

## Book Reviews

Oraa's plan here constitutes certainly a very didactic model for this kind of research. He starts with what he calls 'two preliminary questions', i.e. the question of the existence of human rights standards in customary law and the question of the special evidence required to prove the existence of customary norms in the area of human rights. The examination is concluded through two 'lines of inquiry': the first line consisting in the existence of legal doctrines: they are to be found mainly in the doctrine of necessity. The second line is more general and, it must be stressed, more original: it contends that some of the principles of the derogations' clauses are emerging as principles of general international law. The contention is well presented, it relies on all possible sources, from the general 'norm-creating' character of the ICCPR, to the importance of the repetition of the same norms in several human rights treaties (as probative source for customary law), the practice of various organs of International Organizations and the acceptance of some of these principles by States Non-Parties to the Human Rights treaties. In various respects this way of establishing the existence of such new principles may be considered what the French call a magnificent *exercice de style*.

On the basis of these inquiries, Oraa concludes that there are various principles which constitute emergent principles of International Law governing Human Rights in states of emergency. He cites: the principle of exceptional threat, the principle of proportionality, the principle of non-discrimination and, last *but certainly not least*, the principle of non-derogability of fundamental rights.

Oraa's work is impressive. His conclusions are stimulating: it is undoubtedly a major contribution to this very special corner of International Human Rights theory and practice. It is well-known that the real test for enlightened and democratic regime is precisely in times of emergency. Whether the State is exposed to external or internal threat, when its organs have to use exceptional means in order to restore order and security, it will be judged according to this very special yardstick provided now by general international law and not only by conventional law. Oraa indicates clearly that he precisely aimed at that result, since 'almost half of the States of the international community are not parties to the international treaties on human rights which establish a legal regime for emergencies'<sup>13</sup> it is of paramount importance to perform 'a thorough analysis of the standards in general international law'. This job has been perfectly achieved.

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Patrick Thornberry, *International Law and the Rights of Minorities*, Oxford, Clarendon Press, (1991) 411p. + Annexes + Index

Nowadays the world community faces not only the question of how to ensure democratic majority rule, but also the growing problem of guaranteeing respect for the rights of various underprivileged minority groups. It is hardly disputable that the problem of 'national', 'racial', 'ethnic', 'religious' and 'linguistic' minorities all over the world constitutes currently one of the most burning issues on the international human rights agenda. The development of modern human rights philosophy occurred in such a way that it passed over to a large extent from the ideas of simple majority rule and political rights for all to taking into consideration the interests of those who are distinct in some respect from the majority and, being therefore in a minority, find it difficult for themselves to make the bodies of power consider their special position and interests.

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What is a 'minority' in legal terms? Should it be regarded as a collective entity or simply as a sum of individuals possessing certain characteristics? To what extent are minorities protected by modern international law? What specific rights, if any, must be granted to minorities in order to improve their situation? Is the idea of 'special treatment' of minorities compatible with the principles of equality and non-discrimination? These are only some of the questions posed by the problem considered. The author of *International Law and the Rights of Minorities* shows good insight into these matters, and enables the reader to obtain a systematized view of them.

P. Thornberry's book is an in-depth study of modern international law applicable to minorities. The author also briefly discusses the usual theoretical problems connected with the minority matter.

In the introduction Thornberry outlines the differences between the notions 'assimilation', 'integration', 'fusion' and 'segregation'. He supports the already traditional definition of the minority formulated by Capotorti,<sup>14</sup> according to which a minority is a group numerically inferior to the rest of the population, in a non-dominant position, consisting of nationals of the State, possessing distinct ethnic, religious or linguistic characteristics and showing a sense of solidarity aimed at preserving those characteristics.<sup>15</sup> The question of minority definition is further addressed in connection with Article 27 of the Covenant on Civil and Political Rights.<sup>16</sup> He deals with the problem of whether the right to self-determination is applicable to minorities and shows that these two matters from the point of view of positive international law are in no way interconnected. The author argues that rights which may be attributable to minorities (or 'persons belonging to minorities'), as well as any other type of human rights, can be either 'individual' or 'collective', or both. He does not elaborate, however, on how these types of rights can be distinguished. Thornberry supports Dinstein in his view that two rights can be deduced from international law which pertain to minorities as collectivities: the right to physical existence (prohibition of genocide), and the right to preservation of a separate identity (Article 27 of the Covenant on Civil and Political Rights). According to Thornberry, however, the latter is not truly a collective right under modern international law, but represents a compromise between group rights and individual rights. These two rights, as well as the individual right not to be discriminated against, form the basis on which the author analyses the corresponding international law provisions.

The structure of the book reflects both the history of the problem as well as the author's analytical approach.<sup>17</sup> Part I describes the historical background and the League of Nations' system of minority protection. Part II concerns the right of minorities to existence. The author in particular gives an extensive account of the history of genocide prohibition. He reviews in detail

14 See, F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc. E/CN.4/Sub.2/384/Rev.1; Sales No. E.78.XIV.1, para. 568.

