PART I

Evolution and trends of international labour law

CHAPTER 1

Introduction to International Law

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1. Introductory remarks

Like domestic law, international law covers a wide range of subjects such as security, diplomatic relations, trade, labour, culture and human rights. It differs from domestic legal systems in a number of substantial ways.

In international law there is no single legislature, nor is there a single enforcing institution. International law can only be established with the consent of nation-states and is primarily dependent on self-enforcement by those same states. In cases of non-compliance, there is no supra-national institution; enforcement can only take place by means of individual or collective actions of other states.

This consent, from which the rules of international law are derived, may be expressed in various ways. The obvious way is an explicit treaty, imposing obligations on the states parties. Such 'treaty law' constitutes a dominant part of international law. In addition to treaties, other international documents and agreements constitute guidelines for the conduct of states, although they may not be legally binding. Such a consent may also be inferred from established and consistent practice of states in conducting their relationships with each other.

In this regard, the sources of international law are many, but the internationally accepted classification of sources of international law is formulated in Art. 38 of the Statute of the International Court of Justice. These are:

a) international treaties, whether general or particular;
b) international custom, as evidence of general practice accepted as law;
c) the general principles of law recognised by civilised nations;
d) subsidiary means for the determination of rules of law such as judicial decisions and teachings of the most highly qualified publicists.

2. International treaties

International treaties are contracts signed between states. They are legally binding and impose mutual obligations on the states that are party to any treaty (states parties). The main specificity of human rights treaties is that they impose obligations on states about the manner in which they treat all individuals within their jurisdiction. Even though the sources of international law are not hierarchical, treaties have some degree of primacy. More than forty major international treaties for the protection of human rights have been adopted. International human rights treaties bear various titles, including 'covenant', 'convention' and 'protocol'; but what they share are the explicit indication of states parties to be bound by their terms.

Human rights treaties have been adopted at the universal level (within the framework of the United Nations and its specialised agencies such as the ILO) as well as under the auspices of regional organisations, such as the Council of Europe (CoE), the Organisation of American States (OAS) and the African Union (AU) (formerly the Organisation of African Unity – OAU). These organisations have greatly contributed to the codification of a comprehensive and consistent body of human rights law.

3. Universal treaties for the protection of human rights

Human rights had already found expression in the *Covenant of the League of Nations*, which led, *inter alia*, to the creation of the International Labour Organisation. At the San Francisco Conference in 1945, the UN Charter clearly speaks of 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion' (Art. 1, para. 3). The idea of promulgating an 'International Bill of Rights' was developed immediately afterwards and led to

the adoption in 1948 of the *Universal Declaration of Human Rights* (UDHR).

The UDHR, adopted by a resolution of the United Nations General Assembly (UNGA), although not a treaty is the earliest comprehensive human rights instrument adopted by the international community. On the same day that it adopted the Universal Declaration, the UNGA requested the UN Commission on Human Rights to prepare, as a matter of priority, a legally binding human rights treaty. Wide differences in economic and social philosophies hampered efforts to achieve agreement on a single instrument, but in 1954 two draft covenants were completed and submitted to the UNGA for consideration. Twelve years later, in 1966, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) were adopted, as well as the *First Optional Protocol to the* ICCPR, which established an individual complaint procedure. The Covenants and the Optional Protocol entered into force in 1976. A *Second Optional Protocol to the ICCPR*, on the abolition of the death penalty, was adopted in 1989 and entered into force in 1991.

The 'International Bill of Human Rights' consists of the UDHR, the ICESCR and the ICCPR and its two Optional Protocols. The International Bill of Rights is the basis for numerous conventions and national constitutions.

The ICESCR and the ICCPR are key international human rights instruments. They have a common Preamble and Art. 1, in which the right to self-determination is defined. The ICCPR primarily contains civil and political rights.[1] The supervisory body is the Human Rights Committee. The Committee provides supervision in the form of review of reports of states parties to the Covenant, as well as decisions on inter-state complaints. Individuals alleging violations of their rights under the Covenant can also bring claims against states to the Committee provided the state concerned is party to the First Optional Protocol.

The ICESCR consists of a catalogue of economic, social and cultural rights in the same vein as the 'social' part of the UDHR.[2] Supervision is

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[1] The *UN International Convenant on Civil and Political Rights* (ICCPR) makes the case that worker rights are human rights. The articles most relevant to workers affirm: a) the right to equality between men and women in the workplace; b) freedom from inhumane or degrading treatment or punishment; c) freedom of association; d) the right to peaceful assembly.

