

ELGAR ADVANCED INTRODUCTIONS

Advanced Introduction to

# INTERNATIONAL HUMAN RIGHTS LAW

Dinah L. Shelton



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# International Human Rights Law

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## **Advanced Introduction to International Human Rights Law**

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## Preface

The aim of this volume is to provide an overview of the development, contents and challenges of international human rights law, which can serve to inform those new to the topic and also be of benefit to those seeking to further their knowledge of particular aspects of that law. The subject of human rights is increasingly complex as it enters its eighth decade of development since the end of the Second World War. New rights are emerging or being proposed, existing rights have been expanded or reformulated. Nearly all global and regional intergovernmental organizations now engage in standard-setting and monitor to a greater or lesser extent the human rights actions of their members. Those organizations that have not incorporated human rights considerations in the exercise of their mandates are increasingly criticized for failing to do so by the ever-growing number of civil society organizations dedicated to the promotion and protection of human rights. At the same time, debate continues over how to reconcile and balance human rights concerns with what may appear to be competing primary mandates of organizations dedicated to other matters, such as trade, environment or economic development.

No doubt remains that the observance of human rights is a matter of international concern, but in part as a consequence of this development many human rights bodies created within international organizations struggle to meet expanded expectations, new functions and a growing caseload. At the same time, human rights bodies often encounter resistance to compliance with norms and decisions, and nearly all human rights institutions function at less than peak potential due to a lack of adequate financial resources and personnel. The risk of backsliding, including denunciation of human rights treaties, is ever-present in an international system that is largely consensual. The expanding power of non-State actors also presents difficulties for an international system that was designed to respond to the excesses and abuses of powerful governments, and not those of failed States and weak State institutions unable to ensure the effective enjoyment

of human rights for those within the State's territory and jurisdiction. These are all challenges to the survival and strengthening of international human rights law.

An advanced introduction cannot cover every topic in depth. In order to ensure an adequate discussion of the global and regional institutions, norms and procedures that have emerged in the field of human rights law, national institutions and constitutional law are not addressed. In addition, it has been necessary to omit any detailed discussion of the overlapping, but still separate fields of international humanitarian law and international criminal law.

I would like to thank Herb Somers of the George Washington University law library for his assistance in obtaining materials and sources for the preparation of this volume, Jannat Majeed for her research assistance, and the law school for the leave of absence that enabled me to meet the contractual date set for completion of this volume. I also benefitted greatly from the experience of serving from 2010 to 2014 on the Inter-American Commission on Human Rights. The invaluable insights gained from four years of participation in one of the institutions discussed in this volume contributed greatly to generating new reflections on the critically important topic of international human rights law.

# Abbreviations

ACMW	ASEAN Committee on the Implementation of the Declaration on the Protection and Promotion of the Rights of Migrant Workers
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
ADRDM	American Declaration of the Rights and Duties of Man
Af. Ct. HR	African Court of Human Rights
Afr. Comm. HPR	African Commission on Human and Peoples Rights
AICHR	ASEAN Inter-Governmental Human Rights Commission
AICHR TOR	Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
AU	African Union
BIT	Bilateral Investment Treaty
CAT	Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
COE	Council of Europe
COM	Committee of Ministers of the Council of Europe
CPMW	Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
CRC	Convention on the Rights of the Child



CRPD	Convention on the Rights of Persons with Disabilities
CSCE	Conference on Security and Cooperation in Europe
CSW	Commission on the Status of Women
DPIL	UN Declaration on Principles of International Law
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOSOC	UN Economic and Social Council
ECOWAS	Economic Community of West African States
ECRI	European Commission against Racism and Intolerance
EHRR	European Human Rights Reports
ESC	European Social Charter
ETS	European Treaty Series
EU	European Union
Eur. Ct. HR	European Court of Human Rights
FAO	Food and Agriculture Organization
FRA	Fundamental Rights Agency
HCNM	High Commissioner on National Minorities
HFA	Helsinki Final Act
HRC	UN Human Rights Committee
I-A	Inter-American
I-A CPPT	Inter-American Convention to Prevent and Punish Torture
I-A Ct. HR	Inter-American Court of Human Rights
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
ILO	International Labour Organization
ILOAT	International Labour Organization's Administrative Tribunal

NEPAD	New Partnership for Africa's Development
NGO	Non-governmental organization
OAS	Organization of American States
OAS TS	Organization of American States Treaty Series
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OPCAT	Optional Protocol to the Convention against Torture
OSCE	Organization for Security and Cooperation in Europe
OUP	Oxford University Press
PACE	Parliamentary Assembly of the Council of Europe
PAHO	Pan American Health Organization
PCIJ	Permanent Court of International Justice
PSC	Peace and Security Council of the African Union
R2P	responsibility to protect
SADC	South African Development Community
SPT	Subcommittee for the Prevention of Torture
TRIMs	Trade-Related Investment Measures
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
US	United States
VCLT	Vienna Convention on the Law of Treaties
WBG	World Bank Group
WHO	World Health Organization
WTO	World Trade Organization

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# 1

## Concepts and foundations

The concept of human rights involves consideration of what “rights” a person possesses by virtue of being “human”, that is, rights that human beings have simply because they are human beings, independent of the infinite variety of individual characteristics and human social circumstances. What is the essence of “human” that inevitably gives right to rights, if it does? It is also necessary to consider the meaning of “rights” and the variety of legal relationships encompassed within the term. Approaches to these issues vary widely, and some scholars claim that efforts to define human rights are futile because they involve self-evident moral judgments that are not further explicable. Those who are instrumentalist in approach are more concerned with the consequences of having human rights than with a theoretical justification of rights. Many persons concerned with this topic, however, consider it useful to understand the foundations that support human rights law.

