

Book Review

CONCRETIZING HUMAN RIGHTS LAW

Review and Commentary
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International Human Rights Law and Practice: Cases, Treaties and Materials by Francisco Forrest Martin et al., 1997, 1356 pages and document supplements.

I. INTRODUCTION

Times have certainly changed for international human rights law. Once a discipline focused exclusively on a handful of global and regional treaties and declarations with often ambiguous texts, human rights law has been transformed in the last quarter of a century by the burgeoning of supranational litigation across the planet.¹ Human rights courts and quasi-judicial tribunals have become increasingly visible and important actors on the international stage, first in Europe and the Americas and more recently in the United Nations and Africa. These courts and tribunals now decide cases ranging from the most flagrant and shocking abuses of the human person² to “highly technical

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1. Human rights courts and tribunals are principally “supranational” juridical bodies, inasmuch as they adjudicate claims brought by individuals, groups, and other private parties against national governments. Pure international tribunals, by contrast, adjudicate only claims between nation-states. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Yale L.J. 273, 289 (1997) (defining supranational adjudication and distinguishing it from international adjudication). Although human rights bodies also hear state-to-state disputes, they do so far less frequently and with far less impressive results. See *id.* at 296-97.

2. See Francisco Forrest Martin et al., *International Human Rights Law and Practice: Cases, Treaties and Materials* 315-37, 341-75, 1191-1200 (1997) (reprinting and discussing excerpts of decisions by the Inter-American Court of Human Rights, the U.N. Human Rights Committee, and the U.N. Committee Against Torture concerning abductions, disappeared persons, summary executions, and torture).

questions . . . concerning trade unions and their membership, the right to work, police powers, the minutiae of due process of law, and the like."³

The prospect of a litigant seeking supranational judicial review after her legal challenge before a domestic court has failed is a foreign one in the United States. Indeed, the idea of an international court or tribunal "overruling" a decision of a U.S. court strikes many Americans as unthinkable.⁴ But litigants and lawyers throughout the world are closely attuned to the fact that they often achieve meaningful redress *only* when they take their case to a level above the nation-state.⁵ And perhaps most remarkably, these advocates and their clients have learned that national governments are increasingly willing to modify their statutes, regulations, and case law in response to pressure by individuals and groups who have received a favorable international judgment.⁶

3. Sir Robert Jennings, *Human Rights and Domestic Law and Courts*, in *Protecting Human Rights: The European Dimension* 295, 298 (Franz Matscher & Herbert Petzold eds., 1990). See also Martin, *supra* note 2, at 527-608, 1010-27 (discussing due process and employment-related rights).

4. See generally *Recent Development: The North American Agreement on Labor Cooperation: Linking Labor Standards and Rights to Trade Agreements*, 12 Am. U. J. Int'l L. & Pol'y 815 (1997). "I mean, is the American citizen . . . or the Congress, ready to have an international body, that they didn't elect, come in and overturn domestic laws and domestic decisions? This has, in fact, been one of the major criticisms from the progressive community about the GATT, the World Trade Organization, and NAFTA." *Id.* at 851 (statement by Lance Compa, Director, Commission for Labor Cooperation of the North American Agreement on Labor Cooperation). It is striking that although the United States has never permitted its citizens to file petitions before human rights bodies such as the Inter-American Court of Human Rights or the United Nations Human Rights Committee, it has recently ratified trade treaties that authorize other nations and in some cases private parties to challenge U.S. laws before international review bodies.

5. *International Human Rights Law and Practice* is replete with examples of supranational courts and tribunals finding violations of civil and political rights after contrary rulings by national courts. See, e.g., Martin, *supra* note 2, at 179-93, 215-50, 275-90, 315 (discussing cases from Ireland, the United Kingdom, Germany, Denmark, and South Korea).

