps … to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.’ States parties also commit to providing an effective and enforceable remedy, as determined by competent authorities, to victims of rights violations.

The ICESCR contemplates a much more diffused obligation than that of the ICCPR. States parties undertake ‘to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’ Article 2 makes special provision for ‘developing countries’, which may ‘with due regard to human rights and their national economy, … determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.’ These different formulations provide one explanation for why the ICESCR contains no equivalent to Article 4 of the ICCPR, discussed above: there seems no need to allow derogation from many of the ICESCR rights because their implementation is already made subject to the availability of resources.

The distinction between these categories of rights has been reflected to some extent in the jurisprudence of the two monitoring bodies for the treaties. The Committee on Economic, Social and Cultural Rights has referred to the length of time required for the realisation of all economic, social and cultural rights. With respect to particular rights, however, the Committee has identified elements that

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69 The UN Special Rapporteur on Human Rights and Counter-Terrorism has highlighted these issues. See Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, UN Doc A/HRC/6/17/Add. 4, 16 November 2007. See also the Wall in the Occupied Palestinian Territories advisory opinion where the International Court of Justice briefly acknowledges Israel’s violations of the ICESCR. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, ICJ, Advisory Opinion, 9 July 2004, paras. 190–192.

70 ICESCR, Article 2.

71 See Müller 2009.

72 E.g. Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties’ Obligations, UN Doc. E/1991/23, para. 1 (referring to rights such as the right to non-discrimination etc.).
are susceptible to ‘immediate implementation.’ These include the right to fair wages and equal remuneration for work of equal value in Article 7(a)(i), and the right to form trade unions in Article 8 of the ICESCR. The Committee has also called on states parties to ‘modify the domestic legal order as necessary’ to implement the treaty, including through ‘direct incorporation’ of its provisions into national legal systems. The Committee has developed the notion of ‘minimum core obligations’ in relation to economic, social and cultural rights in order to distinguish between the mandatory, non-derogable aspects of rights protection and their penumbra, which is subject to the availability of resources and may be achieved progressively. The language of minimum core obligations allows violations of these rights to be perceived more readily as forms of crisis. The entry into force of the Optional Protocol to the ICESCR in 2013 may reinforce this tendency.

The Human Rights Committee, which monitors implementation of the ICCPR, couches its jurisprudence in terms of immediate obligations more consistently than the Committee on Economic, Social and Cultural Rights. The language of its General Comment 31 on ‘The nature of the general legal obligation imposed on States parties to the Covenant’ is in markedly stronger terms than the parallel General Comment of the Committee on Economic, Social and Cultural Rights. For example, it presents Article 2 of the ICCPR as an *erga omnes* obligation; in other words one that a state party to the treaty owes to every other state party, and refers to a ‘legitimate [international] community interest’ in implementing the treaty. The General Comment emphasises that the obligation to respect and ensure ICCPR rights has an ‘immediate effect’ and contemplates a broad operation for this obligation, including the duty of states parties ‘to exercise due diligence to prevent, punish, investigate or redress the harm caused [by violations of rights] by private persons or entities.’

Various human rights treaties protect both categories of rights in some measure. For example, the CEDAW, the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD) cover a range of rights that spans the two categories. The work of the UN Human Rights

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74 Ibid., paras. 3, 8.
77 Ibid., para. 2.
78 Ibid., para. 5.
79 Ibid., para. 8.
Council’s special procedures also manifest a move towards a more integrated approach to human rights. While initially the mandates of special rapporteurs were either geographical or focussed on particular civil or political rights, they have been expanded to include a number of economic, social and cultural rights or issues related to them, such as the right to education (1998), extreme poverty and human rights (1998), the right to adequate housing (2000), the right to food (2000), and cultural rights (2009).