[2] The *UN International Covenant on Economic, Social and Cultural Rights* (ICESCR), especially artt. 6, 7, 8, and 10, focuses on the right to work. People have the right to: a) earn a living from their work and get a fair wage; b) have working conditions that are

provided in the form of reporting by states parties to the Covenant and review of state reports has been entrusted by the UN Economic and Social Council (ECOSOC) to the Committee on Economic, Social and Cultural Rights. An Optional Protocol establishing a system of individual and collective complaints was adopted on 10 December 2008.

While the United Nations does not deal with *labour matters as such*, and recognizes the ILO as the only specialized agency responsible for taking appropriate action for the accomplishment of the purposes set out in its Constitution, some UN instrument of more general scope cover labour matters.

A number of provisions concerning labour matters are contained in the *International Covenant on Economic, Social and Cultural Rights* and *the International Covenant on Civil and Political Rights*, which are legally binding human rights agreements. Both Covenants were adopted in 1966 and entered into force 10 years later, making many of the provisions of the *Universal Declaration of Human Rights* effectively binding.

Because of their comprehensive nature, the Covenants are drafted in general terms, and the various rights relating to labour issues are dealt with in a less detailed mannare as compared to the ILO Conventions and Recommendations.

The UN General Assembly has also adopted a number of legally binding Conventions concerning labour matters. The most important ones are the *Convention on the Elimination of All Forms of Racial Discrimination* (1969), *Elimination of all Forms of Discrimination against Women* (1979), *Rights of the Child* (1989), *Status of the Refugees* (1954) and *Status of Stateless Persons* (1960).

The Conventions may be divided into three groups:

a) Conventions elaborating on specific rights, *inter alia*:
   - The Convention on the Prevention and Punishment of the Crime of Genocide (1948);
   - ILO Convention No. 98 concerning the Right to Organise and to Bargain Collectively (1949);
   - The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984);
   - International Convention for the Protection of All Persons from Enforced Disappearance (2006).

b) Conventions dealing with certain categories of persons which may need special protection, *inter alia*:

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safe, healthy, and dignified; c) be free from discrimination at work, including the right to equal pay for equal work; d) have paid holidays; e) organize and bargain collectively.

- The Convention relating to the Status of Refugees (1951), and the 1967 Protocol thereto;
- The Convention on the Rights of the Child (1989);
- Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (2000);
- Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000);
- ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989);
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);
- The Convention on the Rights of Persons with Disabilities (2006).

c) Conventions seeking to eliminate discrimination:
- ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation (1958);
- UNESCO Convention against Discrimination in Education (1960);
- The International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- The International Convention on the Suppression and Punishment of the Crime of Apartheid (1973);
- The Convention on the Elimination of All Forms of Discrimination against Women (1979) and its Optional Protocol (2000).

4. Trade agreements and international law

Trade agreements create the rules by which enterprises and governments do business across borders. Most trade agreements limit the restrictions governments can place on enterprises. Most of the times, laws that protect people and the environment are seen as obstacles to free trade. Sometime, trade agreements and membership requirements of trade organizations stop governments from making and enforcing policies that protect the environment and public health. The World Trade Organization (WTO) sets the standards for global trading practices and regulates national trade policies. If a country is a member of the WTO, its national laws must follow WTO trade rules.

Workers are not fairly represented in the WTO. International trade unions have requested that the WTO adopt ILO labour standards and promote labour rights by including a “worker rights clause” within the global trade system. The WTO has so far refused to do this.

Some trade agreements address labour rights. For example, in 1992 the *North American Free Trade Agreement* (NAFTA) became the first trade agreement to include an agreement on labour, the *North America Agreement on Labour Cooperation* (NAALC). Unfortunately, it has not been effective. The NAALC did not establish an international court or monitoring system to ensure the implementation of labour standards. It did not require each participating country to improve its labour law. And it has not promoted or protected workers' rights.

Trade agreements do occasionally improve occupational health in countries where labour and occupational health laws are lacking. In Peru, for example, a trade agreement with the USA promoted a law requiring workplaces to form joint health and safety committees. But the agreement did not include recognition of the most basic labour right that workers could organize and bargain collectively.

The UN's Principles on Business and Human Rights were developed to protect workers from the business rules in international trade that put "profits over people." These principles put pressure on companies to respect international human rights and follow the labour laws of the country where the factory is located as well as the labour standards of the international brand's home country. However, it has been difficult to implement these principles, because the Principles on Business and Human Rights have no enforcement mechanism.

