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## REVIEW

Of Menno T. Kamminga and Martin Scheinin, *The Impact of Human Rights Law on General International Law* (Oxford University Press, 2009)

### MUCH ADO ABOUT NOTHING?

By AXELLE REITER\*

#### 1. Introduction

The book under review is the result of the work of the Committee on International Human Rights Law and Practice of the International Law Association on the impact of international human rights law on general international law, during the four years separating the 2004 Conference in Berlin, which entrusted the Committee with the task of preparing a report on the question, and the 2008 Conference in Rio de Janeiro, where its final report was adopted.<sup>1</sup> It takes roots in the debate between tenants of the ‘fragmentation’ or ‘unity’ of the international legal order and sides squarely with the latter by endorsing what it calls the ‘reconciliation’ view of the question. It recognises that the bearing of human rights on general international law is a two-way process. Yet, it focuses specifically on the influence that the norms instituting individual rights and obligations entrenched in international human rights law, international humanitarian law and international criminal law have on general public international law, as it is less documented than the more traditional contrary approach. In the process, it attempts to uncover the structural and substantive effects of the growing role that individuals and other non-state actors play on the international scene.

#### 2. Composition

The final report of the Committee was drafted on the basis of the various papers collected in the edited book under review and comments from other members of the Committee. Accordingly, the first chapter of the book includes a general introduction and background information to the report before presenting its main findings regarding the different aspects of general international law that it deems particularly affected by the human rights paradigm. The topics covered range from the structure of international obligations to an analysis of the traditional sources of international law - namely, international customs and treaties-, and from the relationship between international and domestic law and classical state prerogatives -like immunity, diplomatic protection and consular notification- to their responsibility for

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<sup>1</sup> International Law Association, *Report of the 73th Conference* (Rio de Janeiro, 2008).

internationally wrongful acts. The following contributions deal in a more detailed fashion with each of these matters in turn.

## 2.1 Structure and sources of international obligations

After the general introduction of its mandate, the report delves first into the question of the evolution of the structure of international obligations. In this regard, it concentrates on the development of two crucial notions; obligations *erga omnes* and peremptory or *ius cogens* norms. On one hand, obligations *erga omnes* are closely tied to the recognition by the International Court of Justice and the International Law Commission of the emergence of an international community imbued with values and interests distinct from those of its member states. On the other hand, the International Law Commission relies on the concept of *ius cogens* in order to trump state consent and establish a normative hierarchy in the international legal order. According to the report, the practical effects of both notions remain scant and cannot be attributed to the influence of international human rights law, even if it constitutes its material core.

Then, the report moves to the recent break in the formation of customary international law away from the theory of the two elements. It highlights the progressive reliance on deduction from fundamental principles in lieu and place of induction from state practice, as well as the emphasis on states declarations and professed intentions or the pronouncements of international bodies rather than their actual deeds. Although the International Court of Justice actually initiated this revolution, the preponderant role of human rights supervisory organs and international criminal tribunals into the redefinition of the concept cannot be neglected. As a result, the new approach has not infiltrated all areas of international law to the same extent and mostly rules over those associated with community interests.

Next, the report tackles three issues related to the law of treaties; namely, treaty interpretation, reservations and state succession. It underlines the general inadequacy of the 1969 Vienna Convention on the Law of Treaties to deal with multilateral agreements, chiefly those assorted of specific monitoring mechanisms. Firstly, human rights bodies tend to assert an 'exceptionalist' position in relation to treaty interpretation; which is not expressly foreseen in general international law. Then again, they have effectively applied methods listed in Article 31 of the Vienna Convention. In consequence, they have not shaped the field in any significant manner.

Secondly, international human rights law relies on the object and purpose test enshrined in the Vienna Convention to determine the permissibility of reservations. By opposition, it takes exception with the determination of their validity by states objections; a system which provides adequate guarantees for reciprocal engagements but cannot safeguard integral obligations. Instead, it entrusts supervisory organs with this task. The endorsement of this practice by the International Law Commission special rapporteur on reservations considerably affects the relevant international regime. Likewise, international human rights law departs from the usual regime governing the consequences of incompatible reservations by severing them from the bulk of the treaty. Subsequently, the instrument remains fully operative for the

reserving party without the benefit of the contentious reservation. However, several states expressly opposed this trend and the International Law Commission has not pronounced itself on the matter yet; leaving the question somewhat unresolved.

Thirdly, the 'clean slate' doctrine applicable for state succession in respect of treaties, with the exception of boundaries and other territorial regimes, has been challenged by human rights organs. In contrast, they suggest that the specificity of human rights instruments mandates that their protection is left unaffected by state succession and transferred with the territory. Here again, their views have not been formally endorsed in general international law. Hence, the actual outcome produced on the field appears uncertain.

