

Contents

<i>Preface</i>	xxiii
<i>Abbreviations</i>	xxvii
<i>Websites</i>	xxxiii
<i>Table of Cases</i>	xxxv
<i>Table of Treaty-Bodies' comments and recommendations</i>	lvii

Part I Human rights in the international legal system

1 The foundation and historical development of international human rights	3
1.1 Concept and foundation of human rights	3
1.2 Historical precedents.....	4
1.2.1 Historical development of human rights in national legal systems	4
1.2.2 The role of the individual in classical international law	5
1.2.3 Obligation to protect aliens and their property.....	5
1.2.4 Humanitarian intervention	6
1.2.5 Treaties against slavery and on the protection of religious groups.....	6
1.2.6 The birth of international humanitarian law	7
1.2.7 The League of Nations and the system of mandates	8
1.2.8 Protection of workers	9
1.2.9 The system for the protection of minorities	9
1.2.10 The limits of the above historical precedents.....	10
1.3 The turning point after the Second World War: human rights theory imposes itself internationally	11
1.4 General aims of human rights	13
1.4.1 Dignity of the human person and universal values	13
1.4.2 The problem of the universalism of human rights in a multicultural world	14
References	17

2 The impact of human rights on international law	19
2.1 Human rights and the modernization process of international law.....	19
2.2 International human rights law as a self-contained regime?	20
2.3 Influence of human rights theory on the traditional structure of the international legal order	22
2.3.1 Extension of the content and scope of international law.....	22
2.3.2 Enlargement of international law actors: the new role of the individual	22
2.3.3 Change in the typical nature of international law.....	24
2.3.3.1 <i>Erga omnes</i> obligations and collective values	25
2.3.3.2 <i>Jus cogens</i> and fundamental values.....	26
2.3.4. Modernization of the regime of international responsibility of States	27
2.3.4.1 Invocation of responsibility for breach of <i>erga omnes</i> obligations.....	27
2.3.4.2 Aggravated responsibility for breach of obligations arising under <i>jus cogens</i> norms.....	30
2.3.4.3 State responsibility towards individuals and individual right to reparation	31
2.3.5 The relationship between international law and domestic law: towards ever greater harmonization and integration between the two legal orders.....	33
2.3.6 Influence of international human rights law on international sources and obligations (cross-reference).....	35
2.4 Impact of human rights on specific areas of international law.....	35
2.4.1 International humanitarian law.....	36
2.4.2 International criminal law	40
2.4.3 Use of force, humanitarian intervention and “responsibility to protect”	42
2.4.4 Other areas influenced by human rights theory.....	45
References	48
Part II International sources	
3 General international law	53

Contents	vii
3.1 Customary law	53
3.1.1 A modern concept of custom in the field of human rights.....	53
3.1.2 The role of human rights treaties in the formation of custom.....	56
3.2 General principles of law recognized by civilized nations <i>in foro domestico</i>	58
3.3 General principles of international law	60
3.4 <i>Jus cogens</i>	63
3.5 Conclusions.....	65
References	66
4 Treaties	69
4.1 Possible reasons for the “specialty” of human rights treaties.....	69
4.1.1 Non-reciprocity and obligations <i>erga omnes partes</i>	70
4.1.2 Theory on the “objective” character of conventional human rights obligations. Criticism	72
4.1.3 Theory on the peremptory character of human rights norms. Criticism.....	74
4.1.4 Theory on the “constitutional” nature of human rights treaties. Criticism	74
4.1.5 Individuals as addressees of human rights treaties	76
4.1.6 Provisional conclusions: impact of the principles of primacy of the individual and universality of human rights.....	78
4.2 Effects of the two principles on the stability and continuity of the treaties.....	79
4.2.1 Reservations	79
4.2.2 State succession in treaties	81
4.2.3 Causes of treaty termination.....	83
4.2.3.1 Material breach of treaty	83
4.2.3.2 Effects of armed conflict	84
4.2.3.3 Withdrawal not provided for in the treaty	85
4.3 Effects of the two guiding principles on treaty interpretation	87
4.3.1 Dynamic and evolutionary interpretation.....	87
4.3.2 “Autonomous” legal concepts	89
4.3.3 Positive obligations and “positive procedural” obligations	90
4.3.4 Theory of “horizontal effects” of human rights	93

