Traditional international law aims to protect the values and interests of states. The rapidly increasing corpus of international human rights law (including international humanitarian law and international criminal law) increasingly challenges the basic tenets of general international law. In order to become accepted as the law of the world community, general international law needs to reflect better the values and interests of a wider range of actors, including the individual. This book examines the impact of international human rights law on general international law. It considers areas including the structure of international obligations, the formation of customary international law, treaty law, immunities, state responsibility, and diplomatic protection. The book traces the extent to which concepts emanating from international human rights law are being incorporated by the guardians of traditional international law: the International Court of Justice and the International Law Commission.

Convictions Under Articles 7(1) and 7(3) of the ICTY Statute and Articles 6(1) and 6(3) of the ICTR Statute

Guénaël Mettraux

in International Crimes and the Ad Hoc Tribunals

If the conditions of liability required by both Articles 7(1)/6(1) and 7(3)/6(3) of the statutes of the ad hoc tribunals for the former Yugoslavia and for Rwanda, respectively, are met, could the accused then be found responsible for taking part in the commission of this crime as well as failing in his duty to prevent or punish it? While Articles 7(1)/6(1) sanction an individual’s involvement in the commission of a crime,
Articles 7(3)/6(3) punish the superior’s failure to fulfil his obligations as a commander which are specifically placed upon any superior or commander. In order to show the totality of his guilt while not convicting him twice for the same acts, the appeals chamber said that an accused who meets the requirements of both Article 7(1) and Article 7(3) of the statute for the Yugoslav tribunal should be convicted pursuant to Article 7(1) whilst his position as a superior should be regarded as an aggravating factor for sentencing.

**Human Rights and Judicial Technique**

Jack Beatson

in *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives*

Published in print: 2013 Published Online: January 2014
Item type: chapter

This chapter assesses changes in judicial approach and technique since the enactment of the Human Rights Act (HRA), and whether they are irreversible. It considers the language of analysis; the significance of terms such as ‘deference’, ‘institutional competence’, and ‘weight’; and the interpretative obligation in s.3 HRA enabling radical re-interpretation, and its relationship with the s.4 power to make declarations of incompatibility. It asks whether the ‘no less, but certainly no more’ than Strasbourg approach, with its need to predict outcomes in Strasbourg, reflects a ‘domestic remedy for breach of international obligations’ view of the HRA, or is an indication of the courts' understanding of their constitutional role and its limits. Finally, it suggests it is important not to sideline or forget the potential of the common law and the continued relevance and importance of traditional common law public law techniques.

**Australian Bills of Rights and the ‘New Commonwealth Model of Constitutionalism’**

Simon Evans and Julia Watson

in *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives*

Published in print: 2013 Published Online: January 2014
Item type: chapter
This chapter examines the influence of the new Commonwealth model of human rights protection (exemplified by the UK Human Rights Act 1998) on the form of the two Australian statutory Bills of Rights, and then considers the impact of Australia's distinctive legal culture and constitutional structure on the operation of these instruments. In particular, it examines the impact of culture and structure in the decision of the High Court of Australia in R. v Momcilovic [2011] HCA 34; (2011) 280 A.L.R. As a result of that case, key features of the Australian Bills of Rights now diverge from the dominant UK approach, a divergence so striking that it may no longer be possible to identify the Australian Bills of Rights as exemplars of the new Commonwealth model.

Cross-fertilisation of Constitutional Ideas
Petra Butler

in The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives
Published in print: 2013 Published Online: January 2014
Item type: chapter

This chapter discusses the New Zealand courts' jurisprudence in regard to the interpretative provisions — sections 4, 5, and 6 — of the New Zealand Bill of Rights Act 1990. It not only gives an overview of the relevant New Zealand case law but also compares the courts' approaches to those of their UK counterparts, in particular the UK Supreme Court (formerly, the House of Lords) in regard to section 3 of the UK Human Rights Act 1998. It is argued that the perceived difference in the approaches can be explained by different contexts rather than different methodology. The chapter thereby questions the view held in New Zealand that the UK courts, and especially the Supreme Court, are more activist than the New Zealand courts.

Conclusion: The Right to Life and Conflicting Interests
Elizabeth Wicks

in The Right to Life and Conflicting Interests
Published in print: 2010 Published Online: September 2010
Item type: chapter

This final chapter concludes by summarising the circumstances in which the right to life may conflict with, and be outweighed by, other
interests. It focuses upon the vital distinction between positive and negative obligations under the right to life and argues that the very limited circumstances in which the state's negative duty not to kill can be outweighed are only justifiable on the basis of saving human life.

The Right to Life and the Quality of Life
Elizabeth Wicks

This chapter investigates the potentially conflicting interest of quality of life. It considers whether the right to life continues to offer protection for incompetent patients with negligible quality of life and then proceeds to consider the requirements of the right if its protection is applicable. The person/human distinction is rejected in the context of human rights law. The key issue in withdrawal of life-sustaining treatment is not whether the right to life is applicable (for, in respect of a not yet brain dead human being, it will always be applicable) but rather what steps will be reasonable for the state to take in order to preserve the individual's life. In determining this, the other rights of the patient must be taken into account, including of particular relevance the right to be free from degrading treatment and the right to privacy and autonomy.