## **2.2 State sovereignty and responsibility**

Traditionally, state sovereignty confers them several specific prerogatives and strongly weights over the interplay between international obligations and domestic law. Recently, international human rights law has mounted a systematic attack against each and every aspect of this principle, culminating in the idea of crimes of states. In general international law, states can choose the means by which they implement international norms domestically, provided that they comply with the duties they have undertaken. Conversely, the European and Inter-American Courts of Human Rights have assumed in several instances that their rulings have direct effect upon the national legal order and ordered the adoption of very precise measures; with variable results at the domestic level, depending on the countries involved. The sovereign immunity of states and foreign officials in front of municipal courts and tribunals has been similarly assailed from a human rights perspective; yet, without much success. This being said, the ongoing debate and some contrary decisions and dissenting opinions foretell that the overall balance might lean in the opposite direction in the future. Besides, human rights law has only impacted marginally, if at all, on the development of general international norms regarding diplomatic protection, the right to consular notification and the attribution of state responsibility.

By opposition, the notion of positive obligations developed in international human rights and humanitarian law has strongly permeated the case law of the International Court of Justice concerning such questions. In addition, the concept has been recognised in secondary rules of general international law, like the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, in relation to the violation of *ius cogens* obligations. Finally, the United Nations General Assembly and Security Council have recently recognised a duty for states to protect individuals against international crimes, whereas the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts obliges them to use available lawful means to end serious breaches of peremptory norms. While the term 'state crimes' introduced in a previous draft of the Articles has been eliminated from the final document, this entails that some international offences generate graver consequences.

## 2.3 Findings

The conclusions of the report are introduced by a *caveat* on the ongoing process of evolution undertaken by general international law. The following observations concede the somewhat mixed outcome of the enterprise in seven distinct points.

First, the report identifies the causes of the partial alteration of the *status quo* with the necessity to account for the growing importance of non-state actors and the relevance of the international community as a whole. Second, it observes that the transforming impact of human rights is actually not so much the product of specific legal rules than of the endorsement of a human rights approach by the International Court of Justice and the International Law Commission. Third, both organs have showed a marked reluctance to vindicate individual rights in cases of clashes with traditional state interests or prerogatives, leading to a rather patchy reception of the integration process. Fourth, the International Court of Justice, above all, merely acknowledges the emergence of concepts correlated to human rights without giving them a non-perfunctory role, in an attempt to circumvent hostile responses. Fifth, the International Law Commission has likewise adopted a rather modest stance to the question. Sixth, the influence of human rights in general international law should be divorced from the broader debate on the unity or fragmentation of the international legal order. In particular, the International Law Commission tends to ground the unity of international law in the Vienna Convention on the Law of Treaties, a multilateral agreement that is not particularly 'friendly' towards human rights concerns. The authors of the present report suggest that, on the contrary, human rights might ultimately constitute the core component of a unified international legal order and the main guarantor of the system's internal coherence. Seventh, the silent legal revolution resulting from the increasing impact of human rights on general international law effectively challenges the paradigmatic statism of the regime.

## 3. Contributions

The article by Scheinin contrasts five readings of the Vienna Convention on the Law of Treaties. First, under the textual positivist approach, the terms of the Vienna Convention would only apply to interactions between states parties and only in relation to the agreements signed after the entry into force of the Vienna Convention. Secondly, this non-retroactivity clause makes exception for the provisions that belong to general international law. In consequence, under the dogmatic approach, the Vienna Convention is considered as a codification of international customs by the International Law Commission, whose rules apply to all multilateral treaties, independent of its ratification. However, this leads to a dogmatic interpretation of the dispositions of the Vienna Convention and poses problems in cases of *lacunae*.

Thirdly, some assumptions in the Vienna Convention, like its focus on states interests and the delegation of the monitoring of treaty obligations to states rather than international supervisory bodies, fail to account for the non-reciprocal nature of law-making conventions; chiefly, including human rights treaties. A first way out of this conundrum consists in emphasising the *sui generis* character of such treaties, even if this

results in a fragmentation of the international legal order. Fourthly, instead of identifying human rights treaties with a special regime, they can be granted a constitutional status. Accordingly, they would constitute an embryonic global constitution of a substantive type. Building upon the notion of *ius cogens* in the Vienna Convention, it entails a more coherent and unified vision of the international legal system and allows sidestepping its erosion through fragmentation.

