

# International Human Rights & Humanitarian Law

## TREATIES, CASES, & ANALYSIS



Francisco Forrest Martin

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CAMBRIDGE

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WE DEDICATE THIS BOOK TO

Frank and Jonathan Askin

David Fathi

Andrea L. Teitler

— *from Francisco Forrest Martin*

To my wife, Ann

— *from Richard Wilson*

Christina

— *from Jonathan Simon*

ACLU National Prison Project

— *from Mark Tushnet*

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## Preface

The fields of international human rights law and international humanitarian law have exploded over the past fifty years. The first few decades after World War II were devoted primarily to the recognition of human rights norms; recent years have witnessed a steady growth in the recognition of humanitarian norms and the creation of mechanisms for enforcing and implementing both human rights and humanitarian norms. Thus, victims of human rights and humanitarian law violations around the world increasingly can find legal protection and redress for their grievances.

This book seeks to integrate the fields of international human rights law and international humanitarian law. Historically, these fields of law have developed in a somewhat disjointed fashion, leading its expositors to view the fields as wholly distinct. However, as we hope will become apparent to the reader, these fields increasingly have become integrated, relying on each other for their own respective coherence. Indeed, a fundamental general principle of international law interpretation demands that states interpret their international legal obligations consistently with their other international legal obligations. Hence, a state's international human rights legal obligations must be construed in conformity with its international humanitarian legal obligations and vice versa.

This integrationist approach is also supported by the texts of international human rights and international humanitarian treaties. For example, human rights treaties explicitly address rights protections during armed conflicts – the customary subject that international humanitarian law governs. And, humanitarian treaties often explicitly prohibit acts (e.g., genocide, crimes against humanity) that occur outside of armed conflicts – the customary period of international human rights law application.

Accordingly, this book will integrate international human rights legal materials with those of international humanitarian law. Specifically, the book will expose the student to substantive, procedural, and theoretical issues through international legal instruments, case law, and literature. We begin with a historical and conceptual overview to provide the student with a social, political, institutional, and ideological context for understanding this law. We then address the formal categories and principles of international law with especial attention to how these relate to international human rights and humanitarian law.

Because this book is primarily designed for a U.S. audience, we have included a section on the incorporation of international law in U.S. law as well as integrated U.S. constitutional legal comparisons with the substantive international human rights law in the following sections because there is much to be gained from such a comparison. Civil liberties and civil rights law in the United States is highly developed, more so than is

international human rights law in many areas. At the same time, it is far from perfect. Accordingly, contrasts between U.S. law and international law in specific areas can help highlight any needed areas of improvement in either tradition. Also, the emergence of the United States as the sole superpower in the post–Cold War era makes it ever more vital for the United States to promote international human rights and humanitarian law. Yet the U.S. commitment to human rights and humanitarian law has been tepid at best; a number of important treaties remain unratified, and others have been ratified only with large numbers of reservations, declarations, and understandings designed to limit their impact. The tentativeness of this commitment may well stem in part from the unfamiliarity of human rights and humanitarian law to many in the United States, including a large segment of its legal profession. The comparative analysis with U.S. law may offer a small contribution to demystifying and clarifying to a U.S. audience the ramifications of a full commitment to human rights and humanitarian law.

We then address procedural and substantive law, which constitutes the major proportion of the book. In the sections dealing with substantive law, we have focused on issues the we believe a U.S. law student audience would find especially interesting and timely. Such issues include abortion, the death penalty, torture, gay rights, war crimes, genocide and discrimination, freedom of speech, and economic rights.

Finally, we have placed theoretical materials at the end of the book to suggest that a more abstract and critical treatment of international human rights law and international humanitarian law may be best approached after one has become familiar with the substantive and procedural law. We have attempted to give the reader a taste of different theoretical and critical approaches from a variety of viewpoints.

Beyond the pedagogical purposes of this book, we hope that in exposing the law student to the full range of current human rights and humanitarian legal issues, this book will illuminate the future promise of human rights and humanitarian law as a means of protecting individuals and groups facing persecution. The inspiration of that promise – and the responsibilities it imposes – sustain the efforts of countless advocates for international human rights and humanitarian law.

We invite our readers – faculty, students, practitioners, and others – to send suggestions and comments as well as any corrections. Rights International can be reached through its home page at <http://www.rightsinternational.org> or by e-mail at <[ricenter@rightsinternational.org](mailto:ricenter@rightsinternational.org)>.

## **Researching International Human Rights Law**

It is our hope that the casebook will serve as a research aid for practitioners handling cases, and students and faculty writing about international human rights law topics. Thus, one purpose of this book is to bring together in a convenient arrangement a large portion of the impressive body of international human rights and humanitarian case law.

