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Giuseppe Casale

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PART I

Evolution and trends of international labour law

CHAPTER 1

Introduction to international law

Summary: 1. Introductory remarks. – 2. International treaties. – 3. Universal treaties for the protection of human rights. – 4. Trade agreements and international law. – 5. Regional instruments for the protection of human rights. – 6. International custom and practice. – 7. General principles of law. – 8. Subsidiary means for the determination of rules of law. – 9. Other contributions to standard setting. – 10. Decisions of political organs. – 11. Decisions of supervisory bodies. – 12. No restriction on human rights.

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 and enforcement can only take place by means of individual or collective actions of other states.

The rules of international law are expressed in various ways. The obvious one 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 interna-

tionally 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 that is 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 experts.

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 these treaties impose obligations on states about the manner in which they deal all individuals within their respective 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'. What they share in common is 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). 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 international 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 Covenant 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 arts. 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 do not deal with *labour matters as such*, and recognize 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 instruments of more general scope cover labour issues.

A number of provisions concerning labour issues is 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. In this regard, the various rights relating to labour issues are dealt within a less detailed manner as compared to the ILO Conventions and Recommendations.

The UN General Assembly has also adopted a number of legally binding Conventions concerning labour issues. 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*:
   - 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);
   - 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.

- Convention relating to the Status of Refugees (1951), and the 1967 Protocol thereto;
- Convention on the Rights of the Child (1989);
- ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989);
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990);
- 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);
- Convention on the Rights of Persons with Disabilities (2006);
- ILO Convention No. 190 concerning Violence and Harassment (2019).

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);
- International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- International Convention on the Suppression and Punishment of the Crime of Apartheid (1973);
- 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, national 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.

Actually, workers are not fairly represented in the WTO. For many years, 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 so.

However, 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 and it has not promoted or protected effectively workers' rights.

Trade agreements do occasionally improve occupational health in countries where labour and occupational health laws are lacking. In some Latin American countries (e.g. Peru), a trade agreement with the United States promoted a national law requiring workplaces to form joint health and safety committees. But the agreement did not include recognition of the most basic labour rights that workers could organize and bargain collectively.

In September 2018, the United States, Mexico, and Canada reached an agreement to replace NAFTA with the United States-Mexico-Canada Agreement (USMCA). As part of the deal, a new chapter specifically addressing labour issues is included in the USMCA agreement (chapter 23). The fundamental labour rights set out in chapter 23 reflect those that were enunciated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998) and the ILO Declaration on Social Justice for a Fair Globalization (2008). These include freedom of association and the effective recognition of the right to collective bargaining, eliminating all form of forced or compulsory labour, abolishing child labour, eliminating discrimination in employment and occupation and acceptable conditions of work with respect to minimum wages, hours of work, and the right to a safe and healthy working environment.

In addition, a specific provision provides that workers and their organizations must be able to exercise these labour rights "in a climate that is free from violence, threats, and intimidation […]".

Migrant Workers

The vulnerability of migrant workers regarding labour protection is recognized. Each party to the agreement now must ensure that migrant workers can benefit from the basic labour rights mentioned above, whether they are nationals or non-nationals of the trade agreement.

Sex-Based Discrimination in the Workplace

The parties have agreed that eliminating sex-based discrimination in employment and occupation is an important goal. To that effect, multiple grounds for discrimination have been named and each party is engaged in implementing policies to protect workers against them. These include: sex, including with regard to pregnancy; sexual harassment; sexual orientation; gender identity and caregiving responsibilities.

It has been further agreed that workers have to be provided with job-protected leaves for birth, adoption or care for a family member and protected against wage discrimination.

Cooperation

To effectively implement the USMCA labour chapter, the parties have agreed to undertake various cooperative activities and include worker and employer representatives in identifying potential areas for cooperation.

Enforcement of Labour Law

The parties have agreed they will not fail to effectively enforce their national labour laws and that these reflect the obligations set out in the USMCA labour chapter.

Labour Council

Within one year of the USMCA's entry into force and thereafter every two years, a labour council composed of senior governmental representatives at the ministerial or other level from trade and labour ministries will meet to consider any matter within the scope of chapter 23 and perform any other functions as the parties may decide. This council shall provide a means for receiving and considering the views of interested persons on matters related to chapter 23.