Fifthly, a last approach aims at reconciling the Vienna Convention with human rights treaties. It sees the Vienna Convention as a reflection of customary norms, an approximation of international customs that is subject to modification whenever the specificities of a treaty mandate it. Besides, some rules of the Vienna Convention allow for such exceptions. Scheinin favours the last two approaches and recommends using them complementarily, depending on the feasibility of the latter in the circumstances of the case in hand.

According to Christoffersen's contribution to the general principles of treaty interpretation, while it is generally assumed that the interpretation of human rights treaties is governed by specific rules, human rights supervisory bodies actually rely on accepted methods of interpretation. Focusing on the relevant case law of the European Court of Human Rights, the author puts forward that human rights law has not impacted substantially on general international law at the methodological level.

Following Boerefijn, the approach adopted by the United Nations treaty-bodies and the European Court of Human Rights has impacted on the ongoing work of the International Law Commission on treaty reservations, even if the International Law Commission seems most concerned with the interests of states parties than with those of the individual beneficiaries of the protected rights. This position of the International Law Commission clashes with its recognition of the non-reciprocal character of human rights conventions. In addition, the International Law Commission uses other avenues than the human rights supervisory bodies to invalidate reservations and mostly rely on the general rules of public international law rather than on the (in-)compatibility with the specific object and purpose of human rights instruments. As a result, it is difficult to determine the precise impact of human rights law on general international law regarding reservations, aside from the monitoring role of human rights supervisory bodies.

Kamminga explores the impact of human rights on state succession in respect of treaties. In contrast with the traditionally accepted clean slate doctrine, successor states are bound to respect the individual rights previously guaranteed under human rights treaties. Hence, the continuous applicability of rights devolves with the territory, even though confirmation by the succeeding state helps avoiding ambiguities. This constitutes a major exception to general international law rules on state succession, solely comparable to the exception concerning treaties establishing boundaries and other territorial regimes. It also implies that successor states cannot enter new reservations to human rights treaties.

Ryngaert and Wouters analyse the process of formation of customary international law. In matters related to community interests, the International Court of Justice has put

more emphasis on *opinio iuris* than actual state practice, at times even glossing over inconsistent practice; thereby, paving the way for an evolution of the customary formation process in the fields of international human rights and humanitarian law. The International Criminal Tribunal for the former Yugoslavia goes one step further down that road and considers that battlefield practice is methodologically irrelevant because inherently untrustworthy. Likewise, the study on customary international humanitarian law by the International Committee of the Red Cross attaches more importance to verbal acts and *opinio iuris*, as well as to its own official statements, than to actual operational practice.

On one hand, this ‘modernist positivist’ approach is informed by ideological considerations and value preferences, like any alternative methodology. In addition, the ensuung move towards iusnaturalism undermines legal certainty. On the other hand, the classical positivist approach is grounded in a similarly biased vision and faces difficulties in accounting for the legal recognition of human rights. Incidentally, several sources of international law are divorced from state practice; chiefly, *ius cogens* norms and general principles of either international law or domestic constitutional law. Finally, emphasis on *opinio iuris* and states verbal commitments might entail a stronger attachment to consensualism than reference to inconsistent state practice.

The current tendency to focus on multilateralism and obligations towards the international community as a whole, *in lieu et place* of bilateralism and reciprocal obligations, involve relying on deduction and selective practice in order to bring forth moral conclusions, instead of inductively deriving customary rules from actual state actions. As a result of the intensification of the former process, the ‘modernist positivist’ conception will increasingly permeate other areas of international law; hence, largely impacting on the development of general international law.

The contribution of Sivakumaran on the structure of international obligations concludes that human rights norms have been central to the move away from bilateralism to community interests and the creation of a hierarchy of norms at the international level, respectively through the notions of obligations *erga omnes* and *ius cogens*. This shift totally restructures general international obligations. More specifically, it leads to such fundamental corolaries as the invalidity of inconsistent treaty provisions, or Security Council resolutions, and to specific consequences at the level of state responsibility.

Following Rensmann, whereas human rights breaches have not yet been entrenched as a general exception to the traditional immunity of states and their officials, international human rights law has contributed to the evolution from an absolute understanding to the current restrictive conception of immunity. In addition, contemporary attempts to further erode the traditional rules impact on the development of general international law in this direction.

The articles by Cerna and Pisillo Mazzeschi both deal with diplomatic protection and, more precisely, with the right to consular notification. The traditional conception that the law on diplomatic protection and the treatment of aliens only concerns interstate relations has been under attack from three fronts, by the widening of the scope and



public nature of international law, as well as of the holders and addressees of international rights and obligations.