At the same time, it is clear that no single work can possibly be comprehensive. While the present work provides a useful starting point for research, lawyers and academics will of course need to supplement its efforts. The human rights litigator and academic should be aware that library searches, often through hard copies of poorly indexed and dated materials, will be essential to comprehensive legal analysis. The materials of the United Nations, for example, are among the most daunting and obscure to research.

A number of excellent bibliographies provide systematic guidance to human rights sources. They should be consulted at the outset of any research task. Two noteworthy examples are David Weissbrodt and Marci Hoffman's *Bibliography for Research on International Human Rights Law*, 6 MINN. J. GLOBAL TRADE 200 (1997), and Jack Tobin and Jennifer Green's *GUIDE TO HUMAN RIGHTS RESEARCH* (1994).

Online databases such as LexisNexis and Westlaw or, increasingly, the Internet, also provide valuable tools for research. Indeed, educated in the era of computers, many law students today tend to conclude that the time for doing research in books, digests, and other hard copies has passed. The conclusion is premature. Students and practitioners alike must still take great care to examine multiple sources, often by digging through the library stacks. Nevertheless, online resources can be essential, particularly for finding the most up-to-date cases.

There are many places to find guidance to online research. The Rights International home page maintains links to many helpful research sources on the Internet.

### Note Regarding Editing

To facilitate reading, most footnotes from the case excerpts have been placed in parentheses within the text of the excerpt; however, some footnotes and citations in excerpts from cases and other materials have been omitted. The editors have changed citation styles within case excerpts from the European Court of Human Rights for purposes of consistency, clarity, and brevity. Footnote numbering in excerpts contained in this book may not reflect the original numbering in the excerpt.

The editors' comments generally are enclosed by brackets.

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Press, 1993); Richard Falk, *THE END OF WORLD ORDER: ESSAYS ON NORMATIVE INTERNATIONAL RELATIONS* 26–30, 277, 288, 289–89 (New York: Holmes & Meier, 1983), copyright 1983 by Holmes & Meier Publishers, Inc. Reproduced by permission of the publisher; Thomas M. Franck, *Legitimacy in the International System*, 82 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 705 (Wash., D.C.: American Society of International Law, 1988); Laurence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 *CORNELL INTERNATIONAL LAW JOURNAL* 133 (1993), copyright 1993 by Cornell University, All Rights Reserved; Laurence R. Helfer and Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 *HARVARD HUMAN RIGHTS JOURNAL* 61 (1996); Louis Henkin, *THE AGE OF RIGHTS* (1990), copyright 1990 by Columbia University Press; Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights*, 11 *HUMAN RIGHTS LAW JOURNAL* 57 (1990), copyright 1990 by N. P. Engel Publisher, Kehl/Arlington, Va.; Dinah L. Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 *FORDHAM INTERNATIONAL LAW JOURNAL* 1 (1990); Francisco Forrest Martin, *Delineating a Hierarchical Outline of International Law Sources and Norms*, 65 *SASK. L. REV.* 333 (2002); Francisco Forrest Martin, *Using International Human Rights Law for Establishing a Unified Use of Force Rule in the Law of Armed Conflict*, 64(2) *Sask. L. Rev.* 347 (2002); Francisco Forrest Martin, “U.S. Opposition to the International Criminal Court: What Now?” 1 *Accountability* 2–8 (2002); Francisco Forrest Martin, *Our Constitution as Federal Treaty: A New Theory of United States Constitutional Construction Based on an Originalist Understanding for Addressing a New World*, 31 *HASTINGS CONST. L. QUART.* 258 (2004); Francisco Forrest Martin, *CHALLENGING HUMAN RIGHTS VIOLATIONS: USING INTERNATIONAL LAW IN U.S. COURTS* (2001); Francisco Forrest Martin, *The International Human Rights Aspects of the Forum Non Conveniens Doctrine*, 35 *U. MIAMI INTER-AM. L. REV.* 101, 106–109 (2003); Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 *GEO. L. J.* 479, 495–533 (1998); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 *YALE L. J.* 443 (2001); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 *COLUM. L. REV.* 1955 (1999); John C. Yoo, *Rejoinder, Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 *COLUM. L. REV.* 2218, 2233 *et passim* (1999); Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 *CARDOZO L. REV.* 1095–1102 (2000); David Kennedy, *The International Human Rights Movement: Part of the Problem?* 15 *HARV. HUM. RTS. J.* 101 (2002), copyright 2002 by the President and Fellows of Harvard College; Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 *CARDOZO L. REV.* 1095–1102 (2000).



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