

# INTERNATIONAL LAW ASSOCIATION

## TORONTO CONFERENCE (2006)

### INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE

*Members of the Committee:*

Professor Martin Scheinin (Finland): *Chair*  
Professor Andrew C Byrnes (Australia): *Co-Rapporteur*  
Professor Menno T Kamminga (Netherlands): *Co-Rapporteur*

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Mr Branislav Srdanovic (Denmark)  
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### INTERIM REPORT ON THE RELATIONSHIP BETWEEN GENERAL INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW

#### Introduction

At the Association's 2004 Berlin Conference the Executive Council entrusted the Committee with the task of preparing a report on the relationship between general international law and international human rights law. This is an interim report on the Committee's progress so far. It was prepared by co-rapporteur Menno Kamminga and approved by the Committee. The Committee plans to submit its final report on this topic to the Association's 2008 Conference in Brazil.

The Committee began its work on the new theme assigned to it at a workshop held in Maastricht from 27-28 January 2006. The session was hosted by the Maastricht Centre for Human Rights and attended by the following members and alternate members of the Committee: Martin Scheinin (Finland, chair), Andrew Byrnes (Australia, co-rapporteur), Menno Kamminga (Netherlands, co-rapporteur), Ineke Boerefijn (Netherlands), Jonas Christoffersen (Denmark), Matthias Herdegen (Germany), Mahulena Hofmann (Germany), Yuji Iwasawa (Japan), Robert McCorquodale (Australia), Riccardo Piscillo Mazzeschi (Italy) and Ralph Wilde (United Kingdom).

### Preliminary papers presented

At the Maastricht workshop the following presentations were made:

*Martin Scheinin* presented a paper entitled *Human Rights Treaties and the Vienna Convention on the Law of Treaties – Conflicts or Harmony*. The paper distinguished five alternative approaches to the study of the relationship between the VCLT and human rights treaties: the positivist approach, the dogmatic approach, the fragmentation approach, the constitutional approach and the reconciliation approach. The paper concluded by expressing a preference for a combination of the constitutional approach and the reconciliation approach. Many of the seeming tensions between the VCLT and the evolving practice under human rights treaties could be reconciled, inter alia by acknowledging that the practice under human rights treaties also represents subsequent practice in respect of the VCLT itself. However, in some areas the reconciliation approach might prove insufficient, due to the focus on inter-state relations in the VCLT, as compared to the construction of human rights treaties as binding upon states for the protection of third-party beneficiaries.

*Ineke Boerefijn* presented a paper entitled *Reservations to Human Rights Treaties*. The paper concluded that the VCLT provisions concerning reservations are applicable to human rights treaties but that there are good reasons to take into account the special nature of human rights treaties. It pointed out that determining the permissibility of reservations and the consequences of such a finding fall within the sphere of competence of the human rights treaty bodies.

*Robert McCorquodale* presented a paper entitled *State Responsibility and Human Rights*. It argued that international human rights law had pushed the boundaries of state responsibility law both in relation to attribution to a state (by including actions by state organs and officials acting outside their official capacity, as well as actions of non-state organs and non-state officials if they are controlled by the state) and the extent of a state's obligations giving rise to responsibility (including extraterritorial obligations).

*Ralph Wilde* made an oral presentation entitled *Human Rights Obligations versus Obligations under the UN Charter*. It addressed the question whether Article 103 of the UN Charter empowers the Security Council to authorize states to modify their obligations under human rights treaties.

*Jonas Christoffersen* presented a paper entitled *The (Special) Interpretation of International Human Rights Treaties*. It suggested various issues on which the Committee might concentrate its future work, including the difference between ordinary and special means of interpretation and the principle of proportionality.

*Menno Kamminga* presented a paper entitled *Human Rights Treaties and State Succession*. It argued that successor states were automatically bound by human rights treaties binding on predecessor states. Individuals could not be deprived of the rights afforded to them by a human rights treaty as a result of state succession. Human rights treaties were accordingly in the same league as treaties establishing boundaries and other territorial regimes.

*Ricardo Pisillo Mazzeschi* presented a paper entitled *Recent Decisions of the ICJ (LaGrand, Avena) and the IACtHR (Advisory Opinion OC-16/99): Some Reflections on their Impact on the General International Law of Human Rights*. It suggested that these decisions helped to clarify the role of the individual in contemporary law by broadening the concept of international community to individuals and other non-state entities; by devaluing the concept of international personality; and by softening dualistic conceptions of the relationship between international and national law.

*Mahulena Hofmann* made an oral presentation entitled *Human Rights Treaties as Directly Applicable Law*, focusing on the experience of states in Central and Eastern Europe.

