

INTRODUCTION

The gap between the promise embodied in international human rights law and actual practice is frustrating, as those working in the field know only too well. A critical observer may well turn round saying 'I told you so, your belief in the power of law was mistaken in the first place'. Yet a believer in the system may counter, 'yes, we are facing some problems, but we're still just at the beginning, we need more law and things will improve'. These opposing strands point to broader questions, namely whether human rights provide the best language to safeguard core values and, if so, whether law is a suitable vehicle to promote, protect and vindicate them. Posing the very question suggests that human rights law has somehow lost its innocence – or naivety – in the sense that it is no longer self-evidently good or considered able to provide solutions to the myriad contemporary challenges. This is not a bad thing: on the contrary. Human rights are born out of intense struggles and develop in constant contestation with power and power relations. The law on human rights is therefore at any given time a temporary reflection of an understanding that is already pregnant with future developments and challenges. Being aware of the contentious nature of human rights protects from developing self-congratulatory attitudes and guards against their misappropriation by elites. Ultimately, human rights are not something fragile out there that need protection. Instead, they are constantly claimed and developed if not made anew by multiple actors, all of us, who engage with them in one way or another, as rights-holders, advocates or otherwise, if only by reading this book.

The book is based on this premise, which it seeks to mainstream into the format of a textbook. As this is primarily an international human rights *law* textbook, it seeks to do justice to both the law and the struggle for human rights, and how they interact in practice. With these considerations in mind, the book aims to offer both a sound exposition of the law and a contextual perspective of the realities in which the law is set and how various actors use it. Our intention is to go beyond theory, including human rights jurisprudence, and to bring out and reflect on the thinking, challenges and dilemmas faced by the various actors making up the system. To this end

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each chapter includes a substantial part on practical application, including a series of case studies that seek to capture the complex realities of international human rights law in action. This approach provides unique insights into the global endeavour for human rights protection and how human rights and international human rights law are constructed in the process. We hope that this will encourage critical contextual thinking and provide a good sense of what international human rights law means in practice. Given the inherent limitations of a textbook, each chapter provides a list of further reading, comprising literature and key websites, for the reader wishing to engage in depth with the issues raised and to undertake further research.

Being true to the importance of discourse in human rights, the book is enriched by a plurality of voices. Twenty-two practitioners speak to us through a series of interviews. These practitioners are directly concerned with human rights and many of them have been at the forefront of critical developments. Indeed, several interviewees have suffered violations of human rights and/or faced repercussions on account of their work. The interviewees have been selected so as to share a range of different perspectives. They include grass-roots activists using multiple strategies to advocate human rights protection and changes to the system; representatives of non-governmental organisations (NGOs) known for innovative approaches; lawyers who have litigated human rights cases at the national, regional and international level; doctors who have been at the heart of documenting violations; academics combining theory and practice; those working for and with human rights bodies at the national, regional and international level; and military legal advisors reflecting on the issue of battlefield compliance.

The book covers the foundations of human rights and international human rights law, institutional protection, a number of individual and collective rights, and a series of cross-cutting issues posing particular challenges for the effective protection of human rights in various contexts. It comprises seventeen chapters. Chapters 1–3, 5–8 and 13 were written by Lutz Oette, Chapters 4, 9, 10, 12, 14–17 by Ilias Bantekas, and Chapter 11 by Rupa Reddy.

In the first three chapters, we address foundational questions of international human rights, including its law and practice. In Chapter 1 we chart the development of international human rights law and introduce theories of human rights and their critiques. The chapter revisits the ‘universality and relativism’ debate and explores its resonance in the context of the uprisings in the Arab world. Moataz El Feghery, a scholar and human rights activist in Egypt, provides a regional perspective on these developments, identifying critical challenges ahead. The controversy surrounding the practice of female genital cutting mutilation is used as a case study to illustrate the challenges faced when confronting embedded practices.