Despite this recognition of the interrelationship of the categories of civil and political rights and economic, social and cultural rights, the distinction between them has been remarkably durable. Acknowledgement that all human rights are ‘universal, indivisible, interdependent, and interrelated’ forms part of official international discourse, but these concepts are rarely elaborated or translated in concrete ways. The distinction is often contested in the human rights literature; typically, however, this is done in a general and unspecific manner. It also has some strong defenders. The lines of accountability for breaches of civil and political rights appear more straightforward than for economic, social and cultural rights and thus more susceptible to a crisis analysis.

The apparently different status of the two categories of rights and their relationship to the immediacy of crisis-thinking is magnified in international advocacy. This can be observed in the way these categories are deployed by major human rights organisations, which place a strong emphasis on breaches of civil and political rights. In 2012, for example, the leading international non-government organisation, Human Rights Watch, published 73 major reports on what it regarded as situations of crisis. Over half of these (44) were focussed on civil and political rights (particularly extrajudicial killings and torture) and international humanitarian law, while only two focussed specifically on economic, social and cultural rights. The remainder (27) covered both categories of rights. Even where economic, social and cultural rights were included in a report, they were often submerged within what was depicted as the more critical question of the violation of civil and political rights. In a report on the repression of political protest in Yemen, for example, there is a brief reference to Yemen’s obligations under the ICESCR to allow access to medical care, but the report’s focus is on freedom of assembly and violence against civilians. The Executive Director of Human Rights Watch, Ken Roth, has argued that human rights advocacy is most effective when there is an observable human rights violation, the identity of the violator is clear and the remedy is obvious. This, he suggests, is straightforward in many

82 E.g. UNGA, Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993 para. 5; UNGA Res. 60/1 (2005 World Summit Outcomes), 24 October 2005, para. 13. UNGA Res. 60/251 (establishing the Human Rights Council) adds the following words to this formula: ‘mutually reinforcing, and that all human rights must be treated in a fair and equal manner, on the same footing and with the same emphasis.’ UNGA Res. 60/251, 3 April 2006, Preamble, para. 3.
83 E.g. Ignatieff 2001; Dennis and Stewart 2004.
84 Human Rights Watch 2012, at section IV.
85 Roth 2004, at 67–68.
cases of breaches of civil and political rights, but more complicated when the
issues of distributive justice that are implicated in economic, social and cultural
rights are at stake.86 Roth recommends that human rights organisations focus on
cases where the cause of an economic, social or cultural rights violation is arbitrary
or discriminatory governmental conduct, so that the violator and remedy are both
clear. He refers to the ‘futility’ felt by international human rights activists because
they ‘see how little impact they have in taking on matters of pure distributive
justice’.87

Another example of the influence of the distinction between categories of rights
is in post-conflict peace-building. A major problem after conflict is economic and
social disparity and insecurity exacerbated by conflict and endemic poverty.88
Women are particularly affected by this because gendered discrimination in areas
such as access to land or inheritance of housing and property is common.89 But
these are rarely analysed as crises that can be ameliorated by legal reform. Socio-
economic injustice is at the heart of many modern conflicts, and yet the connection
between violations of economic, social and cultural rights and those of civil and
political rights is rarely explored in critical analyses of peace-building. It is also
absent from most accounts of transitional justice, despite the prevalence of sys-
temic asymmetries of power that can undermine fragile post-conflict settlements.90
Accounts of the rule of law in such societies tend to focus on civil and political
rights; economic, social and cultural rights are associated with political choices
rather than legal ones. Rachel Kleinfeld illustrates this type of reasoning in her
comment that:

> Not any human rights reform would necessarily count as a rule-of-law issue. The idea is
> not simply the growth of human rights, but the notion that the state should be reined in by
> the law and that law should have content to it – that is, the state cannot violate intrinsic
> human rights of individuals. Thus the rule of law is historically about negative rights, not
> positive rights or so-called economic and social rights.91

