Introduction

PRESENTATION

This course book offers a trajectory through the regime of international human rights law – its rules, institutions, and processes. It does not confine itself to the international dimension, however. Although human rights have migrated to international law since the Second World War, they live in a permanent nostalgia for where they come from: the liberal constitutions of the late eighteenth and nineteenth centuries, when they emerged as the Enlightenment's most visible response to the tyranny of monarchs and to the weight of tradition and prejudice. And as we shall see, the colonization of international law by human rights perfectly illustrates the formation of a 'self-contained regime' – one of those regimes that international lawyers are sometimes tempted to ignore, because they know they cannot be domesticated entirely.

The choice of materials seeks to reflect this hybrid character of human rights. The book collects cases, diplomatic documents, or comments. It places these materials into perspective, and it seeks to provide the reader with a robust analytical structure, which should help improve understanding of the broader framework within which they fit. A consistent effort has been made, both in the selection of texts and in the commentary, to highlight the specificity of human rights. For although human rights may have escaped the confines of the territory of domestic constitutions, they have not dissolved fully into international law and in fact, they resist assimilation. International human rights bodies and domestic courts are in constant dialogue with each other. International human rights courts are under the permanent temptation to mutate into constitutional courts. The domestic judge in turn tends to aggrandize his or her power in the name of bringing home values that are universal and rules that are supranational – but, by invoking international law, the domestic judge also transforms it into something else, that is better suited to the regulation of the relationships between the State and the individual or between individuals, than to the relationships among States. All this combines to form a unique human rights grammar which this book seeks to bring to light. Because this grammar is best illustrated by comparing international jurisprudence with the treatment of human rights arguments before national authorities – in particular judicial authorities – I have extensively relied on comparative material to illustrate the theoretical framework proposed. Thus, while

most of the cases presented originate from the Human Rights Committee, from other UN human rights treaty bodies, and from regional courts (particularly the European Court of Human Rights and the Inter-American Court of Human Rights), a significant proportion also originate from the United Kingdom House of Lords (since 1 October 2009 transmuted into the Supreme Court of the United Kingdom), the Canadian Supreme Court, the United States Supreme Court, the South African Constitutional Court, and some other domestic jurisdictions. All these courts contribute to the development of the common law of human rights, and although its focus is on the international dimension, it is this common law that the book is really about.

The book is divided in three parts. Part I is an introduction to the sources of the international law of human rights and to some problems of interpretation that arise as a result of the 'self-contained' character of the human rights regime. Chapter 1 briefly reviews the main stages of the emergence of human rights in international law (whether at universal or at regional level), and it describes the unique characteristics of human rights treaties. Chapter 2 discusses the questions of attribution in the law of State responsibility, in relation to the concepts of 'jurisdiction', 'national territory', and 'effective control'.

Part II describes the substantive obligations of States under international human rights law. Instead of examining the content of States' obligation right by right, the five chapters of this part address, respectively: the obligation to respect human rights (chapter 3); the obligation to protect human rights, and the application of human rights in 'private' relationships (chapter 4); the obligation to fulfil human rights and the progressive realization of rights (chapter 5); derogations in times of emergency (chapter 6); and the prohibition of discrimination (chapter 7). This division is neither functional, as in certain casebooks inspired by the Realist approach; nor does it follow the traditional opposition between civil and political rights on the one hand, and social, economic and cultural rights on the other; nor finally, is it faithful to the separate treatment of each right we find in the treaties themselves. Rather, the choice of this structure was dictated by my overall aim in preparing this volume: to provide the reader with the conceptual tools that will allow him or her to study the development of the case law and the extension of treaty obligations, both of which will continue to evolve at an accelerated pace in the future. On issues such as the obligation of the State to protect human rights from private initiative, the invocation of human rights in relationships between private parties, waiver of rights, or the various meanings of non-discrimination and equality of treatment, my goal has been at once modest and ambitious: modest, in that I have no pretence of being systematic in my treatment of the subject; and yet ambitious, because I hope to provide the reader with a framework for thinking through these issues. The materials selected serve to illustrate this framework, and they are arranged accordingly.

Part III is about institutions or, as stated in the title of this part, 'mechanisms of protection'. It is composed of four chapters, dealing respectively with the protection of human rights at domestic level, through both judicial and non-judicial means (chapter 8); the UN human rights treaties system (chapter 9); the UN Charter-based mechanisms of protection (chapter 10); and the regional systems of protection, in the Council of Europe, the Organization of American States, and the African Union (chapter 11).