Apart of the international labour agreements, there are also some UN principles which have been established. For example, 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.

As mentioned above, the USMCA has introduced Chapter 23 on labour issues, 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 retire-

ment 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* (1999).

The instruments of the OAS are still the main source of international labour law in the Americas. 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. An *Additional Protocol in the Area of Economic, Social and Cultural Rights*, which was signed in 1988, deals in a more specific way with right to work, just, equitable, and satisfactory conditions of work, trade union rights and right to social security.

The *Treaty of Asuncion*, of 1991 which establishes the Southern Common Market between Argentina, Brazil, Paraguay, and Uruguay 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 the member States 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 to take up matters dealing with labour relations, employment and social security.

African instruments. In Africa, both the 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, had already 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 freedom of 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 provide through national 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; 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 of 1992 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 of 1981.

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.

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 specific 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, an 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 regional 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 accumulation 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 sive necessitatis*). Customary law is binding on all states (except those that may have raised objection during its formation), whether or not they have ratified any relevant treaty.

One of the important features of customary international law is that customary 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 in its entirety from which no derogation is permitted. Under the Vienna Convention on the Law of Treaties (VCLT) of 1969 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 unfolding 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 (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'. In fact, 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 when 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'. 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 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, 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 non-binding 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 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 new treaties. Not all resolutions and decisions aim at standard setting, but they open the way to such an outcome.

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 pro-

tect 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.

11. Decisions of supervisory bodies

Numerous human rights supervisory mechanisms have been established to monitor the compliance by states with international human rights standards. Within the UN context, these supervisory bodies are often called 'treaty bodies'. They interpret international treaties, make recommendations and, in some cases, make decisions on cases brought before them. These decisions, opinions and recommendations may not be legally binding *per se*, but their impact on international human rights law (standards) is significant.

In this context, treaty bodies often prepare the so-called General Comments or Recommendations, elaborating on the various articles and provisions of their respective human rights instruments. The purpose of these general comments or recommendations is to assist the states parties in fulfilling their obligations. The Human Rights Committee and the Committee on Economic, Social and Cultural Rights are highly regarded for their practice in this respect. These general comments/recommendations reflect the developments within each Committee as to the interpretation of specific provisions and they aim to provide authoritative guidance to states parties. As such, they have a significant influence on the behaviour of states parties.

12. No restriction on human rights

Most states are bound by numerous international instruments guaranteeing a broad range of human rights. When a state is bound by numerous instruments, it is to implement the most far-reaching obligation or highest standard. Most human rights conventions contain special provisions to this effect. For instance, Art. 5(2) ICCPR and Art. 5(2) ICESCR state that 'there shall be no restriction upon or derogation from any of the fundamental human rights recognised or existing in any state party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.'

In the same vein, Art. 55 ECHR sets out that 'nothing in this Convention

shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party'. Similarly, Art. 41 CRC provides that nothing in the Convention shall affect any provisions which are more conducive to the realisation of the rights of the child – either in the law of a state party or in international law in force in that state.

Within the realm of standard setting, the number of ratifications and accessions to conventions merits special attention. Widely ratified human rights conventions have greater value and impact, and reinforce the universal character of human rights law, as well as the equality of all human beings under that law. Wide accession or ratification (with the least possible number of reservations) contributes greatly to ensuring equal application of human rights standards.

Many scholars contend that much of the standard-setting work has been completed. In addition, it has been argued that in recent decades there has been an excessive proliferation of standards, and what is needed is a means for better implementation of the existing norms. However, although the basic human rights have been roughly defined, it may, for instance, emanate from consistent decisions of supervisory mechanisms that further elaboration is needed. Better legal protection may be necessary for, inter alia, human rights defenders, lesbian, gay, bisexual and transgender people and persons belonging to indigenous peoples, or in relation to particular issues such as transitional justice or scientific advances in biomedicine.

CHAPTER 2

International labour law

Summary: 1. Introduction. – 2. Origins of international labour law. – 3. International Labour Organization (ILO). – 4. Purpose of international labour law. – 5. Sources of international labour law. – 6. Progress in international labour legislation.