In this respect, the Inter-American Court and Commission of Human Rights consider the right to notification of the right to consular assistance an integral part of the minimum due process guarantees required for a fair trial and, in capital cases, of the right to life of foreign detainees. In the process, they create a new human right to consular notification. The International Court of Justice has adopted a more cautious attitude and has condemned offenders for violating the rights of the national states rather than those of individual foreign prisoners. On the other hand, the International Court of Justice and the International Law Commission seem to include human rights in the material scope of the law on diplomatic protection.

Accordingly, international norms on the treatment of aliens attribute rights simultaneously to individuals and national states. As a result, they regulate trilateral rather than bilateral relations; which constitutes an important change in the perception of these legal rules. Even if states are not obliged to protect their nationals abroad, the conception of diplomatic protection as a means to forward the respect of individual rights constitutes a decisive contribution to the evolution of general international law. Besides, the process is progressively developing and the Court of First instance of the European Communities has already consecrated the duty for member states to intervene in order to protect the rights of their citizens deprived of judicial remedies abroad.

In his study on state responsibility, McCorquodale suggests that the International Law Commission treats human rights as a special regime inside the frame of general international law. States are held responsible for the acts and omissions of their organs and officials. In addition, the actions of private persons and entities are attributed to states whenever governments endorse them or their exercise basically amounts to public functions. In this respect, human rights supervisory bodies have confirmed and reinforced the general principles of state responsibility. The International Court of Justice has expressly rejected the lowering by the International Criminal Tribunal for the former Yugoslavia of the effective control threshold required for the purposes of attribution under general international law, although it acknowledges the possibility of a lower test of control under international human rights law. Still, the impact of human rights on general international law concerning the issue of attribution remains minimal. In contrast, in relation to the international obligations of states, the International Court of Justice and the International Law Commission have recognised the development of positive obligations in the human rights case law, both territorially and extra-territorially; considerably affecting the nature and extent of states' obligations under general international law. Likewise, states' obligations towards individuals have been extended to cover all persons under their jurisdiction, independently of their nationality.

#### **4. Assessment and conclusions**

The actual challenge faced by the Committee on International Human Rights Law and Practice of the International Law Association in defining the actual impact of human rights norms on the development of general international law cannot be overestimated.



The report explores nearly all aspects of general international law and tackles many, as yet, unresolved debates and controversies. Besides, the International Law Commission is still involved in the codification of several of the questions it investigates. As such, its task might justly appear Promethean, explaining some of the unavoidable shortcomings of the end product. In this view, the book under review provides a badly needed systematic general introduction to the many issues lying at the intersection between the two ensembles of norms. It usefully summarises and confronts the contrasted positions espoused by the International Court of Justice and the International Law Commission, on one hand, and human rights supervisory bodies and international criminal tribunals, on the other hand.

Unfortunately, the actual output of the report and the book under review does not fully meet the high standards set by its ambitions. While the seven points elaborated upon in the report's findings and relevant *caveat* encapsulate the essence of the phenomenon and provide an interesting explanation for the contemporary evolution of the international legal order, the more specific conclusions adopted in relation to the various topics of international law under examination are often too modest; falling short of accounting for the actual impact of human rights *sensu largo* and community interests on general international law. There are at times discrepancies between the report's findings and the contributions that it is meant to distill and, albeit to a lesser extent, between overlapping contributions on similar subject matters. In addition, in spite of introductory claims to the contrary, the position it occupies in the discussion on the 'fragmentation' or 'unity' of the international legal order is far from obvious either. As a result, the general clarifying aim is all but attained. Moreover, the depth of the analysis and the significance of the ensuing findings vary widely from one contribution to the next. Also, they follow different approaches and methodologies; which further impedes an overall view of the question.

The divergence of views is especially noticeable in relation to the structure of international obligations, the process of formation of customary international law, the immunity of states and their officials, the law of diplomatic protection and the right to consular notification; where the individual underlying contributions go much farther in acknowledging a dominant role of human rights than the final report does. Subsequently, the report underestimates the function of obligations *erga omnes* and *ius cogens* as a unifying factor behind the evolution of the international system from bilateralism to multilateralism; which constitutes the main impact of human rights norms on general international law.<sup>2</sup> In contrast to the findings of the underlying paper and the views of the broader doctrine, it similarly minimises the effective revolution in the process of formation of customary international law. In this regard, the extent of the departure from the traditional theory of the two elements has led some authors to wonder whether one could speak of a new source of international law grounded in the preponderant role of the international judge in the definition of the substance of

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<sup>2</sup> See: P-M Dupuy, 'L'unité de l'ordre juridique international, Cours général de droit international public', (2002) 297 Recueil des Cours de l'Académie de Droit International de La Haye 9; P-M Dupuy, 'The Unity of Application of International Law at the Global Level and the Responsibility of Judges' (2007) European Journal of Legal Studies 1; B Simma, 'From Bilateralism to Community Interest in International Law', (1994) 250 Recueil des Cours de l'Académie de Droit International de La Haye 217.

customs, on the basis of normative rather than strictly positivist premises.<sup>3</sup> Likewise, the report considerably plays down the progressive and ongoing erosion of the traditional prerogatives of state sovereignty.

