BOOK REVIEW

HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW. by Theodor Meron. Oxford: Oxford University Press, 1989. Pp. 263.

*Reviewed by Dr. Ranee K.L. Panjabi**

In this well-researched, carefully documented book, Meron has shared with us some very interesting conclusions and observations concerning the status of international human rights and humanitarian norms as they form part and parcel of international law. The increasing emphasis on human rights in the recent past makes this a timely book, for Meron attempts to give international lawyers some important signposts to indicate the precise status of certain rights and to point to possible directions for future research. The book is therefore of considerable significance in evaluating and clarifying the position of human rights, and in linking human rights issues to related legal fields such as state responsibility. As Meron states: "[b]y coupling human rights and humanitarian norms with the corpus of law governing state responsibility, the latter is mobilized to serve the former and to advance its effectiveness."[1] Advancing the effectiveness and implementation of human rights globally appears to be the mainspring of much recent literature in this field of international law. In *Human Rights and Foreign Policy: Principles and Practice*, Dilys Hill and other writers have examined the interconnections between human rights and foreign policy, in order to assess the impact of the latter on human rights considerations that arise from situations like the present refugee crisis. United Nations estimates place the number of refugees at 13 million,[2] an

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1. T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 1 (1989).

2. HUMAN RIGHTS AND FOREIGN POLICY: PRINCIPLES AND PRACTICES 140 (D. Hill ed.

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alarming statistic when one considers the extent of human rights violations implicit in all those individual stories of political repression and economic deprivation. It is evident that human rights concerns will be the major focus of the 1990s for scholars, for international lawyers and hopefully for governmental policy-makers.

Meron's detailed analysis forms a vital contribution to the burgeoning literature in this field. His inquiry into the relationship of human rights and humanitarian norms with customary law will undoubtedly be a very significant factor in what is now a global interest in expanding the parameters of this field of law.

Not least among Meron's concerns is to increase our awareness of the extent to which a number of human rights "have already crystallized into customary law. . ."[3] In an earlier article, "The Geneva Conventions as Customary Law"[4] Meron suggested: "[i]f states fail to observe the provisions of the Geneva Conventions in conflicts in which they are involved or resort to numerous reservations . . . the claims of the Conventions to customary law status will naturally be weakened."[5]

In the book being reviewed, Meron has utilized and expanded on his earlier article. He discusses the importance of a norm's customary character with reference to the Nicaragua case and the problem of reservations to human rights instruments with some very useful summary material concerning provisions on reservations in a number of significant Conventions. He analyzes the Protocols of 1977 and believes "that the Protocols have often been violated and ignored."[6]

Meron concludes this initial analysis of humanitarian instruments as customary law on a hopeful note by suggesting that "violations of a norm do not necessarily signify the demise of the norm, particularly if the norm itself is well established and recognized."[7]

It is obviously in the interest of all proponents of human rights to ground their claims in legal rather than exclusively moral terminology. As the parameters of human rights must expand legally in order to gain acceptance and credibility in the decision-making centers of governments, it is imperative that human rights be perceived as being legally justifiable, legally acceptable and legally enforcea-

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3. T. MERON, *supra* note 1, at 246.
4. 81 AM. J. INT'L L. 348 (1987).
5. *Id.* at 370.
6. T. MERON, *supra* note 1, at 77.
7. *Id.*

ble. This is not to suggest that public perceptions and world public opinion have no role to play in the process of gaining credibility for human rights. The role of public participation is complementary to that of scholars and international lawyers in pushing forward the frontiers of human rights laws into new territory. While popular participation generates awareness, legal scholarship gives the process solid, reasonable and logical argument to sustain actual claims in a court or before a Commission. It is evident from Meron's careful analysis that further research by several scholars will be needed to develop a consensus on the status of human rights and humanitarian norms. Meron has pointed out the direction. Hopefully, other scholars will follow his lead. Meron indicates that:

> Such consensus might also represent a step in a process that begins with the crystallization of a contractual norm into a principle of customary law and culminates in its elevation to *jus cogens* status. The development of the hierarchic concept of *jus cogens* reflects the quest of the international community for a normative order in which higher rights are invoked as particularly compelling moral and legal barriers to derogations from and violations of human rights.[8]

While Meron's instant concern is with the Geneva Conventions, his conclusions are inherently applicable to all human rights.