The relegation of economic, social and cultural rights to a different sphere is
based on an unsustainable distinction between negative and positive rights, the
assumption that civil and political rights entail only state restraint, while eco-
nomic, social and cultural rights demand state action and expenditure or what Roth
calls ‘distributive justice’.92 Protection of all human rights requires active policy
reform and commitment of resources, and understanding the two sets of rights as
qualitatively distinct makes little sense when applied to human lives. The rela-
tionship between the categories is better understood as symbiotic. Thus the right to

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86 Ibid., at 68–70.
87 Ibid., at 72.
88 Niland 2004, at 322.
89 See Chinkin and Charlesworth 2006.
90 For a discussion of this point in the context of Zimbabwe, see Muvingi 2009.
91 Kleinfeld 2006, at 69, footnote 47.
92 Roth 2004, at 72.
form and join trade unions in the ICESCR is a specific aspect of the rights to freedom of association and assembly contained in the ICCPR. The right to an adequate standard of living in the ICESCR is an element of the right to life in the ICCPR. The right to education is integral to the right to freedom of speech and expression. Implementation of the right to be free from discrimination requires positive action, such as education and monitoring. As Wendy Brown has noted, a failure to address the historical, political and economic contexts in which rights are exercised automatically curtails the idea of human agency on which rights are based.

The shadow of crisis obscures the connections between the two categories and makes it harder to think about the indivisibility of rights. If a violation of rights is associated with a crisis, human rights law seems easier to apply. If it is not, it appears as routine and harder to ameliorate. In the context of economic, social and cultural rights the general lack of crisis thinking has pushed them to the periphery of human rights activism.

### 2.5 Conclusion

In this chapter, we have argued that crises galvanise, sustain and undermine international human rights law. While their reiteration suggests law’s limited capacity to prevent them, crises can nonetheless prompt international human rights law into crafting a response to atrocities. Crises have also operated to contain the scope of the discipline by creating hierarchical categories of both crisis-justified human rights violations and non-critical—what we have termed quotidian—human rights violations.

The multiple functions of crises in international human rights law will always be in tension. One way to reduce this tension is through a redefinition of the quotidian as crisis, in order to make change appear more urgent. In a saturated field, however, this may not have great impact, adding one more crisis to a growing list. Moreover, as Harmes has observed in the area of economic theory, crises do not always deliver what we expect. He has pointed out that the ‘big bang’ or crisis-driven model of change is not supported by evidence and that coalition-building is more effective.

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93 ICESCR, Article 8.
94 ICCPR, Article 22. Article 22 of ICCPR also refers to the right to form and join trade unions.
95 ICESCR, Article 11.
96 ICCPR, Article 6.
97 ICESCR, Article 13.
98 ICCPR, Article 19.
99 See also Van Boven’s schema of the indirect protection of economic, social and cultural rights through civil and political rights (Table 8.1). Van Boven 2010, at 179.
100 Brown 2004, at 455.
politically. Another strategy could be to insist on straddling the quotidian and the crisis, recognising that any violation of rights implicates both a pattern of conduct and a need for decisive action, a background and a foreground. While a quotidian human rights law is neither a panacea for crisis thinking nor its ideal alternative, it may allow us to think more expansively of the spaces in which rights should operate.

All of these approaches, however, require a critical engagement with the discourses through which crises are constructed. Mitchell notes that ‘[c]riticism cannot wait for the crisis to be over to have a “perspective” on the events. Criticism is more properly understood, in fact, as a cultural practice that is, in some deep sense, synonymous with crisis.’ On this analysis, the critical moment is precisely the moment of crisis; it evokes anxiety and risk and the necessity of making a decision or forming a judgment. Crises should be subject to an ongoing interrogation, and criticism should itself be understood as invoking the temporal urgency that crises convey, albeit with an awareness of how those crises are constructed and the purposes to which they are put. Approaching crises with criticism reminds us that crises are produced: they are negotiable narratives that can mask as well as reveal, a recognition that should be central when we respond to crises of human rights with international law.

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102 Mitchell 2002, at 570.
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