Protecting the Right to Life with Limited Public Resources
Elizabeth Wicks

This chapter investigates whether the fact that public resources are limited provides an excuse for a failure on the part of the state to intervene to save life. While courts are reluctant to overstep their judicial boundaries by second guessing allocation of resource issues, it is argued that it is possible for the positive obligations inherent in the right to life to be enforced by the courts even when they involve expenditure. The positive obligation upon the state exists regardless of the financial, or other, burdens caused by it, although such burdens will be highly relevant to a determination of what can reasonably be expected of
a state. It is proposed that the rule of rescue should be a prioritising principle within the balancing exercise which should be performed when allocating public funds. The application of the ‘accountability for reasonableness’ theory will provide a useful check in this context.

Extraterritorial Applicability of Human Rights Law
Noam Lubell

in Extraterritorial Use of Force Against Non-State Actors

This chapter provides detailed analysis of the question of whether states are bound by human rights law when acting outside their borders. The background and objective of the International Covenant on Civil and Political Rights are examined, as is the concept of jurisdiction in the context of human rights treaties and cases of human rights bodies. The different types of actions by a state are examined in this context, including acts of diplomatic and consular agents, detention, and authority or control outside formally acknowledged detention facilities. The chapter raises the possibility of a contextual approach to obligations, and of non treaty-based extraterritorial human rights obligations.

Prosecution under the American Convention on Human Rights
Anja Seibert-Fohr

in Prosecuting Serious Human Rights Violations

The Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have been at the forefront of the fight against impunity for years. This chapter analyses the role of prosecution and punishment under the American Convention on Human Rights. It explains how these institutions have developed their doctrine on whether and why there is a treaty obligation to prosecute serious human violations. Amnesties and large scale impunity have been at the centre of the Court's jurisprudence on criminal matters. A detailed representation of the relevant provisions and the pertinent jurisprudence are provided in order to provide a guide through the wealth of cases. The chapter elaborates on the necessary standards for the criminalization,
investigation, prosecution, and punishment of serious human rights abuses. Special attention is devoted to the role of victims and the right to justice debate in Latin America. The chapter concludes with a summary and outlook.

Riccardo Pavoni

in Human Rights in International Investment Law and Arbitration
Published in print: 2009 Published Online: February 2010
Item type: chapter

This chapter examines the increasing number of international investment disputes where issues relating to environmental rights, sustainable development and foreign investment protection were inextricably intertwined, in order to determine whether arbitrators have approached such interrelationships by taking environmental and sustainable development principles into consideration. It identifies the status and relevance accorded to environmental principles and obligations, either of a customary or treaty nature, in investor-state disputes. The chapter's purpose is to shed into light the extent to which arbitrators are prepared to take into account the obligation of host states to protect the environment and their citizens' right to a healthy environment. The final part of the chapter focuses on the relationship between investment law and the exercise of environmental participatory rights (information, public participation, and access to justice in environmental matters) at the national level.

Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law
Pierre-Marie Dupuy

in Human Rights in International Investment Law and Arbitration
Published in print: 2009 Published Online: February 2010
Item type: chapter

This chapter compares the normative origins of these two distinct branches of international law, assessing the historical anteriority of the obligations of states with regard to the rights of aliens — including
their property rights — which appeared well before a new body of law
developed with regard to human rights protection in general. This
explains for one part some substantial similarities existing between these
two sets of rules, as illustrated in particular by the way in which the
principle of fair and equitable treatment of foreign investments is applied
by arbitral tribunals. The chapter illustrates how judges and arbitrators
— in their judicial interpretation and clarification of indeterminate
investment rules and incomplete treaty regulations — can resort to
principles of treaty interpretation, customary rules, ‘general principles of
law’, judicial precedents, and human rights obligations of governments in
order to avoid conflicts among fragmented jurisdictions, treaty regimes,
diverse judicial interpretations, and domestic implementing rules.

Impact on State Responsibility
Robert McCorquodale

in The Impact of Human Rights Law on General International Law
Published in print: 2009 Published Online: May 2009
Publisher: Oxford University Press
DOI: 10.1093/acprof:oso/9780199565221.003.0011

This chapter explores the extent to which general international law
principles of state responsibility have been influenced by international
human rights law, rather than the impact of state responsibility on
international human rights law. It focuses on the two core aspects
of state responsibility: attribution to a state, and the extent of the
obligations on a state for which it has international legal responsibility.
It also considers the general impact that international human rights law
may have had upon the broader understanding of state responsibility. In
so doing, the issue of whether it is appropriate in any event to engage
in an evaluation of the impact of international human rights law on the
general international law of state responsibility, especially considering
the apparently ‘private’ nature of many human rights abuses, is
considered.