6. Of course, the record of compliance varies across different courts and tribunals. See Helfer & Slaughter, *supra* note 1, at 292-93, 296-97, 344-45 (discussing compliance with judgments and decisions of the European Court of Justice, the European Court of Human Rights, and the United Nations Human Rights Committee). Of all human rights bodies, the European Court of Human Rights has enjoyed the most success in this regard. Its judgments have been described as being "as effective as those of any domestic court." John H. Barton & Barry E. Carter, *The Uneven but Growing Role of International Law*, in *Rethinking America's Security: Beyond Cold War to New World Order* 279, 287

International Human Rights Law and Practice, which focuses on the growing importance of international human rights case law and contains a comprehensive and up-to-date compendium of judgments, decisions, and recommendations issued by global and regional courts and quasi-judicial tribunals,⁷ is a timely and welcome addition to the growing literature in the field of international human rights. The principal text and its two documentary supplements⁸ serve dual functions as a casebook for law school courses and as a desk reference book for civil and human rights practitioners. Together, these works provide clear evidence that international human rights law can no longer be viewed as a theoretical or hortatory body of norms and rules with only marginal practical effect on victims harmed by very real abuses of governmental and private power. For scholars, practitioners, teachers, and students interested in understanding how mature systems of human rights adjudication actually work and how they interact with national laws and means of redress, the book's emphasis on the substantive jurisprudence and procedures of human rights courts and tribunals should prove invaluable.

II. A CASE-CENTERED APPROACH TO HUMAN RIGHTS LAW

(Graham Allison & Gregory F. Treverton eds., 1992). One possible reason for this success is that in most of Europe "human rights grievances . . . have generally seemed not nearly as pervasive or severe as in many other parts of the world." Martin, *supra* note 2, at xl. For additional discussion of why supranational litigation in Europe has been effective, see Helfer & Slaughter, *supra* note 1, at 300-37.

7. The casebook stresses the importance of consulting both print and on-line sources when researching international human rights issues. Martin, *supra* note 2, at xxx-xxxii. Internet sources are essential for the global dissemination of recently published judgments and decisions to practitioners, activists, and scholars. Links to the relevant documents can be found at the Internet website of Rights International, <<http://www.rightsinternational.org/>>, the advocacy organization under whose auspices the casebook was published, and the website of the University of Minnesota's Human Rights Library, <<http://www.umn.edu/humanrts/>>.

8. Francisco Forrest Martin et al., *International Human Rights Law and Practice: Cases, Treaties and Materials, Documentary Supplement* (1997) [hereinafter *Practitioner Supplement*]; Francisco Forrest Martin et al., *International Human Rights Law and Practice: Cases, Treaties and Materials, Documentary Supplement* (student ed. 1997). The student edition includes the most important United Nations and regional human rights treaties and conventions. The practitioner supplement contains a far more comprehensive compendium of treaties and international instruments, as well as the rules of procedure for the most active human rights courts and review bodies, case flow charts, and model pleadings.

The organization and focus of *International Human Rights Law and Practice* reflect the numerous ways in which human rights courts and tribunals have reshaped this area of law. First, the adjudication of claims brought by individuals and other private parties demonstrates that the enforcement of international legal norms need not be solely or even principally a task reserved for sovereign nations. To the contrary, it is private parties who are motivated to utilize the review mechanisms created by the various global and regional human rights treaties, holding governments to their treaty commitments in situations where diplomatic or political pressures often impede international challenges by other nations.⁹ It is no accident, then, that the overwhelming majority of decisions in *International Human Rights Law and Practice* involve cases brought by individuals against their own governments.¹⁰

A second critical function of international courts and tribunals is to concretize the legal norms enshrined in the text of international treaties, translating opaque or ambiguous treaty language into judicial doctrine and a fact-specific, problem-centered jurisprudence. As the casebook authors accurately state:

For concretizing the often vague principles found in human rights treaties, international cases should be of immense importance. The adjudicatory process serves to define the issues surrounding these legal principles, eliminate bad arguments, and validate good arguments. And most importantly, adjudicating cases can create a customary international law that is more socially responsive and responsible.¹¹

Only through a case-by-case application of the law to a diverse range of factual disputes can specific meaning be given to such critical treaty phrases as “reasonable time,” “necessary in a democratic society,” and

9. See David Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 Iowa L. Rev. 769, 779 (1994) (discussing reasons why states may be reluctant to sue one another before international courts and review bodies).