Throughout the text, I have inserted a number of 'boxes'. Their length ranges from a paragraph or two to a few pages. These boxes offer a brief discussion of certain specific issues, such as ethnic profiling, the role of the European Committee on Social Rights in the protection of social rights, or the regime of positive (or affirmative) action in EU law, that were considered to be too detailed to form part of the main text. The boxes can be skipped by the reader who is not interested, since they are not essential to the main argument. At the end of most sections or, at least, in closing each chapter, I also have inserted a set of 'questions for discussion', that should serve to stimulate classroom debate. Although they presuppose that the reader is familiar with the materials presented in the section or the chapter concerned, these 'questions' are not merely rehearsing the content of the materials, and they are not meant to test whether the understanding of the materials is correct; rather, they intend to raise new issues, not explored in detail in the main text, or to provoke a critical discussion about the positions presented in the main text. It is very possible in my experience to teach a full course in international human rights based almost entirely on these questions since, taken together, they cover the full range of the subjects examined in the book.

WHAT THE BOOK IS ABOUT

By the time human rights emerged as a part of international law in 1945, they already had a long history. As legal entitlements, they had originated in the liberal constitutions of the late eighteenth, and especially nineteenth centuries. International law did not follow suit immediately. And it did so, initially, only piece by piece, and hesitatingly. But it may be useful to recall certain antecedents to human rights as understood here, in order to make clear what relationships exist between those first attempts to 'humanize' international law – to borrow the formula of Theodor Meron ('The Humanization of Humanitarian Law', *American Journal of International Law*, 94 (2000), 239) – and the human rights that are the topic of this book.

International humanitarian law

Many authors see international humanitarian law as the first important precursor to international human rights law. While international humanitarian law has its roots in customary international law, it was first codified in treaty form with the adoption of the Geneva Convention of 22 August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field (18 Martens Nouveau Recueil (ser. 1) 607, 129 Consol. T.S. 361). But this instrument, like the ones that followed, still related to situations of armed conflict, a matter pre-eminently suitable for international law as the law regulating relations between States. And it is not before 1949, through the Fourth Geneva Convention relative to the protection of civilians (Convention (IV) relative to the Protection of Civilian Persons in Time of War, signed in Geneva, 12 August 1949, 75 U.N.T.S. 287), that the regulation of armed conflict sought to move beyond the battlefield, and to address what may be called the human rights of civilians during armed conflict.

There is, today, a renewed interest for the interactions between international humanitarian law and human rights law (see, e.g. R. Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law* (Leiden: Martinus Nijhoff, 2008); H.-J. Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law', *International Review of the Red Cross*, 856 (2004), 789; R. Q. Quentin-Baxter, 'Human Rights and Humanitarian Law – Confluence or Conflict?', *Australian Yearbook of International Law*, 9 (1985), 94; L. C. Green, 'Human Rights and the Law of Armed Conflict' in L. C. Green (ed.), *Essays on the Modern Law of War*, second edn (Ardsley, NY: Transnational Publishers, 1999), p. 435; A. Orakhelashvili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?', *European Journal of International Law*, 19, No. 1 (2008), 161).

It is clear, of course, that both international humanitarian law and human rights law are based on the same ideals of preserving the dignity of the human being – they both have a 'humanitarian character', to use an expression familiar in international jurisprudence. And it is equally clear that, in situations of armed conflict, both these branches of international law can apply simultaneously. Indeed, because of this partial overlap, these two branches of international law may have to be made consistent with one another in ways which sometimes may be seen as compromising the integrity of human rights law. This was the case in the famous Advisory Opinion of the International Court of Justice on the *Legality of the Threat or Use of Nuclear Weapons*, where the Court took the view that Article 6 of the International Covenant on Civil and Political Rights (ICCPR), that guarantees the right to life, should be read in accordance with 'the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities', so that 'whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself' (I.C.J. Reports 1996, 240, para. 25).

This position has been criticized for creating the impression that, where international humanitarian law is applicable, the applicability of international human rights law would somehow be suspended, since it should be treated as *lex generalis* giving way to the *lex specialis*. That critique seems excessive. The treatment by the World Court of the relationship of the two branches of law would only seem to apply to the right to life of combatants, and it would be wrong to generalize, from that specific example, to how international humanitarian law and international human rights law should interact in general. Nevertheless, the temptation to treat both as mutually exclusive remains present, and this should come as no surprise. International humanitarian law and international human rights law emerged as answers to different sets of issues, and they were initially intended to apply to different situations. They influence each other in various ways, of course – although in fact the 'humanization of humanitarian law' (the influence exercised by human rights on international humanitarian law) is probably more significant than the subversion of international human rights by the logic of international humanitarian

law. But these two branches of international law confront us nevertheless with different paradigms, which justifies that we treat them separately for the purposes of study.

