

Contents

Table of Boxes	xi
Table of Figures	xiii
Tables of Cases	xiv
Table of Treaties and Conventions	li
Table of Comments and Recommendations of Various International Committees	lxxi

Introduction 1

PART I THE SOURCES

1 The rise of international human rights	13
Introduction	13
1 The universal level: the United Nations and human rights	14
2 The regional level	23
2.1 The Council of Europe and human rights	24
2.2 The Organization of American States and human rights	29
2.3 The African Union and human rights	31
3 The emerging <i>jus commune</i> of human rights	36
4 Human rights law as part of international law	58
4.1 Human rights beyond treaties	58
(a) Human rights in the UN Charter	58
(b) Human rights as part of customary international law	59
(c) Human rights as general principles of law	63
(d) The significance of human rights as part of general international law	64
4.2 Human rights in the hierarchy of international law	68
(a) The arguments in favour of hierarchy	69
(b) Human rights as <i>jus cogens</i> norms	85
(c) Serious breaches of <i>jus cogens</i> norms	109
4.3 The <i>erga omnes</i> character of human rights obligations	111
4.4 Human rights treaties as non-contractual in nature	116
4.5 Reservations to human rights treaties	118
(a) The regime of reservations in international law	119
(b) Reservations in the Inter-American and European systems	125
(c) From regional to universal human rights treaties: the doctrine of the Human Rights Committee	130

2 State responsibility and 'jurisdiction'	145
Introduction	145
1 National territory and 'effective control'	147
1.1 Occupied foreign territory	147
1.2 The inability of the State to control all the national territory	154
2 Extraterritorial obligations under international human rights law	161
2.1 The responsibility of States for the activities of State agents operating outside the national borders	161
2.2 The obligation of States to protect human rights beyond the national territory	188
2.3 The obligation of international assistance and co-operation	208
2.4 Human rights and development	216
3 The responsibility of States in inter-State co-operation	233
3.1 Deportation cases	233
3.2 The execution of foreign judgments	253
4 The responsibility of States for the acts of the international organizations	262
4.1 The general regime	262
4.2 The specific character of the UN Charter and of UN Security Council Resolutions	284

PART II THE SUBSTANTIVE OBLIGATIONS

3 Respecting human rights: avoiding interference	291
Introduction	291
1 The typology of States' obligations	292
1.1 Obligations to respect, to protect, and to fulfil	292
1.2 Availability, accessibility, acceptability, and adaptability	303
2 Rights of an 'absolute' character	307
2.1 The 'War on Terror' under the Bush US administration	307
2.2 The absolute character of the prohibition of torture in the context of deportation proceedings	310
(a) The principle	310
(b) Diplomatic assurances	325
2.3 Case study: the <i>Abu Qatada (Othman)</i> litigation	330
3 The regime of rights which may be restricted	344
3.1 The acceptability of limitations to human rights	344
3.2 The condition of legality	349
3.3 The condition of legitimacy	364
3.4 The condition of necessity	377
(a) The general principle	377
(b) The importance of procedures for weighing all relevant interests	381
(c) The importance of contextual assessments	386
3.5 Case study: restrictions to freedom of religion in vestimentary codes	391
3.6 Abuse of rights	428
4 Protecting human rights: regulating private actors	436
Introduction	436
1 The imputability to the State of the conduct of non-State actors and the obligation to protect	437
1.1 The attribution to the State of acts committed by private entities	437

1.2	Positive obligations to protect	448
	(a) Before UN human rights treaty bodies	449
	(b) Before regional courts	454
2	Measuring the scope of the obligation to protect	465
2.1	The principle	465
2.2	An obligation of means	480
2.3	The limits of the obligation to protect	481
2.4	Human rights in contractual relationships and the question of waiver of rights	495
2.5	Respect for conflicting human rights as a limit to the scope of the obligation to protect	516
	(a) Affirming the priority of the obligation to respect over the obligation to protect	517
	(b) Deferring to the evaluation of other authorities	518
	(c) Developing judicial techniques that can solve conflicts between rights: 'practical concordance' and beyond	523
3	Business and human rights	530
3.1	The issue of human rights and transnational corporations	530
3.2	The 'duty to protect' of States and the due diligence requirements imposed on corporations	537
3.3	Trade and investment agreements and human rights	541
3.4	Climate change, environmental rights and human rights	550
5	Fulfilling human rights: progressive realization	557
	Introduction	557
1	The principle	558
2	Framework laws and action plans	562
2.1	Framework laws	562
2.2	National strategies and action plans	568
3	Indicators and benchmarks	573
4	Measuring the obligation of progressive realization	587
6	Derogations in time of public emergency	607
	Introduction	607
1	First condition: a public emergency which threatens the life of the nation	611
1.1	What is a public emergency threatening the life of the nation?	611
1.2	The need for an official proclamation of a state of emergency	621
2	Second condition: the necessity requirement	624
3	Third condition: the non-discrimination requirement	642
4	Fourth condition: compliance with other international obligations	646
5	Fifth condition: rights which are not subject to derogation	647
6	Sixth condition: international notification	652
7	The prohibition of discrimination	655
	Introduction	655
1	The scope of the requirement of non-discrimination	658
1.1	The International Covenant on Civil and Political Rights	658
1.2	The European Convention on Human Rights	665
1.3	The European Social Charter	668
1.4	The American Convention on Human Rights	669
2	The range of States' obligations	670
2.1	Equality before the law	670
2.2	Equal protection of the law	689