A “right” may be defined in relation to a duty of another, an immunity from having a legal status altered, a privilege to do something or a power to create or alter a legal relationship.<sup>1</sup> One limited concept of human rights is a claim against a government to refrain or abstain from certain acts, such as torture and infringement of individual liberties. This claim may stem from a metaphysical concept such as the nature of humanity, or from a religious belief such as a divine spark inherent in each person. Alternatively, a claim of right may be based on certain interests such as the common good deriving from social contract, requiring a determination of the common good, along with the need to balance it against other societal interests. International legal texts such as the Preambles to the Universal Declaration of Human Rights

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<sup>1</sup> Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LJ 16; WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., Yale UP 1919); HLA HART, *THE CONCEPT OF LAW* (2nd edn, OUP, 1961).

(UDHR)<sup>2</sup> and the International Covenants on Human Rights partly reflect a utilitarian approach in mentioning that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, but the Covenants add that “these rights derive from the inherent dignity of the human person”.<sup>3</sup> Part of the complexity in identifying the foundations of human rights is the need “to confront conflicts between utilitarian and anti-utilitarian philosophy, between values of equality and liberty, between absolute and relativist conceptions of rights, all issues of moral justification”.<sup>4</sup>

Understanding the foundations of human rights can help clarify issues of universality, the scope of protection available, the permissibility and limits of derogations or exceptions, the balancing or priorities afforded to various rights, and similar problems. The justifications for human rights that affect the responses to these and similar issues are considered in this chapter.

## 1.1 Foundations

### 1.1.1 Religion

A central tenet of most religions is that every human being has a sacred spark conferred by a transcendental creator. It is deemed to follow from this belief that divine authority establishes the equal and inherent value of each person. Such common and unique humanity means that every human has a high moral standing that requires appropriate consideration. While the sacred texts of major religions do not speak of human rights per se, they address ethical obligations and responsibilities towards others. The rationales underlying these duties – equality, human dignity and the sacredness of life – provide a foundation for the concept of human rights.<sup>5</sup> Indeed, some scholars believe that the moral

2 Universal Declaration of Human Rights, GA Res 217A, UN GAOR, 3d Sess, Pt I, at 71, UN Doc A/810 (10 Dec 1948).

3 International Covenant on Civil and Political Rights, GA Res 2200A, (XXI), 19 Dec 1966, 999 UNTS 171, 1057 UNTS 407, 6 ILM 368 (1967); International Covenant on Economic, Social and Cultural Rights, 19 Dec 1966, 993 UNTS 3.

4 Jerome J Shestack, *The Philosophical Foundations of Human Rights*, in HUMAN RIGHTS: CONCEPTS AND STANDARDS (Janusz Symonides ed., Ashgate 2000) 31, 33.

5 See generally LEONARD SWINDLER, RELIGIOUS LIBERTY AND HUMAN RIGHTS: IN NATIONS AND IN RELIGIONS (Ecumenical Press, Hippocree Books, 1986); ROBERT TRAER, FAITH IN HUMAN



foundation for human rights comes exclusively from religious ethics, that nothing outside of religious precepts can support the ethical platform of human rights law.<sup>6</sup>

According to the eminent scholar Paul Gordon Lauren, “all of the major religions of the world seek in one way or another to speak to the issue of human responsibility to others”.<sup>7</sup> Among the ancient religions of the East, Hindu texts address the necessity for moral behaviour, the importance of duty (*dharma*) and good conduct towards the suffering of others. Adherents are taught to practise charity and compassion for the hungry, sick, homeless and unfortunate because all life is sacred, to be loved and respected. “Noninjury (*ahimsa*) is not causing pain to any living being at any time through the actions of one’s mind, speech or body” (*Veda*).<sup>8</sup> Buddhism, too, encompasses respect for all life and duties of compassion and charity; it urges renunciation of differences of caste and rank in favour of universal brotherhood and equality. The Confucian *Analects*, *Doctrine of the Mean*, and *Great Learning* express the belief that harmony and cooperation exist when duty and responsibility are exercised towards others, which leads to considering all human beings as having equal worth and recognizing that “within the four seas, all men are brothers”.<sup>9</sup> The fundamental teaching here, as in nearly all religions, is “Do not impose on others what you yourself do not desire”.<sup>10</sup> Another well-known epigram links individuals together in the creation of a just global society: “If there be righteousness in the heart, there will be beauty in the character. If there is beauty in the character, there will be harmony in the home. If there is harmony in the home, there will be order in the nation. If there be order in the nation, there will be peace in the world”.<sup>11</sup>

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6 Michael J Perry, *The Morality of Human Rights: A Problem for Non-Believers?*, 133 COMMONWEAL, 14 July 2006, at 16.

7 PAUL GORDON LAUREN, *THE EVOLUTION OF HUMAN RIGHTS: VISIONS SEEN* (3rd edn, University of Pennsylvania Press 2011).

8 ARVIND SHARMA, *HINDUISM AND HUMAN RIGHTS: A CONCEPTUAL APPROACH* (OUP 2004).

9 Joseph CW Chan, *Confucianism and Human Rights* in RELIGION AND HUMAN RIGHTS: AN INVITATION (n. 5), 92.

10 *Analects*, XV, 23. Similar expressions can be found in Judaism (Leviticus 9:13, 15, 18) and Christianity (“Do unto others as you would have them do unto you” Galatians 3:28; 5:14). See JUDAISM AND HUMAN RIGHTS (Milton R Konvitz, ed, 2nd edn, Transaction 2001).

11 *Great Learning*, cited in HUSTON SMITH, *THE RELIGIONS OF MAN* (Harper & Row, 1958), 181.