Finally, the approach adopted by some of the underlying contributions also raises questions. In particular, the want of a systematic and thorough analysis of the position of international organs on the interpretation of treaties is striking. On one hand, Scheinin's exposition of the five possible readings of the Vienna Convention on the Law of Treaties has the merit to present a critical overview of the doctrinal debates. Yet, he mostly grounds his vision of the Convention on purely normative considerations and does not delve in any details into the positions of international organs on the question. On the other hand, Christoffersen's article on the general principles of treaty interpretation limits itself to a study of the case law of the European Court of Human Rights and does not look at the methods used by other human rights supervisory bodies and international criminal tribunals, both of which are usually considered to rely on more proactive interpretative techniques. As a result, the conclusions drawn in this respect are necessarily incomplete.

At another level, the contribution by Ryngaert and Wouters on the process of transformation of customary international law departs from the classical positivist position that would be expected from a paper meant to describe the current state of the field. Unlike the final report, it recognises the amplitude of the ongoing shift towards natural law. However, the authors avowedly endorse the *iusnaturalist* turn towards what they somewhat ambiguously call the 'modernist positivist' approach, on account of the necessity to better protect and promote human rights, though at the cost of doctrinal rigor and legal certainty. Nonetheless, this move does not only entail innocent consequences in the framework of criminal trials, in which it was precisely developed. One cannot fail to notice the advantages of this type of casual approach to the identification of customary norms in the context of classical human rights litigation. By opposition, overtly progressive methods of interpretation produce truly problematical results when adopted in the frame of trials involving the determination of individual criminal responsibility for grave breaches of international law, likely to be sanctioned by extremely heavy sentences. In effect, so-called 'modernist positivism' actually clashes with the human rights paradigm instead of enhancing it:<sup>4</sup> it undermines the prohibition

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<sup>3</sup> See: N Arajärvi, 'The Role of the International Criminal Judge in the Formation of Customary International Law', (2007) *European Journal of Legal Studies* 1, 30; I Bantekas, 'Reflections on Some Sources and Methods of International Criminal and Humanitarian Law', (2006) *International Criminal Law Review* 129-132.

<sup>4</sup> See, in this regard, for a critical assessment of the new method of customs' formation, in particular, and the authoritarian conception of justice that underlies such teleological approaches to criminal law, more generally: A. Fichtelberg, 'Liberal Values in International Criminal Law', (2008) *Journal of International Criminal Justice*, 18-9; A. Guellali, *Droit international pénal, droit humanitaire et droits de l'homme* (PhD Thesis, Florence, European University Institute, 2008) 362-364; T. Hoffmann, 'The Gentle Humanizer of Humanitarian Law', in C. Stahn and L. Van Den Herik, *Future Perspectives on International Criminal Justice* (Asser, The Hague 2010) 58-80; D. Robinson, 'The Identity Crisis of International Criminal Law', (2008) *Leiden Journal of International Law* 925-963; D. Robinson, 'The Two Liberalisms of International Criminal Law', in C. Stahn and L. Van Den Herik, *Future Perspectives on International Criminal Justice* (Asser, The Hague 2010) 115-160; G. Sluiter and A. Zahar, *International Criminal Law* (Oxford University Press, Oxford 2008) 97, 105; J. Verhoeven, 'Article 21 of the Rome Statute and the Ambiguities of Applicable Law', (2002) *Netherlands Yearbook of International Law* 22.

of retroactive offences, a fundamental right that cannot be derogated from even in times of war or public emergency, and impedes the development of the rule of law at the global level, by effectively canceling out the principle of legality.

To sum up, the book under review constitutes an interesting contribution to the analysis of the metamorphosis currently undergone by international law, from a fragmented set of bilateral and reciprocal primary obligations into a fully integrated legal order, based on a hierarchy of norms grounded in the interests of the international community as a whole. Besides, it correctly identifies this transformation with the process of substantive unification of international law. However, it does not always recognise the logical conclusions that obtain from these bold premises and often underplays actual developments that are already observable in the practice of international organs; ultimately leaving the reader with an impression of 'much ado about nothing'.