THEODOR MERON

HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS

A Critique of Instruments and Processes

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Preface

I WISH to express my gratitude to the New York University Law Center Foundation for supporting my research on this book and to the Max Planck Institute for Comparative Public Law and International Law in Heidelberg for making it possible for me to work on it at the Institute during sabbatical leave from New York University School of Law. Special thanks are addressed to the Directors of the Institute, Professors Rudolf Bernhardt, Karl Doehring, and Jochen-Abr. Frowein. I am most grateful to my research assistants Gwen Robosson, Manuel Vargas, John Gill, and Scott Coleman, and especially Donna J. Sullivan, without whose able help this study would not have been possible, and to my friends and colleagues who have been kind enough to read various parts of the draft manuscript and to comment upon them.

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T.M.

Max Planck Institute for Comparative Public Law and International Law,
Heidelberg,
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Abbreviations

ACC	Administrative Committee on Co-ordination
ASIL	American Society of International Law
AJIL	American Journal of International Law
CDDH	Committee of Experts on Human Rights
CERD	Committee on the Elimination of Racial Discrimination
CFR	Code of Federal Regulations
ECOSOC	Economic and Social Council
ECR	European Court Reports (European Communities law reports)
EEOC	Equal Employment Opportunities Commission
ESC	Economic and Social Council
ESCOR	Economic and Social Council Official Records
FSC	Federal Supreme Court (Nigeria)
GAOR	General Assembly Official Records
IACHR	Inter-American Commission on Human Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organisation
NGO	Non-governmental organization
OAS	Organisation of American States
OEA	Organizacion de Los Estados Americanos
TIAS	Treaties and Other International Acts Series
TS	Treaty Series
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
USC	United States Code
USCA	United States Code Annotated
UST	United States Treaties and Other International Agreements .
WHO	World Health Organization

Contents

Introduction

THE United Nations has made a tremendous contribution to the promotion and protection of human rights. It has adopted conventions and declarations regulating most aspects of the relationship between the governments and the governed and has established important procedures for the implementation and supervision of norms stated in these instruments. It has thus fostered the principle of international accountability of governments for the manner in which they treat individuals and groups. Without detracting from any of these great achievements, this book attempts to demonstrate some of the weaknesses inherent in the present methods of adopting human rights instruments employed by the United Nations and the resulting inadequacies of the instruments themselves. Since it would be impractical to attempt to analyse within the confines of this book all the human rights instruments which have been adopted by the United Nations, three of the major instruments have been selected as examples. The book also subjects to a critical analysis another aspect of law-making: the normative and the jurisdictional relations between the instruments and organs. Although a great many of the weaknesses result from the political realities prevailing in the United Nations, others could have been prevented by better law-making techniques, including higher levels of competence, more careful drafting and editing, more research, and so on. Some suggestions therefore have been made for the necessary reforms, both of the institutions and of the process itself.

The continued inadequacies of the present system of law-making cause considerable difficulties in the interpretation and application of the various instruments and in the relations between human rights instruments and organs. These problems encourage cynicism and endanger the credibility of this most important function of the organized international community, ensuring the respect of human rights. There are many examples of conflicting provisions within a single instrument, of provisions which are over broad and couched in vague terms, and there are

problems of overlap and conflict between different instruments.

In many cases abstraction helps, of course, to obtain the necessary support of States. While it is true that rights stated in the Constitution of the United States and in constitutions and laws of other countries are also couched in general terms, these rights have been interpreted in the rich practice and jurisprudence of the national courts. In international human rights, however, the process of creating interpretative jurisprudence is slow in time and non-comprehensive in scope. The United Nations human rights system is thus characterized by weak and sporadic implementation. The weaker the implementation system, the greater the importance of a more precise formulation of human rights instruments. The quality of the instrument and the instrument's relationship to international practice and to the needs of the international community will affect, no doubt, the acceptability of the instrument as a treaty and of the norms stated in it as customary law by the international community.

Part I of this book comprises critical essays on three instruments, in a sequence progressing from the more specific – the International Convention on the Elimination of All Forms of Racial Discrimination (Chapter I) and the Convention on the Elimination of All Forms of Discrimination Against Women (Chapter II) – to the more general, the International Covenant on Civil and Political Rights (Chapter III). The first two instruments have been selected because of their special importance and because the international community has given the notion of equality a special priority level. The discussion focuses on selected aspects of each of the instruments considered.

To prevent conflicts and to avoid gaps and undesirable overlap, the lawmaker must take into account the ensemble of international human rights instruments, indeed, the entire system of international human rights law. Part II of the book is concerned with this broad perspective. Since substantive problems of law-making are closely related to problems of supervision or implementation, Chapter IV focuses on the former and Chapter V on the latter.

Chapter IV concerns the relations between norms stated in different instruments. Instruments may be inconsistent or incompatible with each other, may overlap (which may not

always be undesirable for the effective protection of international human rights), or may fail to address subjects which require normative regulation. The risk of conflict between norms and values stated in various international instruments reflects difficulties in establishing a sound legislative policy for the Member States of the United Nations in view of the diversity of their stages of development, cultures, traditions, and conditions of social peace and security. The risk of conflict is enhanced by the fact that the general practice in the United Nations has been for each normative system to create its own system of supervision. The scope of competence of a particular 'control' organ is, therefore, of relevance to the avoidance and resolution of conflicts and the development of a rational and consistent jurisprudence.

Several questions which merit consideration will be addressed. For example, what is the actual scope for conflicts between instruments in general or between specific norms such as women's equality and freedom of religion? Are conflicts between human rights instruments inevitable in the present decentralized and poorly co-ordinated process of law-making? Are provisions of the Vienna Convention on the Law of Treaties helpful for resolving conflicts between various instruments? Has the international community developed a hierarchy of human rights norms, such as *jus cogens*? What principles or techniques are useful for the avoidance, reduction, or resolution of conflicts?