4.4	Limits to the two principles: the prerogatives of States	95
4.4.1	Subsidiarity	96
4.4.1.1	Exhaustion of domestic remedies.....	98
4.4.1.2	Right to an effective domestic remedy.....	100
4.4.2	Restriction clauses.....	101
4.4.3.	Derogation clauses	104
4.4.4	State margin of appreciation	112
	References	116
5	Sources envisaged in international treaties	119
5.1	Binding decisions of international organizations	119
5.1.1	Decisions of the UN Security Council	120
5.1.2	Secondary legislation of the European Union.....	122
5.2	Conclusions.....	125
	References	126
6. Soft law	127
6.1	The variety of soft law acts.....	127
6.2	Legal value of these acts	128
	References	130

Part III International obligations

7	Personal scope of obligations	133
7.1	Bearers of obligations	133
7.1.1	States	133
7.1.2	International organizations.....	134
7.1.3	Individuals.....	135
7.1.4.	Peoples, minorities, indigenous peoples and other non-state actors	137
7.2	Holders of rights.....	138
7.2.1	States	138
7.2.2	Individuals.....	139

7.2.3 Peoples, minorities, indigenous peoples and other non-state actors	141
References	142
8 Content and nature of the obligations. Various categories and their validity	143
8.1 Categories only descriptive and of low conceptual-systematic value	144
8.1.1 Obligations concerning human rights of first, second, third and fourth generation. Criticism	144
8.1.2 Precise obligations and vague obligations. Criticism.....	147
8.1.3 Obligations without cost and expensive obligations. Criticism	149
8.1.4 Obligations to respect, to protect and to fulfil human rights. Criticism.....	150
8.2 Useful categories with conceptual-systematic value.....	153
8.2.1 Negative and positive obligations	153
8.2.2 Obligations of result and obligations of due diligence	154
8.2.3 Immediate obligations and obligations “of progressive realization”.....	157
8.2.4 Distinction between legal obligations and non-binding political objectives	160
8.3 Conclusions on the content and nature of human rights obligations.....	161
References	162
9. Spatial scope of obligations	163
9.1 Introduction.....	163
9.2 Provisions of treaties on their “spatial scope”.....	164
9.3 Three different forms of “spatial jurisdiction” of the State in human rights matters.....	166
9.4 Territorial jurisdiction: obligations and responsibility of the State for acts performed on its territory	167
9.4.1 The general rule based on territorial sovereignty	167
9.4.2 Inability of the State to control its territory	167
9.4.3 Inability of the State to control human rights violations committed on its territory by foreign agents	170

9.5 “Extraterritorial jurisdiction”: obligations and responsibility of the State for acts committed on foreign territory	171
9.5.1 Occupation or effective control of a foreign territory	172
9.5.2 Acts of State agents operating in foreign territory without effective control thereof. The concept of “State agent authority and control”	175
9.5.2.1 Acts of diplomatic and consular agents.....	176
9.5.2.2 Acts of State agents on persons in custody or detention.....	176
9.5.2.3 Other extraterritorial acts of State agents.....	180
9.6 Jurisdiction “with extraterritorial effects”: obligations and responsibility of the State for acts performed on its own territory but that have effect abroad	184
References	186

Part IV Conventional human rights systems: treaties, organs and procedures

10 The United Nations System.....	191
10.1 The United Nations Charter	191
10.2 The Universal Declaration of Human Rights.....	192
10.3 Evolution over time of the United Nations’ action: the different generations of human rights.....	193
10.4 Treaties promoted by the United Nations. Monitoring bodies and procedures (Treaty-Bodies and Treaty-Procedures)	194
10.4.1 General treaties: the International Covenants of 1966.....	195
10.4.1.1 The Covenant on Civil and Political Rights	196
10.4.1.2 The Covenant on Economic, Social and Cultural Rights	197
10.4.2 Sectoral treaties	199
10.4.2.1 The Genocide Convention.....	199
10.4.2.2 The Geneva Convention on Refugees	200
10.4.2.3 The Convention against Racial Discrimination.....	201
10.4.2.4 The Convention against Apartheid.....	202

