

Contents

<i>Table of Cases</i>	xv
<i>Tables of Treaties, Legislation, and other Relevant Instruments</i>	xxiv
<i>Table of Abbreviations</i>	xxx

Introduction	1
Globalization	4
Privatization	8
Fragmentation	12
Feminization	15
1 Old Objections and New Approaches	25
1.1 The Expanding Scope of International Law	29
1.2 The Trivialization Argument	33
1.3 The Legal Impossibility Argument	35
1.4 The Policy Tactical Argument	41
1.5 The Legitimization of Violence Argument	46
1.6 The Rights as Barriers to Social Justice Arguments	53
1.7 New Ways of Looking at Human Rights	56
2 Thinking Responsibly about the Subject of Subjects	59
2.1 Subjects as Prisoners of Doctrine	59
2.2 The <i>Reparations for Injuries</i> Opinion, the United Nations, and UN Agencies	63
2.3 Certain Non-Universal Inter-Governmental Organizations	69
2.4 Acquiring Rights and Duties through Capacity rather than Subjectivity	70
2.5 Rights without Remedies—Duties without Jurisdictions	74
2.6 The International Committee of the Red Cross	76
2.7 The Legal Subjectivity of Transnational Corporations	76
2.8 International Capacity Derived from the Rights of Non-State Actors to Complain to International Instances under Treaty Law	81
2.9 Final Remarks on the International Law Obligations of Non-State Actors	82

3	Characteristics of International Human Rights Law	85
3.1	Customary International Law	85
3.2	<i>Jus Cogens</i> or Peremptory Norms of International Law	87
3.3	Human Rights Treaties	91
3.4	International Crimes	94
3.5	<i>Erga Omnes</i> Obligations	96
3.6	Universal Standards	99
3.7	Recategorization of Human Rights Violations and Hybrid Types of Obligation	100
4	The United Nations	109
4.1	The United Nations Organization	110
4.1.1	Obligations on the UN and Other Entities Engaged in Armed Conflict, Multilateral Peace-Keeping, and Peace-Enforcement Operations	110
4.1.2	Claims against UN Peace Operations	115
4.1.3	The Principles and Spirit of General Conventions Applicable to the Conduct of Military Personnel	118
4.1.4	UN Human Rights Obligations and the Issue of Discrimination in Employment	124
4.1.5	UNMIK in Kosovo and the Issue of UN Administration of Territory	128
4.1.6	Action by the UN Security Council	132
4.1.7	Summary of Legal Issues Related to the Human Rights Obligations of the United Nations	136
4.2	The Obligations of the United Nations' International Financial Institutions	137
4.2.1	The Legal Arguments over Human Rights at the World Bank and the IMF	142
4.2.2	The 2001 Opinion of the IMF General Counsel	145
4.2.3	The Content of the Human Rights Obligations of the International Financial Institutions	150
4.2.4	The World Bank's Operational Standards and the Inspection Panel	152
4.2.5	The World Bank Inspection Panel and the Chad Pipeline Report	153
4.2.6	International Investment Protection through ICSID at the World Bank	155
4.2.7	Summary Conclusion Regarding the World Bank and the IMF	157
5	The World Trade Organization and the European Union	161
5.1	The World Trade Organization	161
5.1.1	Decisions by the Panels and Appellate Body	165

5.1.1.1	Protecting Human Rights from the WTO through the Law of Treaty Interpretation	166
5.1.1.2	Trade Sanctions to Protect Human Rights Precluded by WTO Rules	172
5.1.1.3	The Threat to Human Rights and Human Rights Enforcement from WTO Agreements	175
5.1.2	Summary Conclusions Regarding the WTO	177
5.2	The European Community and the European Union	177
5.2.1	The European Community as a Party to Treaties with Human Rights Clauses	178
5.2.2	Obligations on the Community in the Community Legal Order	180
5.2.2.1	The European Union Charter of Human Rights and Fundamental Freedoms	181
5.2.2.2	The European Community before the European Court of Human Rights	185
5.2.2.3	Community Law as the Source of Human Rights Obligations on Non-State Actors	189
5.2.3	Summary Conclusions Regarding the European Community and the European Union	193
6	Corporations and Human Rights	195
6.1	Corporate Responsibility and Corporate Accountability	195
6.2	Transnationals, Multinationals, and National Corporations	199
6.3	The OECD Guidelines for Multinational Enterprises	201
6.3.1	The OECD Guidelines' Implementation Procedures	207
6.4	The Tripartite Declaration of Principles Concerning Multinational Enterprises	211
6.4.1	The Tripartite Declaration's Links to Binding Obligations	213
6.4.2	Implementing the Tripartite Declaration	216
6.5	The UN Global Compact (2000) and the Incorporation of Respect for Human Rights into Business and UN Practices	218
6.6	Initiatives at the UN Sub-Commission and Commission on Human Rights and the General Human Rights Obligations of Corporations	225
6.7	The Role of International Law	237
6.7.1	State Responsibility for Corporations	241
6.7.2	Customary International Law Obligations for Corporations	244
6.7.3	International Treaties that Demand Action against Legal Persons	247
6.8	The Alien Tort Claims Act in the United States	252
6.8.1	Corporate Complicity in Violations of Human Rights Law	254
6.8.2	Corporate Complicity in the <i>Unocal</i> Ruling	255
6.8.3	The <i>Actus Reus</i> of Complicity in the <i>Unocal</i> Case	256