Jurisdictional relations between instruments and organs are the subject of Chapter V. What are the purposes and the means of rationalizing and co-ordinating the systems of supervision and implementation of international human rights? Is the resolution of jurisdictional conflicts the duty of the supervisory organs only, to be fulfilled by means such as due deference to other control organs and the exercise of 'judicial restraint', or is it also, and perhaps primarily, the task of the lawmaker, who, by careful, thoughtful, and imaginative drafting, can, in some cases, avoid conflicts altogether?

The quality and the effectiveness of each instrument and of the ensemble of instruments depends on the system of law-making in international organizations, that is on the international community's legislative organs and on their methods of

work. The structure and the operation of these bodies is affected by a wide range of political, budgetary, administrative, and legal considerations. The law-making process is the subject of Part III of this book. Chapter VI focuses on the experience of the specialized agencies of the United Nations. Chapter VII concerns the United Nations itself. Since all worthwhile critique and analysis should be constructive, here, too, the object is to consider what reforms could be envisaged. It is my hope that this book will serve as the catalyst for reflection and, eventually, action.

This book focuses on human rights law-making in the United Nations, not in regional and other organizations. Reference to specialized instruments, for instance those of the International Labour Organisation, or to regional human rights instruments has been made when necessary, mostly for comparative purposes. Because the African Charter on Human and Peoples' Rights has not yet entered into force, only a small number of allusions have been made to its provisions.

PART I

A Critique of Selected Human Rights Instruments

I

The International Convention on the Elimination of All Forms of Racial Discrimination

I. INTRODUCTION

THE International Convention on the Elimination of All Forms of Racial Discrimination[1] (the Convention) is the most important of the general instruments (as distinguished from specialized instruments such as those pertaining to labour or education) which develop the fundamental norm of the United Nations Charter – by now accepted into the corpus of customary international law – requiring respect for and observance of human rights and fundamental freedoms for all, without distinction as to race.[2] It has been eloquently described as 'the international community's only tool for combating racial discrimination which is at one and the same time universal in reach, comprehensive in scope, legally binding in character, and equipped with built-in measures of implementation . . .'.[3]

The chain of events that ultimately led to the preparation and adoption of the Convention originated with swastika painting and additional 'manifestations of anti-semitism and other forms of racial and national hatred and religious and racial prejudices of a similar nature' in 1959-60.[4] But an explicit

[1] 660 UNTS 195, reprinted in 5 ILM 352 (1966).

[2] Concerning the status of this norm as customary law, see Restatement of the Foreign Relations Law of the United States (Revised) §702 (Tent. Draft No. 6, vol. i, 1985). Regarding human rights instruments on discrimination, see generally Marie, *International Instruments Relating to Human Rights: Classification and Chart Showing Ratifications as of 1 January 1984*, 4 Human Rights L. J. 503, 522-4 (1984).

[3] 33 UN GAOR, Supp. (No. 18) at 108, 109, UN Doc. A/33/18 (1978) (a statement by the Committee on the Elimination of Racial Discrimination at the World Conference to Combat Racism and Racial Discrimination).

[4] Schwelb, *The International Convention on the Elimination of All Forms of Racial Discrimination*, 15 Int'l & Comp. L. Q. 996, 997 (1966); N. Lerner, The UN Convention on the Elimination of All Forms of Racial Discrimination 1 (1980).

reference to anti-Semitism was not included in the Convention as adopted.[5] Nor does it mention other specific forms of racism, except for apartheid, which is addressed in Art. 3, as well as in the Preamble. Nevertheless, anti-Semitism may be regarded as encompassed by the general prohibitions of racial discrimination stated in the Convention.[6] Although expressions of discrimination on ethnic grounds and on religious grounds are sometimes closely related,[7] the Convention does not prohibit religious discrimination. The intention, of course, was to make it the subject of separate instruments.[8]

The Convention drew its primary impetus from the desire of the United Nations to put an immediate end to discrimination against black and other non-white persons. Because of the strong political support of the African, Asian, and other developing States, top priority was given to the Convention by the organs involved in its preparation, that is the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Commission on Human Rights, the Economic and Social Council (ECOSOC), and the Third (Social, Humanitarian and Cultural Questions) Committee of the General Assembly. Although the Sub-Commission began working on it only in January 1964, the Convention was adopted with record speed on 21 December 1965 and entered into force on 4 January 1969.[9] It has been ratified by more States[10] than any other human rights treaty except for the Geneva Conventions of 12 August 1949 for the Protection of Victims of War.[11]

On the preparatory work of the Convention, see generally Schwelb, above, at 997-1000; N. Lerner, above, at 1-6; 2 Review of the Multilateral Treaty-Making Process, UN Doc. ST/LEG/SER.B/21 at 70-2 (Prov. edn. 1982).

[5] For the background, see N. Lerner, above n. 4, at 2, 68-73; Schwelb, above n. 4, at 1011-15.

[6] Schwelb, above n. 4, at 1014-15; N. Lerner, above n. 4, at 72.

[7] See below text accompanying nn. 104-6.

[8] The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted by the UN General Assembly on 25 Nov. 1981, by Res. 36/55, 36 UN GAOR, Supp. (No. 51) at 171, UN Doc. A/36/51 (1981). A convention on the subject is still far from completion.

[9] Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1984, at 99. UN Doc. ST/LEG/SER. E/3 (1985).

[10] A total of 124 States. 40 UN GAOR Supp. (No. 18) at 1, UN Doc. A/40/18 (1985).

[11] A total of 160 States. Int'l Rev. Red Cross, No. 242, Sept.-Oct. 1984, at 274. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 UST 3114,