1. Introduction

International labour law is one category of international law. As we have seen above, international law is the body of legal rules that apply between sovereign states and other entities to which sovereign states have granted international personality. Concerning labour law, the most important entity is the *International Labour Organization* (ILO).

The rules of international law are of a normative character. They prescribe standards of conduct. They distinguish themselves, however, from moral rules by being designed for authoritative interpretation by an independent judicial authority and by being capable of enforcement through the application of external sanctions.

The law-creating processes of international law are the forms in which rules of international law come into existence (i.e., treaties, rules of international customary law, and general principles of law recognized by civilized nations). It is Art. 38 of the Statute of the *International Court of Justice* that provides an exclusive list of primary law-creating processes and that has received universal consent.

International law means public international law as distinct from private international law or the conflict of laws, which deals with the differences between the national laws of different countries.

International law forms a contrast to national law. While international law applies only between entities that can claim international personality,

national law is the internal law of states that regulates the conduct of individuals and other legal entities within national jurisdiction.

International law can be universal, regional or bilateral. Although there is some duplication between universal and regional labour law, the practical value of regional law lies mainly in the possibility that establish standards which are more ad hoc for the regional realities than the worldwide standards. For example, regional standards can secure greater uniformity of law within a region or can provide more extensive reciprocal advantages. Bilateral law has a different purpose. Mainly, it determines the conditions of entry and of employment in each contracting country for the nationals of the other. In this chapter, we deal only with universal and regional labour law.

The *sources* of international law are international agreements.

The agreements assume a variety of form and style, but they are all governed by the law of treaties, which is part of customary international law.

A *treaty*, the typical instrument of international relations, is defined by the Vienna Convention on the Law of Treaties of 1969 as an "agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

Some multilateral agreements set up an international organization for a specific purpose or a variety of purposes. They may therefore be referred to as constituent agreements. The *United Nations Charter* (1945) is both a multilateral treaty and the constituent agreement of the United Nations. An example of a regional agreement that operates as a constituent agreement is the charter of the *Organization of American States* (Charter of Bogotá), which established the organization in 1948. The constitution of an international organization may be part of a wider multilateral treaty. The *Treaty of Versailles* (1919), for example, contained in Part I the *Covenant of the League of Nations* and in Part XIII the *Constitution of the International Labour Organization* (adopted by the Peace Conference in April of 1919).

The term *supranational* is used to describe the type of treaty structure developed originally by six western European states: France, Germany, Italy, Netherlands, Belgium, and Luxembourg. The first treaty was that of Paris, signed in 1951, establishing the *European Coal and Steel Community* (ECSC); the second, the *Rome treaty*, signed in 1957, establishing the European Economic Community (EEC); the third, the Rome treaty of the same date establishing the *European Atomic Energy Community* (EURATOM). A clause in the ECSC treaty provides for the complete independence of the members of the executive organ from the governments that appoint them.

Treaties, however, are not the only instruments by which international

agreements are concluded. There are single instruments that lack the formality of a treaty called agreed minute, memorandum of agreement, or modus vivendi; there are formal single instruments called convention, agreement, protocol, declaration, charter, covenant, pact, statute, final act, general act, and concordat; finally, there are less formal agreements consisting of two or more instruments, such as "exchange of notes" or "exchange of letters".

2. Origins of international labour law

The first moves toward international labour conventions date back to the beginning of the 19th century. Robert Owen in England, J.A. Blanqui and Villerme in France, and Ducepetiaux in Belgium are considered precursors to the idea of international regulation of labour issues. David Legrand, an industrialist from Alsace, put forward this idea most systematically, defending it and developing it in repeated appeals addressed to the governments of the main European countries from 1840 to 1855.

In the second half of the 19th century, the idea was first taken up by private associations. Thereafter, a number of proposals to promote international regulation of labour matters were made in the French and German parliaments. The first official initiative came from Switzerland. Following proposals made in 1876 and 1881 and in consultation with other European countries, the Swiss government suggested convening a Conference on the matter in Bern in May 1890.