10.4.2.5 The Convention against Discrimination towards Women	203
10.4.2.6 The Convention against Torture.....	204
10.4.2.7 The Convention on the Rights of the Child.....	206
10.4.2.8 The Convention on the Rights of Migrant Workers.....	207
10.4.2.9 The Convention on the Rights of Persons with Disabilities	207
10.4.2.10 The Convention against Enforced Disappearance.....	208
10.4.3 Overall assessment of the Treaty-Bodies and the opportunity for their reform	209
10.5 Monitoring bodies and procedures based on the UN Charter (Charter-Bodies and Charter-Procedures).....	213
10.5.1 Human Rights Council.....	213
10.5.1.1 Universal Periodic Review.....	214
10.5.1.2 Special Procedures	218
10.5.1.3 Complaint Procedure.....	218
10.5.1.4 Advisory Committee	218
10.5.2 High Commissioner for Human Rights.....	219
10.5.3 Other Charter-Bodies specializing in human rights	219
10.5.4 Main organs of the United Nations and their human rights-related tasks	220
10.5.4.1 General Assembly	220
10.5.4.2 Economic and Social Council	221
10.5.4.3 Secretary General	221
10.5.4.4 Security Council.....	221
10.5.4.5 International Court of Justice	222
10.6 Specialized Institutes and conferences on human rights	223
10.6.1 International Labour Organization	223
10.6.2 United Nations Educational, Scientific and Cultural Organization.....	224
10.6.3 Human rights conferences.....	225
References	225
11 The European System of human rights	227
11.1 Council of Europe	227
11.1.1 The European Convention on Human Rights.....	227
11.1.1.1 The rights guaranteed.....	229

11.1.1.2 Bodies and procedures	229
11.1.2 The European Social Charter	232
11.1.3 Other human rights treaties of the Council of Europe.....	233
11.1.3.1 The European Convention for the Prevention of Torture	233
11.1.3.2 The European Charter for Regional and Minority Languages	234
11.1.3.3 The European Framework Convention for the Protection of National Minorities	234
11.1.3.4 The Convention on Human Rights and Biomedicine	235
11.1.4 Council of Europe Commissioner for Human Rights	235
11.2 European Union	236
11.2.1 The current normative framework.....	237
11.2.2 The competence of the Court of Justice in the field of human rights	238
11.3 Organization for Security and Cooperation in Europe.....	239
References	241
12 Other regional human rights systems	243
12.1 The Inter-American System	243
12.1.1 The Inter-American Commission.....	244
12.1.2 The Inter-American Court.....	245
12.2 The African System	246
12.2.1 The African Union	246
12.2.1.1 The African Commission on Human and Peoples' Rights	247
12.2.1.2 The African Court on Human and Peoples' Rights	248
12.2.1.3 The African Court of Justice and Human Rights	249
12.2.2 The Economic Community of West African States and its Court of Justice.....	249
12.3 Other regional initiatives.....	250
References	251

Part V “Fundamental” human rights

13 Distinctions between human rights categories	255
13.1 The problem of a hierarchy within human rights.....	255
13.2 The category of “fundamental” human rights	257
13.3 Possible distinguishing criteria for the category of “fundamental” rights.....	258
13.3.1 The criterion of rights considered “essential” or “preeminent” in the human rights treaties. Criticism	258
13.3.2 The criterion of “absolute” rights. Criticism	259
13.3.3 The criterion of rights defined as “non-derogable in time of emergency”. Criticism	260
13.3.4 The criterion of rights established by general inter- national law	261
13.3.5 The criterion of rights established by <i>jus cogens</i> norms.....	263
13.4 The concepts of “core rights”, “core content” and “core ob- ligations”	265
13.5 Conclusions.....	269
References	270
 14 Protection of life and physical integrity of the person	 273
14.1 Right to life	273
14.1.1 Norms.....	273
14.1.2 Content of the right	275
14.1.2.1 Exceptions: death penalty and armed con- flict	275
14.1.2.2 Scope of the right: the beginning and end of life	277
14.1.3 Obligations	279
14.1.3.1 Negative obligations.....	280
14.1.3.2 Positive obligations of prevention.....	283
14.1.3.3 Positive obligations of repression.....	293
14.1.3.4 Positive obligations concerning repara- tion	296
14.2 Prohibition of torture and inhuman or degrading treatment or punishment.....	298
14.2.1 Norms.....	298
14.2.2 Content of the prohibition	300

