

CHALLENGES IN  
INTERNATIONAL HUMAN  
RIGHTS LAW

VOLUME III

MENNO T. KAMMINGA

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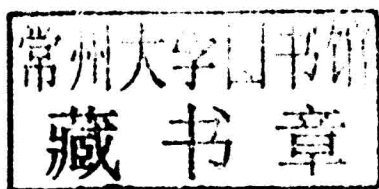
# Challenges in International Human Rights Law

## Volume III

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# Series Preface

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The *Library of Essays in International Human Rights Law* provides access, in a single series, to some of the most important and influential journal articles and papers on the subject. Selections include broad overviews of key areas in international human rights law, critical assessments of this law and of human rights institutions and inquiries into areas of contestation. Some are classic works in the field; others are more recent works that provide insight into important developments or debates.

The series comprises five volumes. A volume on the development of international human rights law covers both the historical and philosophical development of human rights law as well as major issues during this development. A volume on challenges of human rights law presents works not only on issues of non-state actors, transitional justice and terrorism, but also articles on a human rights approach to public health, severe poverty as a human rights violation, investment arbitration as a venue of human rights challenges and climate change. The subject of equality and non-discrimination under international law merited its own volume, as the principles of equality and non-discrimination lie at the heart of human rights law. They are the only human rights explicitly included in the UN Charter, and they appear in virtually every major human rights instrument.

The volume on the United Nations system for protecting human rights presents leading articles on the UN bodies specially created to promote and monitor the implementation of human rights, but it also goes beyond those entities to present articles on the human rights work of UN specialized agencies such as the World Health Organization, the International Labour Organization, UNICEF and UNESCO. Finally, the volume on regional systems for protecting human rights provides selections on the regional human rights instruments and on institutions and their jurisprudence, procedures, activities and effectiveness.

Each volume opens with an introductory essay providing an overview of the topic covered and discussing the significance and context of the works selected. It is my hope that this series will serve as a valuable research resource for those already well-versed in the subject as well as those new to the field.

STEPHANIE FARRIOR  
*Vermont Law School, USA*  
*Series Editor*



# Introduction

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What are the great challenges in human rights law? For international humanitarian law (the law of armed conflict) this question can be answered without much difficulty. The website of the International Committee of the Red Cross (ICRC) contains a lively part entitled Contemporary Challenges for International Humanitarian Law. It addresses issues such as terrorism, direct participation in armed conflict, security detention, ensuring respect for international humanitarian law, multinational forces, occupation, privatization of war and cyber warfare. It contains discussion papers and other documents indicating the state of play on these issues. It therefore provides a useful focus of attention for government officials, scholars and activists. Any prospective PhD candidate looking for a good topic on the law of armed conflict would be wise to start her search here.

No similar inventory exists in the field of international human rights law, however. The website of the UN High Commissioner for Human Rights offers a long list of human rights ‘issues’ within the High Commissioner’s mandate but that is not the same as a list of controversial topics that require priority attention. A Google search for ‘challenges’ and ‘human rights law’ produces very few relevant hits. One obvious reason for this is that international human rights law lacks a guardian body similar to the ICRC that can determine (or at least strongly influence) the international research agenda. The body that came closest to playing this role was the International Council on Human Rights Policy. The Council’s objective was to translate human rights into effective policies. As an NGO the Council lacked the ICRC’s semi-official standing but it successfully identified cutting-edge themes and it commissioned often excellent reports on these themes. The Council was frequently ahead of its times, for example with its reports on business and human rights, universal jurisdiction, corruption and climate change. But unfortunately the Council was unable to attract sufficient financial support to enable it to continue its work. It closed down in 2012, after 14 years of work.

Apart from the absence of an institution endowed with the necessary authority to set the agenda there may also be substantive reasons why there is no authoritative research agenda for international human rights law. The field is so wide and the number of potential issues so vast that it is not easy to come to grips with the field as a whole. Any list invariably reflects the proposer’s own prejudices. It is true that the leading Anglo-American textbooks reflect some consensus on what are the contemporary challenges in international human rights law. Steiner *et al.* (2007) identify as ‘current topics’: transitional justice; non-state actors; development; and climate change. Moeckli *et al.* (2010) list as ‘challenges’: non-state actors; terrorism; poverty; and environmental degradation. However, there obviously is a much wider range of challenges many of which have been addressed by scholars for decades but still have not been satisfactorily resolved. For analytical purposes, these challenges may be organized under the following headings: Contents and Scope; Application to Urgent Social Issues; Application to Non-State Actors; Implementation and Enforcement; Proposals for New Human Rights.