15 See Dinstein, 'Collective Human Rights of Peoples vis-à-vis Minorities', in S. Chandra (ed.), *Minorities in National and International Laws* (1985) 71-93.

16 The text of the Article reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

17 This structure, although providing for clear conceptual background, is somewhat relative, for some of the instruments and issues which the author considers within the framework of a given chapter, mainly on non-discrimination, also concern other parts of the book (thus, the author admits that at least the UNESCO Convention Against Discrimination in Education and the UNESCO Declaration on Race and Racial Prejudice, which are reviewed in the chapter on non-discrimination, may be also considered as reflecting, although to a limited extent, the idea of a minority right to identity).

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the substantive law of the Convention on the Prevention and Punishment of the Crime of Genocide, its implementation mechanism and the contents of the corresponding customary law. The author provides evidence that prohibition of genocide constitutes part of customary international law and *jus cogens*.

In Part III ('Identity and Non-Discrimination') the post-World War II shift from protecting the identity of minorities to ensuring individual rights for all is reviewed in the light of the history of the United Nations Charter, the post-World War I Peace Treaties, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities and the Universal Declaration of Human Rights.

The chapter on the right to identity (Part IV) is largely a detailed review of the Covenant on Civil and Political Rights and its 'minority' Article 27. The practice of the Human Rights Committee is referred to, as well as the work of the Conference on Security and Cooperation in Europe. Thornberry supports the view according to which, notwithstanding the *travaux préparatoires* support a restrictive interpretation of Article 27, this provision should be construed in a broad way. Such a conclusion is based both on a logical interpretation of the Article (according to which 'unless Article 27 is given a more forceful content, it adds nothing to the Covenant' (p. 180)) and the link of Article 27 with the provisions of the Covenant on Economic, Social and Cultural Rights, which give Article 27 'a programmatic element, a goal to be achieved' (p. 181). Therefore, according to Thornberry, Article 27 imposes on States Parties an obligation to 'take such measures as are necessary in order to assist the minority to preserve its values' (p. 186). The author also categorically argues that another implication of the Article is freedom from interference by States with 'whatever action a minority takes on its own initiative' to preserve its culture (p. 185). This statement, however, is not supported by compelling evidence, and one could doubt whether governments would easily agree with this view. It should also be noted that no clear distinction is made in the book in terms of special minority rights between these two types of minority protection: 'negative' and 'positive'.

Analysing the question of the extent to which human rights standards constitute customary international law, Thornberry notes that, despite certain connections between Article 27 and universally recognized human rights, it is only 'secured by treaty rather than by customary law' (p. 392).

Part V, in which the right of minority members to non-discrimination is considered, contains an account of the relevant provisions in the United Nations instruments on non-discrimination, the Covenants on Human Rights, the European Convention on Human Rights, as well as references to this principle in the South-West Africa Cases and the Advisory Opinion on Namibia. In particular, Thornberry addresses the question of whether from the point of view of international law 'affirmative action' or 'special measures' for the benefit of disadvantaged groups are compatible with the prohibition of discrimination or 'distinction', and replies in the affirmative. The author also quite convincingly argues that non-discrimination on the grounds of language and religion should not be considered as having weaker status than non-discrimination on the grounds of race. The corollary made by Thornberry with regard to freedom from discrimination of minority members on the grounds of race, religion or language is that it is 'probably reflected in customary international law' (p. 394) and, less probably, in *jus cogens*.

In Part VI the author deals with the relatively independent problem of 'indigenous peoples'. He rightly mentions that 'there is clearly an overlap between the general case of minorities and the specific issue of indigenous groups' (p. 331). 'Indigenous rights' are a broader concept than 'minority rights', for they also concern, among others, such issues as land rights and self-determination. Nonetheless, indigenous peoples are generally viewed as beneficiaries of the 'minority rights' as well, in particular by the Human Rights Committee in its application of Article 27 of the Covenant on Civil and Political Rights.

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An interesting point which Thornberry discusses in his book, in particular in connection with the Declaration and the Convention on the Elimination of All Forms of Racial Discrimination, the practice of the Committee on the Elimination of Racial Discrimination and the question of indigenous peoples, is about the relationship between the concepts of 'integration' and 'assimilation'. The author shows that States tend to use the pretext of 'integration' to justify what in reality constitutes outlawed 'artificial assimilation'.

Part VII contains conclusions and recommendations *de lege lata* and *de lege ferenda*. In terms of *lex ferenda* the author is skeptical whether any progress can soon be achieved in respect of minority protection on the universal level, but is more optimistic as far as Europe is concerned. He is keen on securing States' willingness to move in this direction by 'very explicitly' safeguarding their territorial integrity in any eventual new instruments on minorities. Despite the fact that the book is mostly focused on the analysis of existing international law rules, it is rightly stated that 'new, more specific instruments' are required to ensure effective protection for minorities (pp. 397-398). The book contains a number of appendixes (texts of some of the documents for minority protection), the criteria for the choice of which are rather unclear. It also includes a useful bibliography and an index.

In general, *International Law and the Rights of Minorities* can be recommended as a detailed, enlightening and comprehensive guide to the problem of minority protection by means of international law.

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