6.8.4	The <i>Mens Rea</i> Required for Complicity in the <i>Unocal</i> Case	257
6.8.5	The Application in the <i>Unocal</i> Case of a Non-Criminal Law Test for Third-Party Liability for Violations of International Law	259
6.8.6	Which Tests to Use for Corporate Human Rights Abuses under International Law: Criminal Law or Civil (Tort) Law?	261
6.8.7	<i>Wiwa v Shell</i> and the Issue of Complicity in International Torts	262
6.9	The Test for State Responsibility for State Complicity	263
6.10	Summary on Corporate Complicity in Human Rights Abuses under International Law	265
6.11	Final Comments on Corporate Responsibility under International Law	266
7	Non-State Actors in Times of Armed Conflict	271
7.1	Rebels, Insurgents, and Belligerents	271
7.2	National Liberation Movements	273
7.3	Rebel Groups, Unrecognized Insurgents, Armed Opposition Groups, Parties to an Internal Armed Conflict, etc.	275
7.4	Successful Insurrectional and other Movements	285
7.5	Practical Steps taken to Ensure Respect for Human Rights by Non-State Actors in Times of Armed Conflict	286
7.5.1	The Special Representative of the Secretary-General for Children and Armed Conflict	289
7.5.2	Geneva Call	291
7.5.2.1	The Commitment as a Step towards Recognizing the Human Rights Obligations of Non-State Actors	293
7.5.2.2	The Scope of the Obligations in the Commitment	295
7.5.2.3	Accountability and Monitoring	295
7.6	Private Security Firms and the Issue of Mercenaries	299
7.6.1	Recent Controversies Concerning the Use of Private Military/Security Firms	301
7.6.2	Accountability for Human Rights Abuses	303
7.6.3	The Incorporation of Human Rights Obligations into National Licensing Regimes	307
7.7	The Role of Humanitarian Organizations	310
7.7.1	The Question of Human Rights Denunciations by Humanitarian Organizations	310
7.7.2	The Human Rights Obligations of Humanitarian Organizations	312
8	Selected UN Human Rights Treaties	317
8.1	International Convention on the Elimination of All Forms of Racial Discrimination	319
8.2	Convention on the Rights of the Child	322

8.3	International Covenant on Economic, Social and Cultural Rights	324
8.4	International Covenant on Civil and Political Rights	328
8.5	Convention on the Elimination of All Forms of Discrimination against Women	333
8.6	Refugee Law	335
8.7	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment	342
9	Regional Human Rights Bodies	347
9.1	The European Court of Human Rights	349
9.1.1	Article 1 Obligation to Secure Human Rights to Everyone within the Jurisdiction	352
9.1.2	Article 13 Right to an Effective Remedy	357
9.1.3	Article 2 Right to Life	358
9.1.3.1	The Commission Finds that Non-State Actor Killings Come within the Scope of Article 2	359
9.1.3.2	The Court Develops Criteria for the Duty to Protect the Right to Life from Non-State Actors	361
9.1.3.3	The Court Develops a Duty to Prevent, Investigate, and Ensure Accountability for Killings by Non-State Actors	366
9.1.3.4	The Scope of the Human Rights Obligations of Non-State Actors with Regard to the Right to Life	368
9.1.3.5	Summary Concerning Article 2	372
9.1.4	Article 3 Prohibition of Torture	372
9.1.4.1	Protection of Children and the Prosecution of Rape	373
9.1.4.2	Protection from Violent Non-State Actors Abroad	376
9.1.5	Article 4 Prohibition of Slavery and Forced Labour	380
9.1.6	Article 6 and the Right to Fair Trial	384
9.1.7	Article 7 Non-Retroactivity of Criminal Law for Individual Offences	385
9.1.8	Article 8 Right to Respect for Private and Family Life	387
9.1.8.1	Protection from Violence to the Person and the Home	387
9.1.8.2	Protection from Pollution	389
9.1.8.3	Invasions of Privacy by Photographers and the Media	394
9.1.9	Article 9 Freedom of Thought, Conscience, and Religion	400
9.1.10	Article 10 Freedom of Expression and the Role of Article 17	405
9.1.11	Article 11 Rights to Assembly and Association	411
9.1.11.1	Freedom of Assembly	411
9.1.11.2	Freedom of Association	413
9.1.12	Other Rights under the Convention and its Protocols	418
9.1.13	Concluding Remarks on the European Convention	419