5. Regional instruments for the protection of human rights

The UN Charter encourages the adoption of regional instruments for the establishment of human rights obligations, many of which have been of crucial importance for the development of international human rights law.

American instruments. In the Americas, only few of the recently established regional organizations have adopted labour law instruments.

The North American Free Trade Area (NAFTA) has the *North American Agreement on Labour Cooperation* (NAALC), and the Caribbean Community and Common Market (CARICOM) has an *Agreement on Social Security* concerning the following social security payments: invalidity pensions, disablement pensions, old age or retirement pensions, survivors' pensions, and death benefits in the form of pensions.

The *American Convention on Human Rights* was adopted in 1969, under the auspices of the Organisation of American States (OAS). This Convention has been complemented by two protocols, the 1988 *Protocol of San Salvador on economic, social and cultural rights* and the 1990 *Protocol to abolish the death penalty*.

Other Inter-American Conventions include the *Convention to Prevent and Punish Torture* (1985), the *Convention on the Forced Disappearances of Persons* (1994), the *Convention on the Prevention, Punishment and Eradication of Violence against Women* (1995) and the *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities*.

However, the instruments of the OAS are still the main source of international labour law in the region. The above mentioned *American Convention on Human Rights* contains in particular provisions concerning freedom of association and forced labour. This Convention entered into force in July 1978. Its *Additional Protocol in the Area of Economic, Social and Cultural Rights*, which was signed in 1988, deals in a more specific way with such rights as right to work, just, equitable, and satisfactory conditions of work, trade union rights and rights to social security.

The side agreement of the NAFTA, the NAALC, encompasses the following rights: freedom of association and protection of the right to organize, the right to bargain collectively, the right to strike, prohibition of forced labour, labour protections for children and young persons minimum employment standards, elimination of employment discrimination equal pay for women and men, prevention of occupational injuries and illnesses, compensation in cases of occupational injuries and illness and protection of migrant workers.

The *Treaty of Asuncion*, which establishes the Southern Common Market does not contain any express mention of social and labour matters, but the preamble sets out a generic objective of accelerating development processes with social justice. Nevertheless, in the operative agreements, which they adopted later on to ensure full compliance with the objectives established in the Treaty during the transition period, the governments proceeded to create a working sub-group 10 to take up matters dealing with labour relations, employment and social security.

African instruments In Africa, both of the recently established regional organizations, the Southern African Development Community (SADC) and the Common Market of Eastern and Southern Africa (COMESA), have human rights matters contained in their treaties.

In 1981, the Organisation of African Unity, now the African Union, adopted the *African Charter on Human and Peoples' Rights*, which includes the right to work under equitable and satisfactory conditions, the right to equal pay for equal work and the right to free association. Three protocols to the Charter have been adopted: the *Additional Protocol on the Establishment of the African Court on Human and Peoples' Rights* (1998), the *Protocol on the Rights of Women in Africa* (2003) and the *Protocol on the Statute of the African Court of Justice and Human Rights* (2008). Other African instruments include the *Convention Governing the Specific Aspects of Refugee*

Problems in Africa (1969) and the *African Charter on the Rights and Welfare of the Child* (1990), which provides that every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development. States Parties shall in particular provide through legislation, minimum wages for admission to every employment; provide for appropriate regulation of hours and conditions of employment; provide for appropriate penalties or other sanctions to ensure the effective enforcement of this Article; promote the dissemination of information on the hazards of child labour to all sectors of the community.

In addition, the SADC has human rights provisions in the Treaty of Windhoek by which the community was established, and the COMESA has the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter on Human and People's Rights as one of its objectives according to The Treaty establishing COMESA.

In *Asia*, none of the regional organizations has adopted enforceable legal instruments on labour matters – there are only recommendations, declarations and programmes dealing with these issues. In this regard, see the chapter on the ASEAN experience on labour issues.

At the *European level*, a number of regional organizations that were created after the end of World War II have adopted legal instruments on labour matters. The Council of Europe adopted the *European Convention for the Protection of Human Rights and Fundamental Freedoms* in 1950, supplemented by the *European Social Charter* in 1961 (revised in 1996), the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* in 1987, and the *Framework Convention on National Minorities* in 1994.

The *European Convention for the Protection of Human Rights and Fundamental Freedom*, which was concluded in Rome in 1950, and which has been amended by protocols, deals essentially with civil and political rights. However, it also deals with certain rights falling within the field of international labour law, such as the right not to be required to perform forced or compulsory labour and the right to form trade unions. It specifies that the rights and freedoms laid down in the Convention shall be enjoyed without discrimination on any grounds.