10. Indeed, there have been fewer than 20 inter-state cases brought before the European Court and Commission of Human Rights, and the U.N. Human Rights Committee has never been asked to review a complaint by one state against another. See Helfer & Slaughter, *supra* note 1, at 296-97 nn.97-98, 341 n.295.

11. Martin, *supra* note 2, at 40.

“in the public interest.”¹² *International Human Rights Law and Practice* aptly illustrates the importance of adjudication for interpreting treaty text. Organizing materials by subject area, the casebook brings together important decisions relating to freedom of expression, association, and religious belief; privacy, family and sexual rights; criminal due process guarantees; property rights; and the principle of non-discrimination.¹³ The large number of excerpted decisions included in the casebook, together with the probing commentary which follows, allow readers to witness the transposition of ambiguous treaty language into specific legal doctrines and to observe international jurists wrestling with the legal and political values that underlie those doctrines.

But more than generating detailed legal rules, the blossoming of supranational litigation has also led human rights courts and tribunals to develop novel approaches for balancing the protection of individual liberties against states' interests in regulating those liberties to achieve other important societal goals. The European Court of Human Rights (ECHR) has been a leader in this regard, devising interpretive methodologies that include the principle of effectiveness, the margin of appreciation doctrine, and the European consensus inquiry to assist it in applying the European Convention on Human Rights¹⁴ (the Convention) to specific cases.¹⁵

On the one hand, the ECHR uses these methodologies, particularly the margin of appreciation doctrine, to provide states with a sizable zone of discretion in applying the Convention to diverse local practices where national actors are in a superior position to balance the competing interests at stake.¹⁶ On the other hand, the Court's commitment to interpret the treaty in a rights-protective manner that

12. *Id.* at 124-36, 599-605, 904-28 (discussing cases construing these treaty phrases).

13. The section of the casebook devoted to the right to property is particularly detailed and illuminating, given uncertainties over the existence and scope of this right and the numerous recent decisions by the European human rights tribunals. *See* Martin, *supra* note 2, at 866-1009.

14. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

15. Martin, *supra* note 2, at 42-58 (discussing these doctrines and how they are used “to expand or limit human rights protection” in Europe).

16. *See, e.g.,* Muller v. Switzerland, 133 Eur. Ct. H.R. (ser. A) ¶ 35 (1988) *reprinted in* Martin, *supra* note 2, at 209 (noting that national authorities are better situated than international judges to balance the freedom of expression against the need to protect public morals).

reflects present day legal trends allows it to assert a pervasive “European supervision”¹⁷ over national governments to ensure their compliance with core international obligations and emerging regional standards.¹⁸ Although the casebook authors question whether the zone of national discretion should be narrowed for states that fail to incorporate the Convention into domestic law in some form,¹⁹ they might have explored in greater detail whether the ECHR’s competing interpretive methods are a necessary or desirable part of supranational human rights litigation generally. For example, some jurists and commentators have recently argued that the ECHR provides too much discretion to national decision-makers,²⁰ whereas others have concluded that the Court’s cautious, incremental approach is “essential if the [ECHR’s] jurisdiction is to remain acceptable” to signatory nations.²¹ Whether the ECHR’s methodologies should be adopted by other human rights bodies is another significant and unsettled issue worthy of further scholarly exploration.

A third way in which *International Human Rights Law and Practice* illustrates the importance of supranational adjudication is its comparative focus. The casebook highlights the several instances in which international courts and tribunals have reached at least partly divergent results in cases involving the interpretation of similar or

17. *E.g.*, *Barthold v. Federal Republic of Germany*, 90 Eur. Ct. H.R. (ser. A) ¶ 55 (1985), *reprinted in* Martin, *supra* note 2, at 289.