The establishment of an International Association for the Legal Protection of Workers, the seat of which was in Basel, was followed by a congress held in Brussels in 1897. The activity of this private organization led the Swiss government to convene international conferences in 1905 and 1906 in Bern, where the first two international labour conventions were adopted. One of these related to the prohibition of night work for women in industrial employment, and the other to the prohibition of the use of white phosphorus in the manufacture of matches.

During World War I, the trade union organizations of all countries insisted that their voice be heard at the time of the settlement of peace, and that the peace treaties contain clauses for improving the conditions of workers. The peace conference entrusted the examination of this question to a special commission known as the Commission on International Labour Legislation. The work of the Commission led to the inclusion in the Treaty of Versailles and the other peace treaties of Part XIII, which dealt with labour matters. This section of the treaties provided for the establishment of an *International Labour Organization*, which adopts conventions and recommendations in

labour area. Conventions are binding only on those member states, which ratified them.

In October 1919, the International Labour Conference met in Washington D.C. to adopt the first Conventions and to appoint the Governing Body. Since then, the International Labour Conference has met regularly once a year, except during World War II.

At the end of World War II, the International Labour Conference adopted in May 1944, in Philadelphia, a Declaration ("Philadelphia Declaration"), which defined again the aims and purposes of the ILO. This Declaration reaffirmed that labour is not a commodity, that freedom of expression and of association are essential to sustained progress, that poverty anywhere constitutes a danger to prosperity everywhere and that the war against want requires to be carried on with unrelenting vigour within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join them in free discussion and democratic decision with a view to the promotion of the common welfare.

The Declaration affirmed that all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity. It also referred to the social aspect of economic and financial measures.

The Declaration then defined a number of specific objectives of the ILO, such as full employment, the raising of living standards, facilities of training policies, better wages, hours of work and other conditions of work calculated to ensure a just share of the fruits of progress to all, the effective recognition of the right of collective bargaining, the co-operation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employer in the preparation and application of social and economic measures, the extension of social security measures to provide a basic income to all in need of such protection, and comprehensive medical care.

Apart from the ILO standards, an increasing number of bilateral and regional agreements have been concluded in the field of labour. The general trend of agreements has been the constant broadening of their scope, both as regards the fields covered, the categories of persons protected and the framework within which the matters are treated. Thus a number of these instruments go beyond the traditional field of labour law and touch upon matters of civil liberties and penal law, of property law and so on.

3. International Labour Organization (ILO)

The ILO was created in 1919, as part of the Treaty of Versailles that ended World War I, to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice.

The Constitution was drafted between January and April of 1919, by the Labour Commission set up by the Peace Conference, which first met in Paris and then in Versailles. The Commission, chaired by Samuel Gompers, head of the American Federation of Labor (AFL) in the United States, was composed of representatives from nine countries: Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the United States. It resulted in a tripartite organization, the only one of its kind bringing together representatives of governments, employers and workers in its executive bodies.

As mentioned above, the Constitution contained ideas tested within the International Association for Labour Legislation, founded in Basel in 1901. Advocacy for an international organization dealing with labour issues began in the nineteenth century, led by two industrialists, Robert Owen (1771-1853) of Wales and Daniel Legrand (1783-1859) of France.

The driving forces for ILO's creation arose from security, humanitarian, political and economic considerations. Summarizing them, the ILO Constitution's Preamble says the High Contracting Parties were 'moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world ...'. There was keen appreciation of the importance of social justice in securing peace, against a background of exploitation of workers in the industrializing countries of that time. There was also increasing understanding of the world's economic interdependence and the need for cooperation to obtain similarity of working conditions in countries competing for markets.

Reflecting these ideas, the Preamble states: "Whereas universal and lasting peace can be established only if it is based upon social justice; And whereas conditions of labour exist involving such injustice hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries".

The areas of improvement listed in the Preamble remain relevant today, for example: *a*) regulation of the hours of work including the establishment of a maximum working day and week; *b*) regulation of labour supply, prevention of unemployment and provision of an adequate living wage; *c*) protection of the worker against sickness, disease and injury arising out of his

employment; *d*) protection of children, young persons and women; *e*) provision for old age and injury; *f*) protection of the interests of workers when employed in countries other than their own; *g*) recognition of the principle of equal remuneration for work of equal value; *h*) recognition of the principle of freedom of association; *i*) organization of vocational and technical education, and other measures.