Treaty Interpretation, Current State Practice, and Other
International Law Influences on the Practice of Deference
Andrew Legg

in The Margin of Appreciation in International Human Rights Law: Deference
and Proportionality
Published in print: 2012 Published Online: September 2012
Publisher: Oxford University Press
DOI: 10.1093/acprof:oso/9780199650453.003.0005
This chapter assesses the current practice of states ("consensus") as another factor affecting the margin of appreciation. It is controversial amongst commentators, some of whom regard it as a distraction when selecting standards. However, the consensus factor is justified on the basis of state consent, the sovereign equality of states, and the Vienna Convention on the Law of Treaties, particularly Article 31(3)(b). Since human rights treaties have a special status (they provide standards of protection to individuals) interpretation based on state practice can only be relevant as an indicator of where differing standards might be appropriate. The “consensus” factor need not be measured with precision. The chapter considers the role of interpretative concepts such as “evolutive interpretation”, “autonomous meanings”, and “conventionality control”. It discusses deference to other international norms (e.g., customary international law, jus cogens, obligations erga omnes), institutions and organisations (e.g., the UN Security Council, the European Community).

Mapping the Law
Andrew Burrows and Alan Rodger (eds)

Published in print: 2006 Published Online: January 2009

This collection of essays celebrates the life and work of Peter Birks, who was Regius Professor of Civil Law at the University of Oxford, and Fellow of All Souls College. Widely known as one of the most prolific legal scholars for over twenty years, his contribution to English obligations law is legendary. He was Founder of the Clarendon Law Lectures, editor of the Clarendon Law Series, editor of the Oxford English Law Series, and author of several works on the English law of restitution, comparative restitution, and unjust enrichment. The works in this volume cover a wide range of topics of interest to private law scholars, ranging from the English law of unjust enrichment and restitution, comparative perspectives on unjust enrichment and restitution, Roman law, and legal history, reflecting the range on Peter Birks's work and influence. As one of the most distinguished academic lawyers of his generation Peter Birks's contribution to legal scholarship grew to be recognised as one of the most outstanding by a British jurist in the second half of the twentieth century. This collection attempts to acknowledge and pay tribute to Peter Birks's work.
Models of Extraterritorial Application

Marko Milanovic

in Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy

Published in print: 2011 Published Online: September 2011
Item type: chapter

This chapter concludes the interpretative inquiry into the meaning of the jurisdiction clauses, and elaborates on the several possible models of extraterritorial application of human rights treaties. These include the spatial model of jurisdiction, which grounds the application of human rights treaties in state effective control over territory; the personal model of jurisdiction, based on various forms of state authority and control over individuals; and a mixed model which is based on the distinction between positive and negative obligations under the treaties.

The Rights to Social Security and Social Assistance: Towards an Analytical Framework 1

Jennifer Tooze

in Economic, Social, and Cultural Rights in Action

Published in print: 2007 Published Online: January 2009
Item type: chapter

This chapter argues that the rights to social security and to social assistance in international law can be translated into state obligations that can be effectively monitored and enforced. It begins by discussing the International Covenant on Economic, Social and Cultural Rights and ways of monitoring and enforcing the progressive obligations in it. It introduces the concepts of social security and social assistance. State obligations are then identified by applying the tests of availability, adequacy, and accessibility. Issues relating to expenditure are considered.
Attributing Global Legal Responsibility
Margot E Salomon

in Global Responsibility for Human Rights: World Poverty and the Development of International Law
Published in print: 2007 Published Online: January 2009
Publisher: Oxford University Press
Item type: chapter

This chapter discusses several bases for disaggregating global responsibility pertaining to collective state conduct, for violations of socio-economic rights, manifested as world poverty. It draws on legal doctrine and interpretive guidelines in the area of human rights. These proposals are then considered in light of what are routinely shown to be structural obstacles to the realization of socio-economic rights. The focus is on the attribution of responsibility within a global environment legally inhospitable to individualizing the human rights responsibilities of developed states due to the extent of economic interdependence, the many actors implicated, and the enduring nature of hunger and other deprivations in poor countries.

Denials Ancient and Modern, with some Roman Footnotes
Jeffrey Hackney

in Mapping the Law: Essays in Memory of Peter Birks
Published in print: 2006 Published Online: January 2009
Publisher: Oxford University Press
Item type: chapter

This chapter focuses on the law of leases and the boundary between obligations and property. Starting from the modern law on a tenant's denial of his landlord's title, it uncovers two distinct strands in the medieval law which are often confused. It then shows how a supposed analogy with denial of rent was used to help rationalize the law of conversion in Isaack v Clark.

The Justification of Fundamental Rights
David Bilchitz

in Poverty and Fundamental Rights: The Justification and Enforcement of Socio-economic Rights
Published in print: 2008 Published Online: January 2009
Publisher: Oxford University Press

This chapter considers how we can move from an account of the fundamental interests of sentient beings to an account of their having fundamental rights to have these interests protected. After considering the attempts by Gewirth and Nagel to bridge this theoretical gap, it is argued that the fundamental gap in their theories is the premise that each individual's life is to be treated as being of equal importance to that of every other individual. Reasons are provided for accepting that a society based upon law must treat the lives of each individual being with equal importance. An argument is then provided as to why equal importance must at least require that individuals be guaranteed the necessary preconditions for living lives of value to them. A society founded upon equal importance must consequently realise fundamental rights — both socio-economic and civil-political.