Chapter 8

Conclusions and Implications of Legalisation: A Special Regime?

I. Introduction

Legal theory and practice suggest that law, is by nature, indeterminate. This characteristic is a virtue that in other respects can be a frustrating handicap. Writing in relation to international law, Martti Koskenniemi has argued, rightly, that indeterminacy is an integral part of the law that contributes to the fulfillment of the law’s purposes.\(^1\) Indeterminacy in international human rights law is therefore to be seen in the same light. Concerning its indeterminacy, international human rights has been moulded by its provenance in international law, by its appropriation by diverse intellectual disciplines as well as the tension between its normative promises on the one hand and the daily reality on another.\(^2\) In these circumstances, initiatives, including scholarly interrogation of the scope of international human rights law is valuable. A clear appreciation of the legal character of international human rights makes a useful contribution towards understanding the applicable law and what to expect from it in reality. Furthermore, a good knowledge of the legal character helps to define useful boundaries or interrelationships with other legal and non-legal disciplines.

This chapter draws some broad conclusions concerning the legal nature of international human rights. In addition to the benefits of clarity, the analyses in this study do raise the incidental but nevertheless important question of whether the legal characterisation of international human rights fuels the claim to a ‘special regime’ status. This is an important question that may throw some light on the debate concerning the so-called fragmentation of international law.\(^3\)

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2 See supra ch. 1.
II. Broad Conclusions

The study has confirmed that there is indeed a distinct legal dimension to international human rights. This may not come as a surprise particularly to the legal community, but this is not something to be taken for granted in view of the long shadow that politics casts over international law generally and over human rights in particular. The distinct legal approach to international human rights has now gained in importance as it co-exists and relates quite well with the other approaches to the subject without being overwhelmed. The legal nature of international human rights is the product of long and slow evolution alongside mainstream international law. Both parent and sub disciplines therefore continue to share some common principles and objectives, although quite naturally, they do differ in certain key areas of emphasis. In this respect, it is important to register that as with any legal regime, international law and its human rights sub-system continue to evolve and their future outlook and landscape may be completely different from what we know today.

However, the uncertainty about the future legal landscape of international human rights law should not be exaggerated because the law has developed secure foundational principles and objectives upon which its continuing evolution is likely to be based. The legal order of the United Nations from which the modern international human rights strategy is hewn, by inducting important values concerning the rule of law into international law and human rights, represents an important source of continuing inspiration. Its ideals of equality and co-operation among States as well as its determination to maintain peace and security for example will continue to influence the evolutionary trajectory of its institutional objectives, including the promotion and protection of human rights.

The current legal character of international human rights bears some important characteristics such as its overwhelming development through treaties, often situated in the context of inter-governmental organizations of which there are a few.\(^4\) This factor of diverse institutional platform can prove to be significant because of the institutions’ contributions to the governing principles of human rights by responding to different social or political concerns. Despite these differences, it is reassuring that there is a growing consensus on the emerging standards.

\(^4\) The United Nations, the Council of Europe, the African Union and the Organisation of American States are the main examples.