Diplomatic protection

Another, at least as important influence on the origins of international human rights law, is the exercise of diplomatic protection by States whose nationals have their rights violated in another State. But here again, there are significant differences. Diplomatic protection is clearly instituted in the interest of States, and not for the benefit of the individuals aggrieved themselves: the prejudice caused to the foreigner only may give rise to international responsibility because it is considered to constitute a damage to the State of the nationality of the person concerned. Indeed, the State remains in principle entirely free to extend diplomatic protection or refuse it. There is no obligation under international law for the State to extend diplomatic protection to its nationals: thus, diplomatic protection is not premised on the idea that individuals have rights under international law, although it does presuppose the existence of minimum standards of treatment for aliens and an obligation for each State, who owes in that respect a duty to other States, to comply with those standards.

Of course, here again, there is a tendency for human rights considerations to permeate diplomatic protection, and there exists a lively discussion as to whether, as a result of the rise of human rights, diplomatic protection has become somewhat obsolete (see C. F. Amerasinghe, *Diplomatic Protection* (Oxford University Press, 2008), chapter 16; E. Milano, 'Diplomatic Protection and Human Rights before the International Court of Justice: Re-fashioning tradition?', *Netherlands Yearbook of International Law*, 35 (2004), 85–142). But the two sets of rules still respond to distinct logics, and it is hardly an exaggeration to say that human rights defined themselves, in part, as against the logic of diplomatic protection: the object and purpose of human rights, the Inter-American Court of Human Rights famously stated, 'is the protection of the basic rights of individual human beings *irrespective of their nationality, both against the State of their nationality and all other contracting States*' (Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, 24 September 1982, Inter-Am. Ct. H.R. (Ser. A) No. 2 (1982), at para. 29).

The rights of minorities

Two other important developments followed the First World War. The peace treaties concluded then included a number of provisions aiming to protect the rights of minorities, and the Permanent Court of International Justice had the opportunity to identify certain common principles underlying the clauses relating to the protection of minorities in the Advisory Opinion it delivered on the *Minority Schools in Albania*: as it stated there, 'the idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language or religion, the possibility of living peaceably alongside that population and cooperating amicably with it, while at the same time preserving the characteristics which distinguish

them from the majority, and satisfying the ensuing special needs' (Permanent Court of International Justice, *Minority Schools in Albania (Greece* v. *Albania)*, Advisory Opinion, 1935, P.C.I.J., Ser. A/B, No. 64, p. 4 at p. 17). This, the Court continued, explained that the peace treaties containing clauses in favour of the protection of minorities sought to ensure both that 'nationals belonging to racial, religious or linguistic minorities shall be placed in every respect on a footing of perfect equality with the other nationals of the State', and that the protected minorities would enjoy 'suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics' (*ibid.*).

Quite apart even from the question whether the peace treaties concluded after the First World War still were binding after the Second World War, the idea prevailed in 1945–6 that the protection of minorities had failed to pacify the relationships between States (particularly States where national minorities are located and their kin-States), and that it would become unnecessary in the light of the emergence of an international protection of human rights (see A. W. B. Simpson, *Human Rights and the End of Empire* (Oxford University Press, 2001), pp. 227–34). However, as we shall see in chapter 7 (section 5), there exists since the 1990s an increasing convergence between minority rights and human rights. Minority rights, it is now acknowledged, are human rights. New instruments have been adopted to protect minority rights as such – in particular, the Framework Convention on the Protection of National Minorities, of 1 February 1995 and the European Charter for European or Minority Languages, of 5 November 1992, both adopted within the Council of Europe. Remarkably, these instruments follow the model of classical human rights instruments, rather than that of the earlier treaties on minorities: the lesson has apparently been learnt that, in the absence of mechanisms of protection, the most generous clauses on the protection of minority rights will remain a dead letter. In addition, an increasingly voluminous body of jurisprudence has emerged from human rights bodies that protects minorities through human rights such as the right to respect for private life, freedom of religion, the right to education, or the right to property, either alone or in combination with the requirement of non-discrimination. It would hardly be an exaggeration to say that human rights have legitimized and made politically acceptable a revival of minority rights – that minority rights have re-entered the field of international law through the channel of human rights protection (on this revival, see in particular Y. Dinstein and M. Tabory, *The Protection of Minorities and Human Rights* (Leiden: Martinus Nijhoff, 1992); J. Rehman, *The Weaknesses in the International Protection of Minority Rights* (The Hague: Kluwer Law International, 2000); P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991)).