European Social Charter. The most comprehensive instrument adopted by the Council of Europe, which was established in 1949 by the Statute of Council of Europe, is the European Social Charter, signed in 1961. The Charter stipulates that any State wishing to become a Party must undertake to be bound by at least 10 Articles (out of 19) or 45 numbered paragraphs of Part II of the Charter. However, of the seven Articles regarded as particularly significant, each Party must accept at least five, namely: the right to work,

the right to organize, the right to bargain collectively, the right to social security, the right to social and medical assistance, the right to the social, legal and economic protection of the family, and the right to protection and assistance for migrant workers and their families.

The most original feature of the Charter is that it recognizes the rights of workers and employers to collective action in case of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into and to some further restrictions.

In 1988 additional Protocol to the Charter was signed covering matters such as:

a) the right for workers to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the ground of sex;
b) the right for workers to be informed and consulted within the undertaking;
c) the right for workers to take part in the determination and improvement of working conditions and the working environment in the undertaking;
d) the right for elderly persons to social protection.

Two additional protocols were signed in 1991 and 1995, both of which improve considerably the control machinery and the effective enforcement of the social rights guaranteed by the Charter.

Social Security Instruments

In the field of social security, the Council of Europe has adopted a number of instruments. The *European Interim Agreement on Social Security Schemes* relating to Old Age, Invalidity and Survivors and the *European Interim Agreement on Social Security* other than Schemes for Old Age, Invalidity and Survivors, both concluded in 1953, provide for nationals of any one of the Parties to be entitled to receive the social security benefit of the laws and regulations of any other Party, under the same conditions as if person were a national of the latter, provided that certain conditions of residence are fulfilled.

The European Code of Social Security, concluded in 1964, fixes a series of standards, which parties undertake to include in their social security systems. The Code defines norms for social security coverage and establishes minimum levels of protection, which Parties must provide in such areas as medical care, sickness benefits, unemployment benefit, old-age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits, survivors' benefits, etc. It was supplemented by a *Protocol*, which provided for higher standards.

The European Convention on Social Security, concluded in 1972, consists of the four basic principles of international social security law: equality of treatment, single set of legislation applicable, maintenance of acquired rights and rights in the course of acquisition, and the payment of benefits abroad. Some of the parts of the Convention are immediately applicable. The application of special provisions concerning sickness and maternity, unemployment and family benefits, with the exception of the cumulation of periods, however, remains subject to the conclusion of bilateral or multilateral agreements between the Parties.

The Supplementary Agreement to the European Convention on Social Security contains provisions necessary for the application of Convention norms, which are immediately applicable. It covers, among other things, relations among social security institutions and procedures to be followed for settling and paying benefits that are due in conformity with the Convention. It also acts as a guide for Convention provisions which are not applicable until bilateral agreements have been concluded.

A Protocol to the European Convention amends certain provisions of the Convention with a view to extending its personal scope, by extending its benefit to: all persons who are, or have been, subject to the legislation of one or more of the Parties, as well as to members of their families and their survivors; and to civil servants and persons treated as such in so far as they are subject to any legislation of that Party to which this Convention applies.

The European Convention on the Legal Status of Migrant Workers, concluded in 1977, is concerned with the principal aspects of the legal situation of migrant workers, in particular recruitment, medical examinations, occupational tests, travel, residence permits, work permits, the reuniting of families, working conditions, the transfer of savings and social security, social and medical assistance, the expiry of work contracts, dismissal and re-employment.

6. International custom and practice

Customary international law plays a crucial role in international human rights law. The Statute of the International Court of Justice refers to 'general practice accepted as law'. In order to become international customary law, the 'general practice' needs to represent a broad consensus in terms of content and applicability, deriving from a sense that the practice is obligatory (*opinio juris et necessitatis*). Customary law is binding on all states (except those that may have objected to it during its formation), whether or not they have ratified any relevant treaty.

One of the important features of customary international law is that cus-

tomary law may, under certain circumstances, lead to universal jurisdiction or application, so that any national court may hear extra-territorial claims brought under international law. In addition, there also exists a class of customary international law, *jus cogens*, or peremptory norms of general international law, which are norms accepted and recognised by the international community of states as a whole as norms from which no derogation is permitted. Under the Vienna Convention on the Law of Treaties (VCLT) any treaty which conflicts with a peremptory norm is void.

Many scholars argue that some standards laid down in the Universal Declaration of Human Rights (which in formal terms is only a resolution of the UNGA and as such not legally binding) have become part of customary international law as a result of subsequent practice; therefore, they would be binding upon all states. Within the realm of human rights law the distinction between concepts of customary law, treaty law and general principles of law are often unclear.