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In Chapter 2 we set out the international law framework governing human rights law. The chapter explains and analyses its key components, namely sources, the nature of rights and obligations, the implementation of human rights law and its enforcement. In his interview, Med S. K. Kaggwa, the chairperson of Uganda's Human Rights Commission, reflects on the achievements and difficulties faced by national human rights institutions seeking to promote and protect human rights. The general part is complemented by a detailed case study on the experiences of challenging Pakistan's *Hudood* legislation under which women in particular faced the punishment of stoning for adultery. Sohail A. Warraich, a women's rights campaigner who used street theatre as an integral part of awareness raising, recalls pivotal aspects of the campaign and identifies lessons learnt.

In Chapter 3 we focus on key human rights actors and their strategies. The chapter explores the meaning, commonalities and differences of categories such as civil society, social movements, NGOs and human rights defenders. It assesses their distinctive contributions to the promotion and protection of human rights while equally exploring the tensions that their roles and practices have engendered. The story of the Khartoum Centre for Human Rights and Environmental Development in Sudan serves as an example to demonstrate the multiple challenges faced by NGOs working in repressive environments. Following a brief consideration of the role of legal and medical professionals as well as human rights field officers, the chapter shifts to the strategies employed by human rights actors, analysing the nature, effectiveness and – potential – problems of documentation, reporting, monitoring advocacy as well as awareness raising and education. Elham Saudi, Director of Lawyers for Justice in Libya, provides insights into how her organisation and lawyers in Libya tackled the difficulties of documenting violations during conflict in a highly volatile environment where most local actors had limited capacity. Huma Shakeb Khan, a UN human rights officer in Iraq, shares her experiences of life and work at her duty station and the challenges facing UN human rights field officers operating in situations requiring diplomatic skills as well as awareness of and commitment to the protection of human rights. The chapter also briefly refers to the role of litigation, which is covered in depth in Chapters 7 and 13.

In Chapters 4 to 6 we set out the institutional framework of human rights protection; these are complemented by Chapter 7, which focuses specifically on individual complaint procedures.

Chapter 4 examines the evolution and entrenchment of human rights within the framework of the United Nations (UN). The reader will not fail to appreciate the struggle between effective protection and politics, which has culminated in the creation of mechanisms such as the Human Rights Council, which is less politicised and more transparent than its predecessors. The

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chapter additionally examines the human rights dimension of the Security Council, the General Assembly and human rights-specific institutions and looks at the challenges faced by the Commission of Inquiry for Gaza. The UN Special Rapporteur on the effects of debt on human rights, Cephias Lumina, provides a candid account of the realities of his post.

In Chapter 5 we turn to the practice of UN human rights treaty bodies. The chapter critically examines their main functions, namely reporting, general comments and, by way of an overview of jurisprudence to date, complaints procedures. It assesses their contribution to the development of international human rights law and protection, while equally discussing the critical challenges that the system faces in terms of legitimacy and effectiveness. Lesley Ann Foster, who coordinated a South African women's rights network that submitted a shadow report to the Committee on the Elimination of Discrimination against Women (CtEDAW) sheds light on the making and impact of alternative reports to UN treaty bodies. Professor Eibe Riedel, a member of the Committee on Economic, Social and Cultural Rights (CESCR), reflects on his work, the potential of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the challenges facing the UN treaty body system.

In Chapter 6 we canvass the development of regional human rights systems, focusing primarily on the European, Inter-American and African systems. The chapter analyses their founding principles, their applicable legal frameworks, and their contribution to international human rights law in general and to regional human rights protection in particular. It also highlights the political and capacity challenges faced, particularly by the European system. A series of interviews with long-term participants in, and observers of, the respective systems provide critical insider perspectives. Professor Bill Bowring, who has litigated a series of cases before the European Court of Human Rights (ECtHR) against Turkey, Russia and other states, reflects on litigation experiences, implementation of the Convention and the shortcomings of the European system. Dr Başak Çali, who has led a major project on the legitimacy of the ECtHR, reflects on its role in addressing legacies of serious violations and impunity, particularly its failure to act as catalyst for domestic acknowledgement in Turkey. Oswaldo Ruiz-Chiriboga, who has worked with the Centre for Justice and International Law (CEJIL), a highly influential regional NGO, and as Senior Staff Attorney at the Inter-American Court of Human Rights (IACtHR), recalls his time at the Court and identifies the strengths and weaknesses of the Inter-American system. Ibrahima Kane, a prominent regional human rights advocate, provides a nuanced assessment of the achievements of, and challenges facing, the African human rights system, identifying a number of critical factors affecting rights protection in the region. The examination of the three major regional systems is complemented by a brief account of developments in Asia and the Middle East. This

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includes a note on lessons that can be gleaned from existing arrangements for the development of new regional human rights treaty systems.