18. In fact, the ECHR often finds that government practices which were not perceived as human rights issues by the treaty’s drafters are violations of the European Convention. *See, e.g.*, *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981) (criminal regulation of consensual homosexual conduct); *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979) (discrimination against non-marital children).

19. Martin, *supra* note 2, at 56–58.

20. *See Z v. Finland*, slip op. 9/1996/627/811 ¶ 3 (Feb. 25, 1997) (De Meyer, J., dissenting in part) (“The empty phrases concerning the State’s margin of appreciation . . . are unnecessary circumlocutions, serving only to indicate abstrusely that the States may do anything the Court does not consider incompatible with human rights.”). This case is also available at the European Court of Human Rights web site, <<http://www.dhcour.coe.fr/>>; *see also* P. van Dijk & J.G.H. van Hoof, *Theory and Practice of the European Convention on Human Rights* 604 (2d ed. 1990) (referring to doctrine as a “spreading disease”).

21. Sir Nicholas Lyell, *Whither Strasbourg?*, 1997 Eur. Hum. Rts. L. Rev. 132, 134. *See also* *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 28 (1990) (Martens, J., dissenting) (discussing cases in which “judicial self-restraint” is justified by “special situations obtaining in the defending state”).

related treaty texts,²² and where national and international courts have differed over legal issues common to domestic constitutional law and international human rights law.²³ That two or more juridical bodies may reach different conclusions when faced with similar legal and factual questions provides a particularly rich context for scholars, practitioners, and students to explore the different ways in which broad human rights principles can be applied to specific factual situations.²⁴ It also

22. In *Coeriel & Aurik v. The Netherlands*, for example, the U.N. Human Rights Committee concluded that the Netherlands had violated Hindu petitioners' right of privacy under the International Covenant on Civil and Political Rights when it denied a request to change their last names to follow their religious beliefs. *Coeriel & Aurik v. The Netherlands*, Comm. No. 453/1991, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, Annex X, at 23, U.N. Doc. A/49/40 (1994). The European Commission on Human Rights had previously rejected a challenge by the same petitioners under the freedom of religion clause of the European Convention on Human Rights. A dissenting opinion criticized this conclusion in part on the ground that the Committee had paid insufficient attention to the findings and reasoning of the European Commission. *Id.* (dissenting views of Committee Member Herndl), reprinted in Martin, *supra* note 2, at 151-52. Similarly, in *Brinkhof v. The Netherlands*, the Committee considered a petition by a Dutch conscientious objector that had previously been rejected by the European Commission. *Brinkhof v. The Netherlands*, Comm. No. 402/1990, U.N. GAOR Hum. Rts. Comm., 48th Sess., Supp. No. 40, Annex XII, at 124, U.N. Doc. A/48/40 (1993), excerpted in part in Martin, *supra* note 2, at 137-38. The petition challenged special exemptions from military service that the Netherlands granted only to Jehovah's Witnesses. Without discussing the European Commission's past holdings that the differential treatment of Jehovah's Witnesses was based on reasonable and objective criteria, the Committee concluded "the exemption of only one group of conscientious objectors and the inapplicability of exemption for all others cannot be considered reasonable" and it recommended that the Netherlands "review its relevant regulations and practice with a view to removing any discrimination in this respect." *Id.* ¶¶ 9.3-9.4. On the specific facts presented, however, the Committee refrained from finding a violation of the International Covenant. *Id.* ¶ 9.3. For other examples of divergence between human rights tribunals, see Martin, *supra* note 2, at 176-93; Helfer & Slaughter, *supra* note 1, at 359-60.

