

# 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**

<b>1 The foundation and historical development of international human rights</b> .....	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
<b>2</b>	<b>The impact of human rights on international law .....</b>	<b>19</b>
2.1	Human rights and the modernization process of interna- tional law .....	19
2.2	International human rights law as a self-contained regime? .....	20
2.3	Influence of human rights theory on the traditional struc- ture 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 re- sponsibility 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 in- ternational sources and obligations (cross-refer- ence) .....	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 “re- sponsibility to protect” .....	42
2.4.4.	Other areas influenced by human rights theory .....	45
	References .....	48

**Part II International sources**

<b>3</b>	<b>General international law .....</b>	<b>53</b>
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
<b>4</b>	<b>Treaties .....</b>	<b>69</b>
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
<b>5</b>	<b>Sources envisaged in international treaties.....</b>	<b>119</b>
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
<b>6</b>	<b>Soft law.....</b>	<b>127</b>
6.1	The variety of soft law acts.....	127
6.2	Legal value of these acts.....	128
	References.....	130
 <b>Part III International obligations</b>		
<b>7</b>	<b>Personal scope of obligations.....</b>	<b>133</b>
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

Contents	xi
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
<b>8 Content and nature of the obligations. Various categories and their validity.....</b>	<b>143</b>
8.1 Categories only descriptive and of low conceptual-sys- tematic value .....	144
8.1.1 Obligations concerning human rights of first, sec- ond, third and fourth generation. Criticism .....	144
8.1.2 Precise obligations and vague obligations. Criticism.....	147
8.1.3 Obligations without cost and expensive obliga- tions. Criticism .....	149
8.1.4 Obligations to respect, to protect and to fulfil hu- man 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 dili- gence .....	154
8.2.3 Immediate obligations and obligations “of pro- gressive 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 ob- ligations.....	161
References .....	162
<b>9. Spatial scope of obligations .....</b>	<b>163</b>
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**

<b>10</b>	<b>The United Nations system .....</b>	<b>191</b>
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 Dis- appearance .....	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 Char- ter (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 hu- man 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 Cul- tural Organization.....	224
10.6.3	Human rights conferences.....	225
	References .....	225
<b>11</b>	<b>The European system of human rights .....</b>	<b>227</b>
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
<b>12</b>	<b>Other regional human rights systems .....</b>	<b>243</b>
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**

<b>13 Distinctions between human rights categories .....</b>	<b>255</b>
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 international 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 obligations” .....	265
13.5 Conclusions .....	269
References .....	270
<b>14 Protection of life and physical integrity of the person .....</b>	<b>273</b>
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 conflict .....	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 reparation .....	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
<b>15</b>	<b>Protection of basic needs and subsistence rights of the person .....</b>	<b>335</b>
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
<b>16 Protection of liberty and security of the person.....</b>	<b>357</b>
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
<b>17 Essential judicial protection of the person .....</b>	<b>371</b>
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
<b>18</b>	<b>Protection of the essential identity of the person .....</b>	<b>403</b>
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
<b>19</b>	<b>Protection of the will and identity of peoples .....</b>	<b>419</b>
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**

<b>20 Protection of private and family life .....</b>	<b>431</b>
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
<b>21 Protection of intellectual and cultural activities .....</b>	<b>441</b>
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
<b>22 Protection of political activities .....</b>	<b>459</b>
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
<b>23</b>	<b>Protection of economic activities.....</b>	<b>469</b>
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
<b>24</b>	<b>Protection of freedom of movement.....</b>	<b>483</b>
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

<b>25 Collective human rights and political objectives of the international community .....</b>	<b>513</b>
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