14.2.2.1	The notion of torture	300
14.2.2.2	Differences between torture and inhuman or degrading treatment or punishment	303
14.2.2.3	Material scope of the prohibition: main abuses prohibited in practice	305
14.2.3	Obligations	309
14.2.3.1	Negative obligations.....	309
14.2.3.2	Positive obligations of prevention.....	312
14.2.3.3	Positive obligations of repression.....	314
14.2.3.4	Positive obligations concerning reparation	315
14.3	Prohibition of international crimes.....	316
14.3.1	Genocide	318
14.3.1.1	Norms.....	318
14.3.1.2	Content of the prohibition	319
14.3.1.3	Obligations	321
14.3.2	Crimes against humanity	322
14.3.2.1	Norms.....	322
14.3.2.2	Content of the prohibition	324
14.3.2.3	Obligations	325
14.3.3	War crimes	326
14.3.3.1	Norms.....	326
14.3.3.2	Content of the prohibition	327
14.3.3.3	Obligations	329
14.3.4	Crimes against peace. Aggression.....	329
	References	332
15	Protection of basic needs and subsistence rights of the person	335
15.1	Right to food	336
15.1.1	Norms.....	336
15.1.2	Content of the right	340
15.1.3	Obligations	341
15.2	Right to water.....	342
15.2.1	Norms.....	342
15.2.2	Content of the right	344
15.2.3	Obligations	345
15.3	Right to housing	346
15.3.1	Norms.....	346
15.3.2.	Content of the right	348
15.3.3	Obligations	350
15.4	Right to health.....	350

15.4.1 Norms.....	350
15.4.2 Content of the right	353
15.4.3 Obligations.....	354
15.5 Right to a healthy environment (cross-reference)	355
References	355
16 Protection of liberty and security of the person.....	357
16.1 Prohibition of slavery, servitude and forced labor	357
16.1.1 Norms.....	357
16.1.2 Content of the prohibitions.....	359
16.1.3 Derogations and exceptions to the prohibition of forced labor	361
16.1.4 Obligations	362
16.2 Prohibition of arbitrary arrest or detention.....	363
16.2.1 Norms.....	363
16.2.2 Content of the prohibition	365
16.2.3 Obligations	367
16.3 Prohibition of enforced disappearance of persons	367
16.3.1 Norms.....	367
16.3.2 Content of the prohibition	368
16.3.3 Obligations	369
References	369
17 Essential judicial protection of the person	371
17.1 Right of access to justice.....	371
17.1.1 Norms and their historical evolution.....	371
17.1.2 A customary norm on access to justice?	374
17.1.3 Content of the right	376
17.1.4 Derogations and limits	378
17.1.4.1 Derogations in time of emergency	378
17.1.4.2 Restrictions and limits. Conflict between the right of access to justice and interna- tional immunities.....	380
17.1.5 Obligations	389
17.2 Right to reparation	390
17.2.1 Norms.....	390
17.2.2 Content of the right	392