- (a) Sex 689
- (b) Religious or philosophical conviction 694
- (c) Sexual orientation 696
- (d) Nationality 701
- (e) Health status and disability 707
- 2.3 The legal prohibition of discrimination 713
- 2.4 The guarantee of an effective protection against discrimination 720
- 3 The notion of discrimination 722**
 - 3.1 Direct and indirect discrimination 722
 - 3.2 Reasonable accommodation 737
 - 3.3 Positive action 742
 - (a) The notion of positive action or 'temporary special measures' 742
 - (b) The contribution of temporary special measures to the promotion of equality 745
 - (c) The compatibility of temporary special measures with the non-discrimination requirement 758
- 4 Systematizing anti-discrimination law 761**
- 5 Self-determination and minority rights 767**
 - 5.1 The right to self-determination 767
 - (a) General principles 767
 - (b) The internal and external dimensions of self-determination 773
 - (c) The lack of justiciability of the right to self-determination in the context of individual communications 780
 - 5.2 Minority rights 784
 - (a) The direct route: the explicit protection of rights of minorities 785
 - (b) The indirect route: the protection of the rights of minorities and the right to respect for private and family life 795

PART III THE MECHANISMS OF PROTECTION

- 8 Ensuring compliance with international human rights law: the role of national authorities 809**
 - Introduction 809**
 - 1 Judicial remedies 811**
 - 1.1 The general requirement to provide effective remedies 811
 - 1.2 The question of the justiciability of economic and social rights 821
 - (a) Challenges to the justiciability of economic and social rights 821
 - (b) Answers to these challenges 822
 - (c) The justiciability of economic, social and cultural rights: conceptual guidance 825
 - 1.3 Economic and social rights before national courts 831
 - 2 Non-judicial mechanisms 851**
 - 2.1 The role of preventive mechanisms in general 852
 - 2.2 Human rights impact assessments 858
 - 2.3 The role of national human rights institutions 861
- 9 The United Nations human rights treaties system 869**
 - Introduction 869**
 - 1 State reporting 874**
 - 1.1 The objectives of State reporting 874

1.2	The role of non-governmental organizations	879
1.3	The problem of overdue or 'non-reporting states'	880
2	Individual communications	888
2.1	The ' <i>ratione temporis</i> ' rule	892
2.2	The 'victim' requirement	897
2.3	The exhaustion of local remedies	904
2.4	Non-duplication with other international procedures	910
3	The implementation of findings of UN human rights treaty bodies	916
3.1	The follow-up of Concluding Observations	916
3.2	The implementation of decisions (views) adopted on the basis of individual communications	925
4	The reform of the UN human rights treaties system	932
10	The United Nations Charter-based monitoring of human rights	943
	Introduction	943
1	The establishment of the Human Rights Council	944
2	The complaints mechanism	955
3	The universal periodic review	959
4	The special procedures	970
4.1	The origins and diversity of the special procedures of the Human Rights Council	970
4.2	The selection of mandate-holders of special procedures of the Human Rights Council	972
4.3	The code of conduct for special procedures of the Human Rights Council	974
4.4	The tools used by the special procedures of the Human Rights Council	980
	(a) Communications	980
	(b) Country visits	983
	(c) Annual reports	985
11	Regional mechanisms of protection	988
	Introduction	988
1	The European system of protection of human rights	990
1.1	The original system: before Protocol No. 11 restructuring the control machinery of the European Convention on Human Rights	990
1.2	The system reformed: Protocol No. 11 restructuring the control machinery of the European Convention on Human Rights and later reforms	992
	(a) The admissibility phase	994
	(b) The merits phase and the supervision of the execution of judgments	997
	(c) Treating large-scale violations: the 'pilot' judgments	1004
	(d) Co-operation in the execution of judgments	1009
2	The Inter-American system of protection of human rights	1020
2.1	The powers of the Inter-American Commission on Human Rights	1020
2.2	The powers of the Inter-American Court of Human Rights	1026
	(a) The advisory function	1027
	(b) Individual petitions	1030
	<i>The admissibility phase</i>	1030
	<i>The merits phase</i>	1036
2.3	The approach of the Inter-American Court of Human Rights	1046

3 The African system of protection of human and peoples' rights 1048

3.1 The African Commission on Human and Peoples' Rights 1048

(a) Promoting human and peoples' rights 1049

(b) Providing an authoritative interpretation of the Charter 1049

(c) Protecting human and peoples' rights 1050

3.2 The African Court on Human and Peoples' Rights 1054

Index 1061

PART II THE MECHANISMS OF PROTECTION

1 The European system of protection of human rights 990

1.1 The original system before Protocol No. 11 restructuring the control machinery of the European Convention on Human Rights 990

1.2 The system reformed: Protocol No. 11 restructuring the control machinery of the European Convention on Human Rights and later reforms 992

(a) The admissibility phase 994

(b) The merits phase and the supervision of the execution of judgments 997

(c) Treating large-scale violations: the pilot judgments 1004

(d) Co-operation in the execution of judgments 1009

(e) Answers to requests 1024

(f) The Inter-American system of protection of human rights 1050

2 Non-judicial mechanisms 1058

2.1 The power of the Inter-American Court of Human Rights 1058

2.2 The power of the Inter-American Commission on Human Rights 1059

2.3 The power of the Inter-American Court of Human Rights 1059

2.4 The role of preventive mechanisms in general 1059

2.5 Human rights impact assessments 1059

2.6 The role of national human rights institutions 1059

2.7 The approach of the Inter-American Court of Human Rights 1060

9 The United Nations human rights treaties 998

Introduction 998

1 State reporting 974

1.1 The objectives of State reporting 974