## **Contents and Scope of Application**

Perhaps the most fundamental question in human rights law is whether human rights are universal or whether they differ geographically, culturally and religiously. The question may be answered in different ways: for example, from a historical point of view (by examining the drafting process of the Universal Declaration of Human Rights); a philosophical point of view (by researching the common elements in different cultures and religions); or from a legal point of view (by examining ratifications of UN human rights treaties and the presence of provisions of the Universal Declaration in national constitutions and in domestic case law). The issue was highly controversial during the Cold War when states belonging to the Eastern and the Western groups of states defended different interpretations of human rights, with the West prioritizing civil and political rights at the expense of social and economic rights. The essay by Wiktor Osiatynski included in this volume, 'On the Universality of the Universal Declaration of Human Rights' (Chapter 1), effectively demonstrates how it is historically wrong to assume that when the Universal Declaration was adopted in 1948 the West imposed human rights on the rest of the world. He also makes the important point that cultural relativism (the doctrine that opposes the idea of universal human rights) tends to be invoked by oppressive regimes rather than by human rights activists.<sup>1</sup>

An African interpretation of human rights (with an emphasis on individual duties next to individual and collective rights) was codified in the African Charter on Human and Peoples' Rights (1981). During the 1990s some Asian governments suggested that universal human rights are incompatible with 'Asian values' (such as respect for authority and the community rather than for the rights of the individual).

There is also a continuing debate about an alleged incompatibility between Islam and the universality of human rights, especially concerning the rights of women. The essay by Shaheen Sardar Ali, 'Human Rights in Islam and International Law: A Conceptual Analysis' (Chapter 2), analyses the human rights discourse taking place within Islam. She asserts that a literal interpretation of some verses of the Qur'an has produced laws that are discriminatory for women but argues that other interpretations are possible and should be explored.

Issues of universality and relativism have also given rise to debate among feminist theorists. Some are critical about universal human rights because they argue that such rights have been defined by men. Others are critical about cultural relativism, because traditional practices oppress women. These tensions are discussed in an insightful essay by Tracy E. Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (Chapter 3), that opens with the question: 'In the face of profound cultural differences among women, how can feminists maintain a global political movement yet avoid charges of cultural imperialism?' (p. 53).

Partly as result of Cold War controversies, scholarly analysis of the content and scope of economic, social and cultural rights has lagged behind in comparison with civil and political rights. In particular the 'justiciability' of economic, social and cultural rights (the extent to which such rights may be effectively invoked in a court of law) has remained controversial. Although the United Nations has long maintained that all human rights are universal, indivisible, interdependent and interrelated, sceptics continue to suggest that implementation of economic and social rights, such as the right to education and the right to health cannot

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<sup>1</sup> An additional valuable contribution on the subject is Waltz (2001).

be the responsibility of a court of law but requires decisions by political bodies. More recent scholarship, however, suggests that much can be done to make economic and social rights justiciable – for example, by relying on the prohibition of discrimination and a right's minimum core content. A prime example of such scholarship is the essay by Aoife Nolan, Bruce Porter and Malcolm Langford, 'The Justiciability of Social and Economic Rights: An Updated Appraisal' (Chapter 4). They systematically demolish the different objections to the justiciability of social, economic and cultural rights and discuss the emerging domestic and international case law that proves their point.<sup>2</sup>

The debate on the territorial scope of human rights treaties is prompted by the fact that many human rights treaties oblige states parties to respect the human rights of persons 'within their jurisdiction' thereby raising the question whether or not extraterritorial state conduct is covered. It has long been clear that persons in occupied territory are within the occupying power's jurisdiction and that persons arrested and detained by state agents operating outside their own borders are similarly within the detaining state's jurisdiction. However, it continues to be controversial whether victims of armed force carried out extraterritorially are 'within the jurisdiction' of that state and therefore covered by the relevant human rights treaties. Françoise Hampson, 'The Scope of the Extra-Territorial Applicability of International Human Rights Law' (Chapter 5), provides an astute overview of the current state of play.<sup>3</sup> Scholarship has also focused on the extraterritorial obligations of states in respect of economic, social and cultural rights. Are states parties to treaties on such rights required to control the extraterritorial conduct of multinational enterprises incorporated in their territories? Are they obliged to ensure that their external trade and development policies are compatible with economic, social and cultural rights?<sup>4</sup>