The acceptance of certain rights as customary law has ironically been hampered by the proliferation of rights in recent years. Not only are there now three apparent generations of rights (civil and political—first generation; economic, social and cultural—second generation; and solidarity rights—third generation), but there is perceived to be an intergenerational conflict between these various human rights. This issue has recently been explored by James Crawford and a number of scholars of international law in *The Rights of Peoples*.[9] The clash between individual and group rights is only one aspect of this unfortunate development which has bedeviled the entire issue of human rights and made it somewhat easier for some governments to excuse their non-performance and lack of interest in this regard. All the more reason why Meron's scholarship assumes enormous practical significance in its attempt to establish the status and acceptability of human rights as part of customary international law. Such efforts could rescue certain fundamental rights from the controversial arena and elevate them

8. *Id.* at 8-9.
9. THE RIGHTS OF PEOPLES (J. Crawford ed. 1988).

to an immutable status, thereby ensuring that governments find it more difficult to detract from or simply to ignore the existence of such rights.

In an earlier contribution to *The American Journal of International Law*[10] Meron stated:

> In recent years there has been a proliferation of human rights instruments, not all of them necessary and carefully thought out. It would nevertheless appear that the international community needs a short, simple, and modest instrument to state an irreducible and nonderogable core of human rights that must be applied at a minimum in situations of internal strife and violence (even of low intensity) that are akin to armed conflicts, even though the government concerned contests the armed character of the conflict.[11]

Meron went on to suggest that a new instrument governing human rights should not allow derogation or limitations and should include "rights additional to those few mentioned in the nonderogable provisions of the Political Covenant."[12] This suggestion is in line with his belief in the book being reviewed that "[t]he credibility of international rights . . . requires that attempts to extend their universality utilize irreproachable legal methods."[13]

Traditional methods of formulating customary law do ensure that the principles accepted will have strong legal foundations. Meron is somewhat hesitant about more adventurous methods such as the emphasis on consensus or near consensus advocated by Cassese[14] and by Sohn.[15] However, Meron's objections are not very convincing. He feels, for example that "the immediately binding character of a norm should not be asserted on the basis of consensus without considering the authority of the representative to commit his or her state."[16] Meron is less averse to the reliance on acquiescence as a method of building international law. As he states, acquiescence is "an effective means for expanding the universality of international human rights."[17] He further proposes reliance on

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10. Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AM. J. INT'L L. 589 (1983).
11. *Id.* at 604.
12. *Id.* at 605.
13. T. MERON, *supra* note 1, at 81.
14. *Id.* at 85.
15. *Id.* at 86.
16. *Id.* at 87.
17. *Id.* at 89.

codificatory treaties,[18] on normative multilateral treaties[19] and emphasizes that: "[t]he repetition of certain norms in many human rights instruments is in itself an important articulation of state practice and may serve as evidence of customary international law."[20]

Further evidence of sources is incorporated by Meron from The Restatement of the Foreign Relations Law of the United States which cites the following instruments as significant in establishing customary human rights law: The U.N. Charter, the Universal Declaration of Human Rights, international agreements, regional agreements, general support for U.N. resolutions, state action especially in the realm of national law and by incorporation of human rights provisions into national constitutions, diplomatic practice and the decisions of the International Court of Justice as well as the recommendations of the International Law Commission.[21] The degree of evidence required to establish the status of a right would depend on the extent to which the right is perceived as being "crucial to the protection of human dignity and of universally accepted values of humanity."[22]

It is interesting to note that while Meron is very cautious about the methodology for obtaining the status of a right, he is less so when declaring which rights now stand as customary norms. Accepting the list included in the Restatement which catalogues fundamental rights (against genocide, slavery, slave trade, murder, disappearance, torture, or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, systematic racial discrimination, a consistent pattern of gross violations of internationally recognized human rights),[23] Meron goes on to suggest that: "the right of self-determination, which the ICJ has recognized as customary, could safely have been added."[24] The governments of a number of countries might not be too pleased to view self-determination elevated to the point where it might appear to threaten the territorial integrity of their states and encourage secessionist tendencies among their religious and ethnic minorities. The inevitable conflict between claims of self-determination and a state's right

18. *Id.* at 90.
19. *Id.*
20. *Id.* at 92.
21. *Id.* at 92-93.
22. *Id.* at 94.
23. *Id.* at 94-95.
24. *Id.* at 96.

to disallow secession would indicate that Meron's commitment to the former right might be somewhat premature. Though most states have paid lip service to the idea of self-determination (particularly in the context of decolonization of European overseas empires), at the present time the concept of self-determination is fraught with controversy.