In Chapter 7 we provide a detailed account of complaint procedures from a litigant's perspective. The chapter examines the various stages of proceedings, namely admissibility requirements, merits, the nature of decisions and judgments, and their implementation. It identifies key issues, controversies and developments, which are illustrated by a series of case studies. Mandira Sharma, former executive director of Advocacy Forum, Nepal, shares insights on her organisation's approach to litigation before the UN Human Rights Committee (HRCtee) and the challenges experienced in the course of her work. The chapter concludes with a study of the *Hissène Habré* case, which demonstrates the multiple fora in which human rights cases can be litigated, and the complex legal and political issues that litigation efforts in the case have encountered over the last decade.

Chapter 8 examines civil and political rights, addressing the right to life; the prohibition of torture; the right to liberty and security; the right to a fair trial; the prohibition of enforced disappearance; and qualified rights, particularly freedom of expression. The chapter identifies the nature of violations at stake and discusses the challenges of giving effect to the rights. It highlights major debates, particularly in relation to competing rights. Defamation of religion is used as an example to examine the relationship between freedom of expression, and freedom of religion. The discussion surrounding the wearing of the veil illustrates the tensions between freedom of religion and the rights of others. Önder Özkaliç, one of the coordinators of the Istanbul Protocol, reflects on its practical value as a tool to document torture and highlights some of the broader difficulties faced by the anti-torture movement. M. C. Iqbal, former secretary of two of Sri Lanka's Commissions of Inquiry into Disappearances, looks back on his work, the nature of enforced disappearances, and how the failure to bring about accountability has undermined the rule of law in Sri Lanka.

Chapter 9 looks at ESC rights and tries to dispel the myth that they are vague or unenforceable. In fact, an abundance of evidence is furnished from courts in South America, South Africa, Asia and Europe to demonstrate how states should incorporate ESC rights effectively. The practical focus of the chapter analyses the relevance of implementation indicators, justiciability, the concept of resource implications and concludes by examining four particular entitlements: the rights to food, water, health and education. An interview is provided by Tzanetos Antypas, director of the NGO Praxis, who gives an account of the health implications of poverty in post-debt Greece. An analysis linking redundancy and ill health aims to show that the right to work is fundamental to developing one's psyche and personality.

Chapter 10 discusses those entitlements that belong to groups, as opposed to individuals, namely minorities, self-determination and the rights of

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indigenous peoples. The practical dimension of the chapter seeks to understand how the World Bank sees the needs of indigenous peoples when funding projects that have an impact on them. The Chad–Cameroon pipeline project provides a clear indication that indigenous peoples entertain ambitions much the same as everybody else.

Chapter 11 focuses on the rights of women and notions of vulnerability. It explores key issues of vital importance in the debates and practice surrounding women's rights, including the meaning and scope of non-discrimination, the public/private divide and due diligence. The chapter examines feminist legal theory in depth, as theoretical debates have had a profound impact on practice, for example by raising awareness of the need to differentiate and respond adequately to multiple violations, such as intersectional discrimination. A case study on the prosecution of honour crimes in England and Wales, which uses extracts from interviews with police officers and NGOs on the issue, demonstrates both the practical challenges of translating international law in the domestic sphere and the advantages of developing a contextual approach informed by an understanding of gender-based violence.

Chapter 12 looks at the right to development from the point of view of what it means to live a dignified life. To do so, we examine the jurisprudence of courts around the world demonstrating that well-being – the essence of development – is inextricably linked to all other entitlements. We go on to demonstrate that this right is impeded by artificial financial limitations and that development aid should not resemble charity. In this regard, the role of international financial institutions is vital as is international cooperation in the form of the Millennium Development Goals (MDGs). Some radical ideas, such as odious debt, are also introduced. The chapter aims to identify various ideas that have been applied to reduce poverty, the most prominent of which is micro-credit. An extensive analysis of how this has worked is followed by an interview with Ramanou Nassirou, general manager of the Togolese NGO WAGES, who tells us about the success story of micro-credit in her country.