9.2	The Inter-American system	421
9.2.1	The Inter-American Commission on Human Rights and its Action with Regard to Acts of Violence by 'Irregular Armed Groups'	421
9.2.2	Petitions to the Inter-American Commission and the Jurisprudence of the Court of Human Rights	424
9.2.3	The Advisory Opinion on the Rights of Migrant Workers	429
9.3	The African Approach under the OAU Human Rights Treaties	432
9.4	Final Remarks on the Approach of the Regional Bodies	436
10	National Legal Orders	437
10.1	Human Rights Complaints against Non-State Actors Acting in a Non-Governmental Way	441
10.1.1	The Alien Tort Claims Act in the United States	443
10.1.1.1	The US Courts' Application of the ATS Subsequent to the Supreme Court's Judgment in <i>Sosa</i>	447
10.1.2	The South African Constitution	450
10.1.2.1	The Constitutional Court's Approach in <i>Du Plessis v De Klerk</i>	451
10.1.2.2	The 1996 Constitution of the Republic of South Africa	457
10.2	Non-State Actors with a Public Function or State Nexus	460
10.2.1	The Human Rights Act 1998 in the United Kingdom	464
10.2.1.1	Parliamentary Debates and Ministerial Statements	464
10.2.1.2	Cases before the UK Courts	474
10.2.1.3	Policy Arguments Concerning the Public/Private Divide in the Human Rights Act	482
10.2.2	US State Action Cases before the Supreme Court	486
10.2.2.1	Racial Discrimination by Private Entities	486
10.2.2.2	Due Process before Private Decision-Makers	487
10.2.2.3	Freedom of Expression	488
10.2.2.4	Cruel and Unusual Punishment, Privatized Prisons, and the Rejection of Functional Tests	494
10.3	Interpretation of the Law in Conformity with Human Rights	499
10.3.1	Statutory Interpretation	500
10.3.1.1	Hong Kong	500
10.3.1.2	The United Kingdom	503
10.3.2	A Court Itself is Bound to Act in Conformity with Human Rights Law	506
10.3.3	The Court Develops the Common Law	512
10.3.3.1	The United Kingdom	512
10.3.3.2	South Africa	518
10.3.3.3	Canada	520
10.3.4	Reliance on Human Rights to Explain the Scope of Certain Values in National Law	521

10.4	Invoking Positive Obligations	523
10.5	Limits to Human Rights in the Private Sphere	526
10.5.1	Subsidiarity and Complementarity as Tools for Limiting the Human Rights Obligations of Non-State Actors	526
10.5.2	The Availability of Non-Human Rights Remedies and the Question of Cost	527
10.5.3	An <i>Instinctive</i> Understanding of the Limits of Non-State Actor Obligations through Emphasis on the Rights of the Non-State Actor	529
11	Dignity and Democracy	533
11.1	Dignity	535
11.1.1	Philosophical Foundations of Dignity	535
11.1.2	Protection of Dignity as an End in Itself	538
11.1.3	The Dignity Paradox	544
11.2	Democracy	548
11.2.1	The Democracy Paradox	550
11.3	An Example: Freedom of Religion and Corporal Punishment in Private Schools	555
11.4	Summary Regarding Dignity and Democracy	558
12	Complexity, Complicity, and Complementarity	561
12.1	Complexity	561
12.2	Complicity	563
12.3	Complementarity	565
12.4	Final Comments	566
	<i>Bibliography</i>	567
	<i>Index</i>	601