The Human Rights Committee in its "General Comment 24" (1994) has summed up the rights which can be assumed to belong to this part of international law which is binding on all states, irrespective of whether they have ratified relevant conventions, and to which no reservations are allowed: "State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women and children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language. And [...] the right to a fair trial [...]".

Although this list is subject to debate and could possibly be extended with other rights not in the field of civil and political rights (for instance, genocide and large parts of the Four Geneva Conventions on International Humanitarian Law), the Committee underlines that there is a set of human rights which de jure are beyond the (politically oriented) debate on the universality of human rights.

7. General principles of law

In the application of both national and international law, general or guiding principles are used. In international law they have been defined as 'logical propositions resulting from judicial reasoning on the basis of existing

pieces of international law'. At the international level, general principles of law occupy an important place in case-law regarding human rights. A clear example is the principle of proportionality, which is important for human rights supervisory mechanisms in assessing whether interference with a human right may be justified.

No legislation is able to provide answers to every question and to every possible situation that arises. Therefore, rules of law or principles that enable decision-makers and members of the executive and judicial branches to decide on the issues before them are needed. General principles of law play two important roles: on the one hand, they provide guidelines for judges, in particular, in deciding in individual cases; on the other hand, they limit the discretionary power of judges and of members of the executive in their decisions in individual cases.

8. Subsidiary means for the determination of rules of law

According to Art. 38 of the Statute of the International Court of Justice, *judicial decisions and the teachings of the most qualified publicists* are 'subsidiary means for the determination of rules of law'. Therefore, they are not, strictly speaking, formal sources, but they are regarded as evidence of the state of the law. As for the judicial decisions, Art. 38 of the Statute of the International Court of Justice is not confined to international decisions (such as the judgments of the International Court of Justice, the Inter-American Court, the European Court and the future African Court on Justice and Human Rights); decisions of national tribunals relating to human rights are also subsidiary sources of law. The writings of scholars contribute to the development and analysis of human rights law. Compared to the formal standard setting of international organs the impact is indirect. Nevertheless, influential contributions have been made by scholars and experts working in human rights fora, for instance, in the UN Sub-Commission on the Promotion and Protection of Human Rights, as well as by highly regarded NGOs, such as Amnesty International and the International Commission of Jurists.

9. Other contributions to standard setting

Some instruments or decisions of political organs of international organizations and human rights supervisory bodies, although they are not binding on states parties per se, nonetheless carry considerable legal weight. Numerous international organs make decisions that concern human rights and

thereby strengthen the body of international human rights standards. Such nonbinding human rights instruments are called 'soft law', and may shape the practice of states, as well as establish and reflect agreement of states and experts on the interpretation of certain standards.

Every year, the UNGA and the Human Rights Council adopt dozens of resolutions and decisions dealing with human rights. Organizations such as the ILO and the various political organs of the Council of Europe also adopt such resolutions. Some of these resolutions, sometimes called declarations, adopt specific standards on specific human rights that complement existing treaty standards. Prominent examples include the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted by the UNGA in 1985 (Resolution 40/144, 13 December 1985), the Guiding Principles on Internal Displacement, adopted by the UN Commission on Human Rights in 1999 (Doc E/CN.4/1998/53/Add.2) and the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UNGA in 2007 (Resolution 61/295, 13 September 2007). Numerous declarations adopted by the UNGA have later given rise to negotiations leading to treaty standards. Not all resolutions and decisions aim at standard setting; many deal with concrete situations where diverging political interests come more into play.

10. Decisions of political organs

Decisions of political organs involving political obligations play a special role and can have an impact on human rights standard setting, e.g., certain documents of the Organization on Security and Co-operation in Europe (OSCE). Since 1975, the OSCE has devoted much attention to the so-called Human Dimension of European cooperation. OSCE documents are often drafted in a relatively short period of time and do not pretend to be legally binding. Thus, they offer the advantage of flexibility and relevance to current events exercising influence upon states. For instance, the Document of the Copenhagen Meeting of the Conference of the Human Dimension of the Conference on Security and Co-operation in Europe of 1990 made optimal use of the changes that had taken place in Europe after the fall of the Berlin Wall in 1989. This document included paragraphs on national minorities, which have been used as standards to protect minorities and as guidelines for later bilateral treaties. Although this kind of document reflects the dynamism of international human rights law, some experts worry that the political nature of these documents may lead to confusion, as newer texts might contradict existing instruments or broaden the scope of attention for human rights excessively by including too many related issues.