### Application to Urgent Social Issues

There are few social issues that do not have a human rights dimension. This explains the attraction of research of the 'human rights and topic X' variety. Examples of urgent social issues that may benefit from a rights-based approach are the fight against terrorism, impunity for the perpetrators of international crimes, health care, climate change and investment arbitration. Human rights may tell us how to tackle these issues by offering guidance on how to balance different interests and how to set priorities. After all, human rights continue to be the world's only globally agreed value system and may therefore contribute to global consensus on the policies to be adopted.

Terrorism and human rights may be one of the most widely debated human rights issues following 9/11. Included in this volume are essays by two special rapporteurs appointed by the UN Human Rights Council. The essay by Martin Scheinin, UN Special Rapporteur on the Promotion and Protection of Human Rights While Countering Terrorism and Mathias Vermeulen, 'Unilateral Exceptions to International Law: Systematic Legal Analysis and Critique of Doctrines that Seek to Deny or Reduce the Applicability of Human Rights Norms in the Fight against Terrorism' (Chapter 6), provides a systematic critique of the legal 'constructions' that states have used to justify unilateral exceptions to human rights obligations

<sup>2</sup> For more extensive treatment, see Coomans (2006).

<sup>3</sup> See also Gondek (2009); Milanovic (2011).

<sup>4</sup> For a series of case studies, see Coomans and Künnemann (2012).

in the name of countering terrorism. The essay by Philip Alston, UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Study on Targeted Killings' (Chapter 7), is a lucid report on the (un)lawfulness of killings of targeted individuals by sniper fire, missiles from helicopters, drones or otherwise.

During the 1980s one of the hot issues in human rights scholarship was whether alleged perpetrators of international crimes should always be prosecuted, even if this might endanger peace and reconciliation. Can amnesties be granted to those who bear principal responsibility for such crimes in the interest of peace? A thorough essay by Diane F. Orentlicher (1991) became a popular reference point for those arguing in favour of prosecutions. Included in the present volume is a thoughtful essay, "'Settling Accounts" Revisited: Reconciling Global Norms with Local Agency' (Chapter 8), by the same author written 16 years later in which she advocates a more nuanced approach towards transitional justice. A related question that continues to be controversial is whether state officials, including senior officials such as heads of state, heads of government, foreign ministers and diplomats, are entitled to immunity from prosecution before foreign courts even if they are charged with international crimes. In particular, does any immunity enjoyed by these officials continue after they are no longer in office? Exemplary treatment of this thorny issue may be found in the essay by Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' (Chapter 9).

Rights-based approaches are being attempted in a growing number of public policy areas. An overview of the possibilities of a rights-based approach to public health is given in the essay by two of the pioneering experts in this field, Daniel Tarantola and Sofia Gruskin, 'Human Rights Approach to Public Health Policy' (Chapter 10).<sup>5</sup> A useful overview of the human rights dimension of climate change is provided by Stephen Humphreys, 'Introduction: Human Rights and Climate Change' (Chapter 11). This is based on the author's work as a consultant for the International Council on Human Rights Policy.

A relatively recent phenomenon is interest for human rights questions in international investment arbitration. Are states entitled to invoke human rights as a valid reason for not complying with their obligations under investment treaties? For their part, to what extent may investors rely on human rights principles in making claims before arbitral tribunals? In their informative chapter in a book on this subject, Clara Reiner and Christoph Schreuer, 'Human Rights and International Investment Arbitration' (Chapter 12), analyse questions of jurisdiction, applicable law and the invocation of human rights in arbitral proceedings, and address the invocation of human rights by the investor, by the host state, by non-party actors and by the arbitral tribunal.<sup>6</sup>

### **Application to Non-State Actors**

Although human rights were initially conceived as rights of the individual vis-à-vis the state, there is an increasing tendency to assume that human rights must also be respected by non-state actors, including international organizations, armed opposition groups and corporations. In some cases, this view has already been reflected in treaty law. For example, armed opposition groups

<sup>5</sup> See also Gruskin and Tarantola (2008).