Less controversial is Meron's inclusion of due process guarantees such as the right to presumption of innocence, to legal defense and to trial by an independent tribunal established by law.[25] Meron also concedes that some economic rights "may have matured into general international law as general principles of law recognized by civilized nations."[26] One can only agree with Meron that "the list as now constituted should be regarded as essentially open-ended. Human rights are undergoing a stage of continuing evolution,"[27] and "[m]any other rights will be added in the course of time."[28]

With a brief and somewhat selective survey of legal cases, Meron suggests that the establishment of a customary norm in human rights should entail a lighter burden of proof than that required in other areas of international law;[29] that human rights issues should be raised in national courts to "contribute to the acquisition of additional expertise in human rights law by judges, lawyers, and by the public at large, and to the expansion of the role of international human rights in the protection of the individual."[30] This emphasis on national implementation is more than a reflection of the crucial role the nation state plays in bringing human rights to fruition. In an earlier book, *Human Rights Law-Making in the United Nations*, Meron expressed his belief that "[t]he United Nations human rights system is . . . characterized by weak and sporadic implementation."[31] One can hardly argue with this assessment, particularly in view of the political considerations which unfortunately affect U.N. action and often hinder it. All the more reason for national courts to utilize international human rights instruments in the consideration of judicial decision-making.

In the book now being reviewed, Meron also attempts to solidify international acceptance of the subject of human rights by linking

25. *Id.*
26. *Id.* at 97-98.
27. *Id.* at 99.
28. *Id.*
29. *Id.* at 131.
30. *Id.* at 134-35.
31. T. MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 2 (1986).

it to the international law concepts of state responsibility. This is of particular significance because, inevitably, actions to fight human rights violations may originate in national courts. Remedies for victims are also often granted by states. Indeed, some human rights treaties specify national implementation. Governments may themselves be at fault for violating human rights. The existence of an independent judiciary, well-informed about international human rights law becomes vital in such situations.

There is also the likelihood of one state complaining about the human rights violations of another or of individuals or organizations making formal complaints. Meron believes that:

> The institutional mechanisms for presenting complaints which are already in place have been underutilized, both because many states have thus far not accepted the compulsory jurisdiction of human rights organs to consider such complaints and because most states are reluctant to risk antagonizing other states by bringing formal complaints of human rights violations by other states to international judicial, quasi-judicial, and supervisory organs.[32]

However, when submissions to the U.N. General Assembly and the U.N. Commission on Human Rights are concerned, there has been less reluctance to complain and according to Meron, such action is "no longer considered interference in the domestic jurisdiction of states."[33]

Meron analyzes the principle of obligations *erga omnes* in detail and concludes that "all states have a legitimate interest in, and the right to protest against, significant violations of customary human rights regardless of the nationality of the victims."[34] He explains further that "[t]he general principle establishing international accountability and the right to censure can thus be regarded as settled law."[35] He proposes that the European model be followed in considering international human rights violations. The European Commission of Human Rights has emphasized the concept of objective obligations by declaring that formal complaints about violations of the European Convention are made by state parties to vindicate the " 'public order of Europe.' "[36]

An approach of this type might provide states with a non-politi-

32. T. MERON, *supra* note 1, at 152.
33. *Id.* at 153.
34. *Id.* at 194-95.
35. *Id.* at 195.
36. *Id.* at 203-05.

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cal rationale for lodging a complaint. Governments might then view submissions of complaints about human rights violations by other states as less of a threat to their own traditional goals of foreign policy and diplomacy. This might also encourage a more serious commitment to the pursuit of the idealistic aims of human rights in foreign policy. When governments become convinced that idealism and self-interest are not necessarily incompatible, human rights concerns will be pursued with vigor.

Meron urges states to take up complaints either diplomatically or by utilizing international judicial and quasi-judicial bodies.[37] He comments:

> What has largely been missing is the willingness of states to recognize that compliance with the norms serves their own interests as well as the common good and to be ready, therefore, to pay the political price consequent on raising such claims.[38]

The ultimate aim of this book appears to be to urge international lawyers to generate public opinions and persuade governments to act positively in favor of human rights. As Meron states: "[i]t is only when rights are not only rhetorically asserted but are pressed seriously as legal entitlements, that human rights and humanitarian norms will become truly effective protections of human dignity."[39]

37. *Id.* at 247.
38. *Id.*
39. *Id.* at 247-48.