23. See, e.g., Martin, *supra* note 2, at 195, 437-50, 675 (noting differences between international and U.S. positions on hate speech, the death penalty, and lesbian and gay rights); *id.* at 154 (stating that "there are some very serious divergences in the jurisprudence of freedom of expression").

24. Professors using *International Human Rights Law and Practice* as a casebook for law school courses will find many fruitful examples for class discussion and analysis. See, e.g., Martin, *supra* note 2, at 1207 (inviting readers to analyze the U.S. Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), in light of the International Covenant and an ECHR judgment). They should also be able to build on the casebook's basic approach by seeking out other instances in which national courts did not take international norms into consideration and asking students to critique the judges' analysis and reasoning from a perspective

highlights the importance of achieving “a balance or interdependence between regional and global approaches”²⁵ to supranational adjudication in which different courts and tribunals actively consider each other’s case law and engage in a dialogue over the evolution of shared human rights norms.²⁶

Another emerging issue that the casebook helps to illuminate is the relationship between international and domestic law and between national judges and their supranational counterparts. Rather than viewing human rights as an isolated body of international law with little relationship to national constitutional law, the casebook emphasizes the increasing interdependency of domestic and international legal rules and actors. It highlights four distinct ways in which international human rights issues may be litigated in domestic courts, including claims based on incorporated treaties, customary international law, domestic legislation that implements human rights norms, and the decisions of international tribunals.²⁷ Of these four, the last is perhaps the most novel and interesting, and the book cites several recent decisions in which national courts have expressly considered the decisions of supranational tribunals as persuasive authority when resolving issues of domestic constitutional or statutory law.²⁸ The increasing willingness of many domestic jurists to pay attention to supranational judgments and decisions suggests that human rights law will continue to evolve toward greater interpenetration with the national constitutions from which it draws much of its inspiration.

III. A NICHE FOR HUMAN RIGHTS LAWYERS

The authors’ emphasis on human rights case law also suggests a growing and important role for lawyers seeking to represent

informed by human rights treaty texts and case law.

25. Martin, *supra* note 2, at xli.

26. See Helfer & Slaughter, *supra* note 1, at 323–26, 373–86 (noting increasing judicial cross-fertilization in Europe and proposing structured dialogue between European human rights tribunals and the U.N. Human Rights Committee).

27. Martin, *supra* note 2, at 105.

28. *Id.* at 114–19, 463 (discussing the United Kingdom Privy Council’s analysis of the “death row phenomenon” in *Pratt v. Attorney General for Jamaica*, [1994] 2 App. Cas. 1 (P.C. 1993), and the South African Constitutional Court’s rejection of the death penalty in *S v. Makwanyane*, 1995 (3) SA 391 (CC)).

individual victims of human rights abuses before supranational courts and tribunals. Although most human rights bodies permit aggrieved individuals to represent themselves, there has been an increasing tendency for these individuals to seek guidance and support from attorneys, particularly in those nations that must frequently defend their actions internationally.²⁹ Drawing on this trend, the casebook authors highlight the emergence of a “vocational niche within the legal profession for specialists in human rights” that provides lawyers and students “an expanding range of professional opportunities.”³⁰ They also address the practical aspects of human rights lawyering and advocacy, including issues such as working with clients in a cross-cultural context, ethical concerns, framing factual and legal aspects of a claim to a client’s best advantage, and the use of *amicus curiae* briefs as part of a larger litigation strategy.³¹ The casebook authors stress the role that attorneys can play in “developing the law” through an “extensive exegesis or elaboration.”³² It is equally important, however, for advocates to recognize that they are part of a broader community of legal actors that includes international jurists, national court judges, activists, and scholars, all of whom interact with one another in a nominally apolitical context in the shared belief that basic human liberties are rules of law, not merely political aspirations.³³

Finally, consistent with their focus on litigation by individual claimants and their attorneys, the casebook authors include information on the procedural rules and practices of human rights courts and tribunals. For practitioners concerned with the details of how to seek relief for their clients, the brief section on jurisdiction, standing, exhaustion of domestic remedies, and evidentiary burdens will provide a useful introduction.³⁴ The more extensive discussion of the wide variety of injunctive, declaratory, and monetary relief that supranational jurists award or recommend as remedies for states’

29. See Helfer & Slaughter, *supra* note 1, at 352-53, 352 n.368 (citing Human Rights Committee reports to the General Assembly documenting this trend).