<sup>6</sup> See also Simma (2011).

are bound by common Article 3 to the Geneva Conventions on international humanitarian law and by Additional Protocol II to the Conventions. The European Union is on its way towards becoming a party to the European Convention on Human Rights. Interestingly, no similar progress has been made in respect of corporations. The UN Human Rights Council has so far merely managed to adopt non-binding Guiding Principles on business and human rights.

The main difficulty in the area of non-state actors is that it is all very well to take the view that human rights should be binding on non-state actors but this does not resolve the question exactly which human rights should be respected by them and how. It cannot simply be assumed that the human rights obligations owed by states and non-state actors are identical. After all, non-state actors lack the sovereign powers enjoyed by states. This gives states both wider responsibilities and wider possibilities to comply with such responsibilities.

The law on armed opposition groups is ably summarized in an essay by Andrew Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations' (Chapter 15). As for international organizations, the question may be asked, for example, whether the Security Council and the World Trade Organization are bound by human rights obligations. This question arose when Saudi businessman Yasin Abdullah Ezzedine al-Qadi appealed against the financial sanctions imposed on him by the Security Council without any form of due process. The different angles of the *Kadi* case are skilfully analysed in an essay by Gráinne de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (Chapter 13). Is there room for human rights considerations in the dispute settlement procedure of the World Trade Organization? This issue is thoroughly addressed in the essay by Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (Chapter 14). Although the essay is 15 years old as of this writing, a (sadly) still highly relevant introduction into the question whether corporations are bound by human rights is provided by Sarah Joseph, 'Taming the Leviathans: Multinational Enterprises and Human Rights' (Chapter 16).<sup>7</sup> A more recent perspective, a sympathetic account of the work of the UN Special Representative on Business and Human Rights John Ruggie following the endorsement of his Principles on Business and Human Rights by the UN Human Rights Council, is contained in the essay by John H. Knox, 'The Ruggie Rules: Applying Human Rights Law to Corporations' (Chapter 17).

## Implementation and Enforcement

It has long been a truism that the main problem with human rights is their lack of effective implementation. Another truism is that implementation should occur primarily at the domestic level, not only because that is where violations tend to occur but also because the international supervisory machinery will always lack the capacity and the sheer enforcement power available to domestic institutions. Research into domestic implementation and domestic remedies is, however, comparatively rare, perhaps because it is perceived as less glamorous. Beth Stephens, 'Translating *Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations' (Chapter 18), has written an impressive, often cited comparative study on domestic remedies against human rights abuses that is not limited to the United States and the Alien Tort Statute (ATS). This comparative

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<sup>7</sup> Similar and also widely cited is Ratner (2001–2002).

perspective has gathered momentum since the US Supreme Court's restrictive interpretation of the ATS in the *Kiobel* case.<sup>8</sup>

A great boost to the enforcement of human rights at the international level was the adoption by the UN General Assembly of the concept of the Responsibility to Protect (R2P). This helped to change the traditional focus of the debate at the United Nations from the prohibition of interference in internal affairs to R2P. The concept has attracted both defenders and sceptics. Included in the present volume are a sympathetic account of R2P by its auctor intellectualis, Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect' (Chapter 19) and a more sceptical analysis by Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (Chapter 20).

### Proposals for New Human Rights

Activists for a variety of causes have discovered that invoking human rights in support of their objectives can serve as an important trump card both in political debates and in the courtroom. If existing human rights do not sufficiently serve the desired purpose it makes sense from their perspective to propose that their particular cause should be recognized as a human right. Since there is no reason to assume that the human rights catalogue should be considered closed after the adoption of the Universal Declaration of Human Rights there has been a steady increase in the number of human rights codified in treaties. Examples of rights that have been included in some treaties since adoption of the Universal Declaration are the right not to be subjected to the death penalty, the right to own property, the right to appeal in criminal cases and the right to a healthy environment.<sup>9</sup> Another successful technique has been to repackage existing rights in treaties aimed at certain categories of rights holders: women; children; indigenous peoples; migrant workers; disappeared persons; persons with disabilities, and so on. What these treaties tend to add are an elaboration of the content of certain rights and steps that must be taken in order to ensure protection of these rights. A good example of this in non-treaty form is the Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles).