Indeed, it is the extension of human rights that has encouraged an increasingly generous reading of 'minorities' protected under international law. Minorities are traditionally (although still controversially) defined as a group of persons who reside on the territory of a State and are citizens thereof, display distinctive ethnic, cultural, religious or linguistic characteristics, are smaller in number than the rest of the population of that State or of a region of that State, and are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language (see, e.g. Recommendation 1201(1993) adopted by the Parliamentary Assembly of the Council of Europe, proposing the adoption of an additional protocol on the

rights of national minorities to the European Convention on Human Rights; F. Capotorti, *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations, 1991), para. 568; J. Deschênes, 'Proposal concerning the Definition of the Term "Minority"', E/CN.4/Sub.2/1985/31, 14 May 1985). But there has been a tendency, particularly within the Human Rights Committee (in its interpretation of Article 27 of the International Covenant on Civil and Political Rights) and within the Advisory Committee established under the Framework Convention for the Protection of National Minorities, to broaden the scope of the provisions protecting minority rights, so as to ensure that 'minority rights' benefit all those under the jurisdiction of the State, who present certain distinct characteristics (see further on this issue, chapter 7, section 5.2., b)). This evolution would result in defining minority rights as human rights, thus in principle to be enjoyed by all, whether or not they are found to belong to a 'minority' under the classical definition of this term. This tendency has been strongly opposed by certain States. Germany, for example, argues that 'the objective of the Framework Convention [for the protection of national minorities] is to protect national minorities; it is not a general human rights instrument for all groups of the population which differ from the majority population in one or several respects (ancestry, race, language, culture, homeland, origin, nationality, creed, religious or political beliefs, sexual preferences, etc.). Rather, the members of the latter groups are protected by the general human rights and if they are nationals by the guaranteed civil rights' (Germany, Third State Report, ACFC/SR/III(2009)003, 2009, para. 8). One is led to ask, though, why this opposition is so vehement, if indeed, those groups – the 'non-minorities' who differ through one or more characteristics from the majority – anyway are protected under human rights that, as we shall see, largely ensure the same protection of diversity within increasingly multicultural societies. The convergence is such, between minority rights and human rights, that the former have largely lost their subversive character: it is their distinctiveness that they are now in danger of losing.

International labour rights

A last antecedent to international human rights deserves a mention. In 1919, the International Labour Organization (ILO) was set up in order to promote the development of international labour standards. As expressed in the Preamble of the ILO Constitution, it was built on the basis that 'universal and lasting peace can be established only if it is based upon social justice', and that 'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries'. The text of the ILO Constitution has been amended on a number of occasions since, and it has also been complemented by the Declaration concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia), adopted on 10 May 1944. But the basic purpose of the Organization has remained the same throughout its almost one century of existence. In many ways, the instruments adopted within the ILO, although focused on the rights of workers, served as models to the elaboration of the modern international human rights treaties (on the relationship between labour rights and human rights, see further P. Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press, 2005); and L. A. Compa and S. F.

Diamond (eds.), *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press, 1996)). They differ, however, not only by their origins, but also by the economic motive behind their adoption – to avoid unfair competition through the lowering of labour standards – and by the fact that labour rights are centred on the sphere of employment.

The focus of this book

While these different bodies of law have been pursuing the same objectives, to a large extent, as international human rights law, they have been doing so through other legal techniques and institutional mechanisms. This book discusses international human rights as they have emerged as a part of international law since the Second World War. References will be made to international humanitarian law, diplomatic protection, the protection of minorities, or international labour rights, only to the extent that they intersect with the protection of general international human rights law. To repeat, the structure of the book and the analytical framework it proposes are largely based on the conviction that, as a branch of international law, international human rights possesses a logic of its own, as a result of the hybridization of domestic constitutional law and of general international law. It is this logic which the book seeks to introduce and it is with this view that the materials have been selected.

The first edition of this book appeared in 2010. It has since been adopted as a teaching tool in a surprisingly large number of institutions, especially in the United Kingdom and in other EU countries, and in the United States; and it is now serving in many cases as a complement to the 'massive open online course' on International Human Rights proposed on the edX platform as Louv2.01x. While keeping with the original structure and remaining faithful to the conceptual apparatus of the original edition, this new edition systematically updates the earlier version to take into account new developments, and it also enriches the discussion of areas which the first edition had comparatively neglected. The changes made are ubiquitous: it would be a vain enterprise to even begin to list them all.

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In closing, I would like to acknowledge a large number of debts. This casebook originated in a syllabus I prepared, then in a most primitive form, when I first taught a human rights class at New York University School of Law, as a member of the Global Law School Faculty in 2004–5, at the invitation of Philip Alston. It developed incrementally as I offered this subject in different institutions, including the University of Louvain, my home institution, and Columbia University. My first debt is towards the students who were foolish enough to sit these courses, and whose questions served greatly to enrich the presentation of the materials. Either within the EU Network of Independent Experts on Fundamental Rights, or within the group of 'special procedures' of the UN Human Rights Council, which I joined in 2008 as the Special Rapporteur on the right to food, or now within the UN Committee on Economic, Social and Cultural Rights, I have also

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OLIVIER DE SCHUTTER