17.2.3 Restrictions and limits. Conflict between the right to reparation and international immunities (cross-reference)	393
17.2.4 Obligations	393
17.3 Basic rights of the accused. Criminal legality and non-retroactivity of crimes and penalties	395
17.3.1 Norms.....	395
17.3.2 Content of the rights.....	397
17.3.3 Obligations	399
References	400
18 Protection of the essential identity of the person	403
18.1 The general prohibition of discrimination.....	403
18.1.1 Principles and norms	403
18.1.1.1 Equality	404
18.1.1.2 Non-discrimination	406
18.1.1.3 The general prohibition of discrimination as a framework principle.....	408
18.1.2 Content of the prohibition	409
18.1.3 Obligations.....	410
18.2 The prohibition of racial discrimination	411
18.3 The prohibition of discrimination against women and customary law	414
References	417
19 Protection of the will and identity of peoples	419
19.1 Right of peoples to self-determination	419
19.1.1 The principle of self-determination. Origin and development.....	419
19.1.2 Right of “external” self-determination	421
19.1.2.1 Holders of the right	424
19.1.2.2 Obligations	425
19.1.3 Right of “internal” self-determination.....	425
References	427

Part VI Other human rights

20 Protection of private and family life	431
20.1 Right to respect for private life	431
20.1.1 Norms.....	431
20.1.2 Content of the right	432
20.1.3 Obligations.....	435
20.2 Right to family life	436
20.2.1 Norms.....	436
20.2.2 Content of the right	437
20.2.3 Obligations	438
References	439
21 Protection of intellectual and cultural activities	441
21.1 Freedom of thought, conscience and religion	441
21.1.1 Norms.....	441
21.1.2 Content of the freedoms	442
21.1.3 Obligations	446
21.2 Freedom of opinion and expression	446
21.2.1 Norms.....	446
21.2.2 Content of the freedoms	448
21.2.3 Obligations	450
21.3 Right to education	451
21.3.1 Norms.....	451
21.3.2 Content of the right	453
21.3.3 Obligations	454
21.4 Right to cultural life	455
21.4.1 Norms.....	455
21.4.2 Content of the right	457
21.4.3 Obligations	458
References	458
22 Protection of political activities	459
22.1 Freedom of assembly and association.....	459
22.1.1 Norms.....	459
22.1.2 Content of the freedoms	460
22.1.3 Obligations	462

22.2 Right to participate in political and public life. Free elections and access to public service.....	462
22.2.1 Norms.....	462
22.2.2 Content of the rights.....	463
22.2.3 Obligations	467
References	468
23 Protection of economic activities	469
23.1 Right to work	469
23.1.1 Norms.....	469
23.1.2 Content of the right	472
23.1.3 Obligations	473
23.2 Right to property	473
23.2.1 Norms.....	473
23.2.2 Content of the right	476
23.2.3 Obligations	480
References	481
24 Protection of freedom of movement	483
24.1 Freedom of movement of citizens.....	484
24.1.1 Norms.....	484
24.1.2 Content of the freedoms	485
24.1.3 Obligations	486
24.2 Rights of movement of aliens	487
24.2.1 Admission and entry into the country	487
24.2.2 Stay and residence.....	491
24.2.3 Limits to expulsion and other removal measures	492
24.3 Asylum.....	494
24.3.1 Norms and content of the right.....	495
24.3.2 Obligations	500
24.4 Rights of refugees	501
24.4.1 Norms.....	501
24.4.2 Content of the rights.....	501
24.4.3 Obligations	507
24.5 Rights of other internationally protected migrants.....	507
24.5.1 “Subsidiary” protection.....	508
24.5.2 “Temporary” protection	508
24.5.3 “Humanitarian” or “special” protection	509
24.5.4 Internally Displaced Persons.....	510
References	511

25 Collective human rights and political objectives of the international community	513
25.1 Rights of minorities.....	514
25.1.1 Norms.....	514
25.1.2 Content of the rights.....	516
25.1.3 Obligations	519
25.2 Rights of indigenous peoples	520
25.2.1 Norms.....	520
25.2.2 Content of the rights.....	521
25.2.3 Obligations	524
25.3 Other collective human rights?	524
25.3.1 Right to development	526
25.3.2 Right to natural resources.....	527
25.3.3 Right to peace.....	527
25.3.4 Right to democracy	527
25.3.5 Right to good governance	531
25.3.6 Conclusions.....	532
25.4 Human rights between individual and collective interests	533
25.4.1 Right to human security	534
25.4.2 Right to a healthy environment	536
References	542
<i>Selective Bibliography</i>	545