Examples of new human rights that have been proposed but not yet included in treaties are the right to development, the right to peace, the right to be free from poverty and the right to live in a corruption free society. Generally speaking, proposals for new human rights should be considered with scepticism.<sup>10</sup> Often, the objectives the proponents have in mind can be achieved through existing rights. Proposals also frequently suffer from insufficiently careful drafting. Critical questions to be asked in respect of these proposals tend to be similar. Is the interest that is being singled out really so fundamental that it deserves to be consecrated as a human right? Who is the proposed rights holder: individuals, peoples or even states? Who is the proposed duty holder? What is the exact content of the right: is its formulation sufficiently precise so that it can be applied by a court of law?

<sup>8</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).

<sup>9</sup> First (1952), Sixth (1983), Seventh (1984) and Thirteenth (2002) Protocol to the European Convention on Human Rights and Additional Protocol (1988) to the American Convention on Human Rights.

<sup>10</sup> See Alston (1984).

Included in this volume are essays on the right to development by Arjun Sengupta, 'On the Theory and Practice of the Right to Development' (Chapter 21), on the right to be free from severe poverty by Thomas Pogge, 'Severe Poverty as a Human Rights Violation' (Chapter 22) and on whether environmental protection should be treated as a human rights issue, by Alan Boyle, 'Human Rights and the Environment: Where Next?' (Chapter 23).

The essay by Sengupta, an economist who served as Executive Director of the International Monetary Fund, is based on three reports he submitted as Independent Expert on the Right to Development to the UN Commission on Human Rights. He presents a definition of this right, examines controversies including issues of justiciability and resource constraints and suggests elements to use in implementing the right to development.

Writing from the field of ethics, Pogge explores whether and under what conditions severe poverty violates human rights. He emphasizes that at the time of writing, '[r]oughly one-third of all human deaths, 18 million annually or 50,000 each day, are due to poverty-related causes, easily preventable through better nutrition, safe drinking water and sewage systems, cheap rehydration packs, vaccines, antibiotics, and other medicines' (pp. 722–3). He remarks that '[d]espite the undisputed great importance of such basic necessities for human life, there is no agreement on whether human beings have a *right*, or *human right*, to such necessities' (p. 723, emphasis in original).

In his essay, Alan Boyle points out that to the extent that one is speaking of environmental dimensions of rights found in human rights treaties, 'we are necessarily talking about a "greening" of existing human rights law rather than the addition of new rights to existing treaties' (p. 766). Included in his piece are important developments in procedural rights found in environmental instruments, and an examination of 'the difficult issue of the extra-territorial application of existing human rights treaties [...] to transboundary pollution and global [...] climate change' (p. 769).

### Criteria for Selection in This Volume

Unfortunately, human rights research, especially normative human rights research is frequently based on wishful thinking and sloppy analysis. Elsewhere some of my colleagues and I have speculated on the reasons for this tendency.<sup>11</sup> For this volume I have tried to collect essays that are both exemplary from a methodological point of view and likely to have a long shelf life. Some of the essays are classics that were published a long time ago but continue to be cited because they were truly pioneering and set a high standard for subsequent research. Others are more recent pieces that reflect the current state of the art. In making this selection, I have first identified the 'challenges' that should be covered and then tried to find the best, most representative essays dealing with those challenges. Obviously, there were restraints imposed by the number of pages that could reasonably be included in the present volume. Some essays had to be omitted because they were already included in other volumes in this series.<sup>12</sup>

In other fields of scholarship, such as the natural sciences and the medical sciences, there is a clear hierarchy of journals and the best pieces can invariably be found in the highest rated journals. This is not the case for scholarship in the field of international human rights

<sup>11</sup> Coomans *et al.* (2010).

<sup>12</sup> For example, Megret and Hoffmann (2003).

law. Certainly, some of the essays selected for this volume were found in the *Human Rights Quarterly*, the *American Journal of International Law*, the *European Journal of International Law* and other leading journals on human rights and international law. But a surprising number were also found in less mainstream journals. Some are available only on the Internet or as a UN document. This appears to be a reflection of the non-hierarchical, even anarchic nature of human rights scholarship. No doubt this is also connected with the absence of an international research agenda noted above.

I hope that experts on the particular challenges listed in this book will occasionally nod their heads in approval when noting the selections I have made. And I hope that those looking for fresh ideas outside their own field of specialization will feel challenged and inspired by the essays included in this volume.

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