In Chapter 13 we discuss the rights of victims. The chapter explores the notion of reparation and examines the development of the right to an effective remedy and reparation in international law, a development that reflects a shift in emphasis on the actual vindication of rights. The exposition of the law and jurisprudential practice is complemented by several studies on the practical dimension of victims' rights, including victims' politics, Holocaust reparations, and litigation. Basil Fernando, a senior lawyer who has played an instrumental role at the Asian Human Rights Commission, discusses the innovative approaches the organisation has taken to working with, and representing victims, combining litigation and advocacy 'from below'.

In Chapters 14–17 we examine human rights in the broader context, discussing both promises and challenges that have become apparent in addressing

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pressing issues. This includes protection during times of armed conflict, individual criminal accountability, counter-terrorism and human rights, the difficulties posed by non-state actors (NSAs) for the system of human rights protection, and the detrimental impact of the process of globalisation.

Chapter 14 traces the links between human rights and international humanitarian law (or laws of war) and examines the role of international criminal law in the pursuit of human rights objectives. Two senior legal advisors, with significant experience in field operations, explain what it feels like to take part in combat operations and apply the laws of war in practice. This is followed by a brief physiological analysis which brings together various studies demonstrating how the body and the mind cope under extreme stress, such as that experienced on the battlefield. Real-life examples of battlefield compliance and rules of engagement are presented in order to demonstrate best practices.

Chapter 15 discusses the application of human rights to anti-terrorism operations, both in terms of the treatment of suspected terrorists as well as the obligation of the state to take positive measures to prevent terrorism. The analysis necessarily traces the post-9/11 jurisprudence and examines the efforts to expose abuse and restore fair trial guarantees. The practical section focuses on advocacy efforts to expose Guantánamo Bay and other illegal detention sites and the legal strategies to secure the rights of detainees. A prominent barrister behind these efforts, Clive Stafford Smith, provides an incisive interview explaining, among other things, his motivation for undertaking such cases.

Chapter 16 looks at the growing role of non-state actors as contributors to human rights violations and as implementers. Specifically, we examine multinational corporations (MNCs), international organisations and rebel movements and consider the ongoing debate about the human rights dimension of these actors. Readers will hear how Bobby Garcia turned from young rebel fighter to victim of serious abuses at the hands of his comrades, and later became an author and human rights activist. His account is complemented by an interview with Philippine judge and human rights advocate Soliman Santos, who discusses violations by non-state actors in the national and regional context, providing a Southern perspective.

Chapter 17 sheds some light on the dark sides of the processes of globalisation. It demonstrates the detrimental effect of trade liberalisation on agriculture and global food security, the effects of the international intellectual property regime on drug availability, and the impact of poverty on global patterns of migration. These policy dimensions often escape human rights lawyers though a clear understanding is imperative to effectively address their – all too frequently – devastating impact. Eric Holt-Giménez, executive director of Food First, aptly conceptualises these issues in his interview and the chapter concludes with an exposition of the *McLibel* case which

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demonstrates how the Davids of this world can overcome their Goliaths if they are committed and believe in their cause.

The text was completed in July 2012, and we have endeavoured to include developments up to that date as much as possible. Every effort has been made to ensure that all website links were live as of that date.