*Christina Cerna* who was unable to attend the workshop, submitted a paper entitled *The Right to Consular Access as a Human Rights*. It compared the *Breard*, *LaGrand* and *Avena* judgments of the International Court of Justice with *Advisory Opinion OC-16/99* of the Inter-American Court of Human Rights.

At the invitation of the officers of the Committee, Professor *Dinah Shelton* (United States) who is not a member of the Committee, submitted a paper entitled *Are There Differentiations Among Human Rights? Jus Cogens, Core Human Rights, Obligations Erga Omnes and Non-Derogability*. The paper identified five rights that simultaneously belong to these four categories: the right not to be discriminated, the right to life, the right to be free from slavery, the right to be free from torture, and the judicial protections necessary to enjoy the protection of other rights. These rights may not be suspended or subordinated to other rights and they cannot be subject to reservation.

### **Preliminary findings**

On the basis of its Maastricht workshop the Committee presents the following preliminary findings related to the direction of its ongoing study and its programme of work towards the 2008 ILA Conference.

1. In interpreting the scope of its study the Committee decided to adopt a broad concept of international human rights law, i.e. encompassing not only international human rights law *stricto sensu* but any international norm capable of conferring rights directly on individuals including but not limited to international humanitarian law, minority rights law and international labour law.
2. The Committee began by noting that there was increasing interaction between general international law and international human rights law. The interaction occurred in particular when international human rights courts, human rights treaty bodies and international criminal courts apply general international law but also when bodies established to interpret general international law - such as the International Court of Justice and the International Law Commission – apply international human rights law.
3. The Committee discussed two broad, alternative approaches to the study of the relationship between general international law and international human rights law. The first approach was to emphasize the special, distinctive nature of international human rights law and to assume that the rules and principles of general international law are not applicable to human rights law. This was labelled the ‘fragmentation’ approach. The other approach was to take as the point of departure that international human rights law is part of general international law and that the two branches of law should be reconciled with each other as much as possible. This was labelled the ‘reconciliation’ approach. The Committee unanimously agreed that the reconciliation approach was preferable to the fragmentation approach.
4. The Committee noted that international human rights law and the values on which it is based serve as a driver of change vis-à-vis general international law. They help to ‘humanize’ international law, i.e. to gradually transform it from classic inter-state law reflecting only the interests of states into the law of the world community reflecting the interests of a wider variety of actors. An example of this process was the tendency – still far from completed – to replace the system of diplomatic protection based on the international minimum standard by a system of inter-state enforcement based on the erga omnes character of international human rights standards. Other examples included the development of the law on treaty reservations, the effect of international law in domestic law and the absence of the element of damage from the definition of an internationally wrongful act.
5. The Committee noted that certain human rights standards, including the prohibition of genocide, the right to be free from slavery, and the right to be free from torture, have superior status under general international law. The existence of peremptory norms of general international law was recognized recently by the International Court of Justice in *Congo v. Rwanda*. These norms override conflicting norms of other origin. They may not be suspended and reservations to treaty provisions containing them are not permitted. They may therefore be regarded as evidence of the hierarchical nature or constitutionalization of international law.
6. While some special rules apply with respect to international human rights law (for example, with regard to treaty interpretation, treaty reservations and state succession to treaties) the specificity of

these rules should not be overestimated. Many of the characteristics of international human rights law that may be considered 'special' are in fact provided for under general international law and therefore are not as distinctive and special as proponents of a specificity thesis might assume. For example, the list of peremptory norms is not limited to human rights standards but also includes the prohibition of aggression. The principle of automatic continuity of obligations in case of state succession applies not only to human rights treaties but also to treaties establishing boundaries and other territorial regimes. Further, also other than human rights treaties may establish monitoring bodies the functioning of which will affect the application of rules concerning treaty interpretation.

7. The Committee also noted that other specialized areas of international law such as international trade law and international environmental law gave rise to the same question of whether special rules applied in those areas. It was suggested that a comparison of the 'specialized' application of selected general rules of international law in one or other of these fields (e.g. the rules of treaty interpretation in WTO dispute settlement procedures) might be useful in exploring the nature of the application of general rules in the field of human rights.
8. With regard to its future work, the Committee agreed to work towards a succinct doctrinal statement on the relationship between general international law and international human rights law that will be proposed for adoption by the Association's General Conference in 2008. A Committee meeting in order to prepare a draft-statement will be held in late 2007 or early 2008. In addition an edited volume of papers emanating from the Committee's project will be published in 2008. Revised versions of the papers produced so far will be included in this volume. It was agreed that papers by members or alternate members of the Committee on subtopics not yet covered so far (such as remedies) are still very welcome. The officers of the Committee are also grateful for any feedback (including references to literature) from anyone else interested in the theme under consideration.