Early days. The ILO has made significant contributions to the world of work from its early days. The first International Labour Conference held in Washington D.C. in October 1919 adopted six International Labour Conventions, which dealt with hours of work in industry, unemployment, and maternity protection, night work for women, minimum age and night work for young persons in industry.

The ILO was located in Geneva in the summer of 1920 with France's Albert Thomas as the first Director of the International Labour Office, which is the Organization's permanent Secretariat. Under his strong impetus, 16 International Labour Conventions and 18 Recommendations were adopted in less than two years. This early zeal was quickly toned down because some governments felt there were too many Conventions, the budget too high and the reports too critical. Yet, the International Court of Justice declared that the ILO's domain extended also to international regulation of conditions of work in other sectors as well, such as the agricultural sector.

A Committee of Experts was set up in 1926 as a supervisory system on the application of ILO standards. The Committee is composed of independent jurists responsible for examining government reports and presenting its own report each year to the International Labour Conference.

Depression and the War. The Great Depression with its resulting massive unemployment soon confronted Britain's Harold Butler, who succeeded Albert Thomas in 1932. Realizing that handling labour issues also requires international cooperation, the United States became a member of the ILO in 1934. American John Winant became the new Director in 1939 just as the Second World War became imminent. He moved the ILO's headquarters temporarily to Montreal, Canada, in May 1940 for reasons of safety and left in 1941 when he was named US Ambassador to Britain. His successor, Ireland's Edward Phelan, had helped to write the 1919 Constitution and played an important role once again during the Philadelphia meeting of the International Labour Conference, in the midst of the Second World War, attended by representatives of governments, employers and workers from 41 countries. The delegates adopted the Declaration of Philadelphia, annexed to the Constitution and constitutes the Charter of the aims and objectives of the ILO. In 1946, the ILO became the first specialized agency of the newly formed United Nations. In 1948, still during the period of Phelan's leader-

ship, the International Labour Conference adopted Convention No. 87 on freedom of association and the right to organize.

The Post-War Years. America's David Morse was Director General of the ILO from 1948 to1970 when the number of member States doubled, the Organization took on its universal character, industrialized countries became a minority among developing countries, the budget grew five-fold and the number of officials quadrupled. The ILO established the Geneva-based International Institute for Labour Studies in 1960 and the International Training Centre of the ILO in Turin in 1964. The Organization won the Nobel Peace Prize on its 50th anniversary in 1969. Under Britain's Wilfred Jenks, Director-General from 1970 to 1973, the ILO made advanced further in the development of standards and mechanisms for supervising their application, particularly the promotion of freedom of association and the right to organize. His successor Francis Blanchard of France, expanded ILO's technical cooperation with developing countries and averted damage to the Organization, despite the loss of one quarter of its budget following US withdrawal from 1977 to1980. The ILO also played a major role in the emancipation of Poland from dictatorship, by giving its full support to the legitimacy of the Solidarnosc Union based on respect for Convention No. 87 on freedom of association, which Poland had ratified in 1957. Belgium's Michel Hansenne succeeded him in 1989 and guided the ILO into the post-Cold War period, emphasizing the importance of placing social justice at the heart of international economic and social policies. He also set the ILO on a course of decentralization of activities and resources away from the Geneva headquarters. On 4 March 1999, Juan Somavia of Chile took over as Director General. He emphasized the importance of making decent work a strategic international goal and promoting a fair globalization. He also underlined work as an instrument of poverty alleviation and ILO's role in helping to achieve the Millennium Development Goals, including cutting world poverty in half by 2015. In May 2012 Guy Ryder (UK), a former trade unionist, was elected as the 10th Director-General of the ILO. He began his five-year term in October 2012 and in November 2016 was re-elected for another five-year term until 2022. Gilbert Houngbo from Togo was elected as the 11th Director-General of the ILO. He is the first ILO Director-General elected from the African continent. The new Director-General's five-year term (2022-2027) began on 1 October 2022.

4. Purpose of international labour law

Various arguments have been advanced over the years in support of international labour law. The argument concerning international competition