Chapter One

The Nature and Characteristics of International Human Rights Treaty Law

Introduction

We open this book with a discussion of the nature and characteristics of international human rights treaty law. International human rights treaty law situates itself within the broader corpus of international treaty law, notably the Vienna Convention on the Law of Treaties (1969) and applicable international customary law. However, international treaty law in general has received widespread treatment and, in this chapter, we shall focus on the views of the International Court of Justice and international judicial tribunals on the nature of international human rights treaty law, the primacy of international human rights treaty law, the nature of treaty obligations, treaties and international customary law, treaties and general principles of international law, jus cogens rights and rights that may never be suspended or abrogated, and the progressive development of international human rights treaty law.

I. International Judicial Organs and the Nature of International Human Rights Treaty Obligations

In its Advisory Opinion Concerning Reservations to the Convention on the Prevention and Punishment of Genocide, the International Court of Justice (ICJ) provided important insights into the nature of international human rights treaty obligations that would be applicable to most of the human rights treaties in existence today. The ICJ, advancing the doctrine of the common interest of all humanity in the observance of international human rights treaty provisions, affirmed:

“The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as a ‘crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. The first consequence arising from this concep-
tion is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required ‘in order to liberate mankind from such an odious scourge’ (Preamble of the Convention). The Genocide convention was therefore intended by the General Assembly and by the Contracting Parties to be definitely universal in scope. It was in fact approved on December 9th, 1948 by a resolution which was unanimously adopted by fifty-six States. The objects of such a Convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a Convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups, and on the other to confirm and endorse the most elementary principles of morality. In such a Convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the raison d’être of the Convention. Consequently, in a convention of this type, one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.”

The International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of Kupreskic and others expressed similar views:

“The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called ‘humanisation’ of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of international humanitarian law over the last century. After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy. The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals qua hu-

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