While writing a book can be a rather solitary endeavour, it is also always a collective process and achievement. This collective nature is evident in the book itself and we greatly appreciate the contribution of those interviewed for the book, namely Tzanetos Antypas, Bill Bowring, Başak Çali, Moataz El Feghery, Basil Fernando, Lesley Ann Foster, Charles Garraway, Eric Holt-Giménez, M. C. Iqbal, Med S. Kaggwa, Ibrahima Kane, Huma Shakeb Khan, Cephas Lumina, Ramanou Nassirou, Önder Özkaliç, Eibe Riedel, Oswaldo Ruiz-Chiriboga, Soliman M. Santos, Elham Saudi, Mandira Sharma, Clive Stafford Smith and Sohail A. Warraich as well as Robert Francis Garcia for his contribution. We are also grateful for the valuable research assistance and other contributions by a good number of people, particularly Menna Seged Abraha, Laila Alodaat, Julie Bardeche, Madeeha Dani, Mariam Fazal Faruqi, Yusuke Hara, Melanie Horn, Laura Imogen Mcleish, Julie Marie Olesen, Jose Sebastiao Manuel, Guillermo Otalora, Kharunya Paramaguru, Veronica Ranza, Virginie Rouas, Fahad Siddiqui, Salma Yusuf and Parisa Zangeneh.

We also thank Sinéad Moloney at Cambridge University Press, for her encouragement and support throughout.

Our greatest debt belongs to those whose attitude inspired the book, that is all those who cannot stand injustice and have, by word or by deed, given substance to what a life in dignity, freedom and equal rights means.



International human rights law and notions of human rights: foundations, achievements and challenges

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1.1 INTRODUCTION

The term human rights is frequently used as if it were self-explanatory. It is tempting and not uncommon to view ‘human rights’ as something intrinsically good. Human rights are often labelled (somewhat mockingly) as the new religion, a label which illustrates the elevated status they appear to enjoy. On closer inspection, it becomes evident that the term human rights is used freely and sometimes loosely by members of different disciplines and the public at large, meaning different things – both positive and negative – to different people depending on the context and the purpose for which it is used. It is therefore important to clarify the meaning(s) of the term by tracing its genealogy and examining its use in various contexts.

This undertaking cannot be confined to charting the development of international human rights law. Equating human rights with rights recognised in international treaties and/or other legal sources may in practice suffice when addressing particular human rights issues. Beyond this, it amounts to taking a purely positivist position that provides little guidance in response to a crucial question. Can a claim that something be recognised as a human right, for example the right to same-sex marriage, be justified, even if it is currently not explicitly recognised in law?

10 Foundations, achievements and challenges

Human rights have an important dual function: they are claims based on particular values or principles and often also legal rights that entail entitlements and freedoms. Philosophical and political conceptions of human rights are broader than international human rights law, which is essentially a normative term referring to rights validated in recognised sources. While the two spheres are closely intertwined, they do not necessarily share a causal or automatic relationship, i.e. that every claim must turn into a legally recognised right. Nor is the relationship always harmonious. A legally recognised right may be defined too narrowly and may therefore exclude certain categories: for example age may not explicitly fall within the purview of the right to non-discrimination, or conversely a recognised right may be wider than thin theories of human rights.

To take the meaning of human rights for granted, or simply to refer to formulas denoting rights that we have by virtue of being human, would ignore the controversy surrounding their foundations and validity. Theories of human rights abound, including substantive (based on moral values or foundational postulates), formal (constructive, pragmatic, discourse), subaltern (human rights as distinctive practices born out of struggle) and postmodern (empathy for the other) approaches, as well as political theories, such as liberal or socialist notions of human rights. It is in particular the purported universality of human rights that has given rise to enduring debates. Those often, somewhat misleadingly, labelled 'cultural relativists' have raised important challenges regarding the supposed origins, validity, scope of application and politics of human rights. The question of political use and/or abuse of the language of human rights reaches beyond the universality debate but is an integral part of what can be seen as an increased probing of the 'innocence' of human rights. These overlapping debates may be seen as bewildering if not downright counterproductive, potentially undermining support for human rights at a time when much needs to be done to ensure their effective protection. However, downplaying or dismissing the importance of these debates may lead to a failure to answer satisfactorily the question of what we mean when we refer to human rights, which is critical in situations where the very idea is being challenged. It is perhaps inevitable that the notion of human rights is and will remain charged and will be used for differing if not contradictory ends. This does not mean that the notion is entirely open ended, but it counsels against using it lightly without having considered its multiple dimensions. For human rights advocates, developing an understanding that is critically aware of these aspects is arguably the best way forward to being convincing in the recurring public debates about human rights.