30. Martin, *supra* note 2, at xxxvii.

31. *Id.* at 1328-45.

32. *Id.* at 25.

33. See Helfer & Slaughter, *supra* note 1, at 367-73.

34. Martin, *supra* note 2, at 1077-1107. The practitioners’ documentary supplement also contains a rich source of useful information for human rights litigators, including: a directory of international human rights tribunals, Practitioner Supplement, *supra* note 8 at 1027-28; a model petition, *id.* at 1029-47; case flow charts for the tribunals, *id.* at 1056-63; and a checklist for “troubleshooting” petitions, *id.* at 1051-55.

treaty violations should interest both practitioners concerned with the practical effects of a favorable judicial judgment and scholars studying the increasing specificity and frequency with which supranational courts are reshaping the domestic legal landscape through their rulings.³⁵

IV. CONCLUSION

International Human Rights Law and Practice reflects the beginnings of a new age for international human rights law, one in which supranational courts and quasi-judicial tribunals will play an increasingly vital role. Of course, litigation is by no means the only or even the principal strategy available for holding national governments to their treaty obligations, particularly for gross or systematic human rights violations.³⁶ Individuals in many nations have no access to any supranational body. Even where such access exists as a formal matter, individuals often lack the support of local advocacy groups to encourage them to assert claims at the international level. In these areas, international monitoring, fact-finding, and publicizing of violations are the principal strategies available to advocates.³⁷

In a rapidly increasing number of states,³⁸ however, supranational courts and tribunals are beginning to make a real difference as national governments reopen judgments, modify

35. Martin, *supra* note 2, at 1107-70.

36. See Menno T. Kamminga, *Is the European Convention on Human Rights Sufficiently Equipped to Cope with Gross and Systematic Violations?*, 12 Neth. Q. Hum. Rts. 153 (1994).

37. Martin, *supra* note 2, at 1345-50. For a discussion of a range of non-litigation strategies available to advocates of lesbian and gay human rights, see Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 Harv. Hum. Rts. J. 61, 90-100 (1996).

38. As of April 1997, 136 states had ratified the International Covenant on Civil and Political Rights, and 86 states had ratified the Optional Protocol that authorizes individuals to file petitions against their national governments. See United Nations, Economic and Social Council, Human Rights Committee, Press Release: Human Rights Committee Concludes Three-Week Headquarters Session, U.N. Doc. HR/CT/494 (1997). Six years earlier, only 55 states had ratified the Optional Protocol. Helfer & Slaughter, *supra* note 1, at 344 n.314. As of July 1997, 40 states, including most Eastern European nations, had ratified the European Convention and recognized the compulsory jurisdiction of the ECHR. See Council of Europe, Chart of Signatures and Ratifications of European Treaties, Declarations Pursuant to Articles 25 and 46 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 13, 1997.

administrative practices, and release political prisoners to comply with their rulings.³⁹ Their impact extends beyond the outcome of specific cases when national judges or legislators consider supranational rulings as persuasive authority to interpret domestic constitutions and statutes, even in nations geographically precluded from joining the treaty regime that a particular court or tribunal superintends. Indeed, the corpus of decisions is beginning to exert a sovereignty-constraining effect on all nations as supranational judgments contribute to the creation of a shared global *acquis* of human rights law. As the first casebook to focus principally on these developments, *International Human Rights Law and Practice* will add much to the study of supranational courts and tribunals and the ways in which their decisions reshape our understanding of international human rights.

39. See Martin, *supra* note 2, at 44-45, 121-23.