

INTERNATIONAL HUMAN RIGHTS PROTECTION

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Balanced, Critical, Realistic

Marc BOSSUYT

Prefaces

Theo VAN BOVEN

Paul MAHONEY



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
www.intersentia.com | www.intersentia.co.uk

Distribution for the UK and Ireland:

NBN International
Airport Business Centre, 10 Thornbury Road
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*To Juliette, Celeste and Felix,
Louie and Viktor*

PREFACE

A LIFETIME OF FIDELITY AND PARTICIPATION

Theo VAN BOVEN*

This book brings together a remarkable selection of Marc Bossuyt's opinions and insights on specific areas of his interest and expertise. Marc's writings carry the imprint and consistency of legal precision. As also transpires from the farewell lecture delivered at the University of Antwerp under the telling title *At the Crossroads of Law and Politics*, other qualities and dimensions also come to the fore. A comprehensive and effective human rights policy requires, in addition to international and domestic judicial control, a variety of extra-judicial means of prevention, promotion and protection, particularly in situations where gross violations are imminent or rampant.

Some forty years cover Marc Bossuyt's intricate professional involvement in support of the cause of human rights and fundamental freedoms. As it happened, being myself Marc's country neighbour from the North and brought up in the same mother tongue, I shared with him, albeit not precisely concurrently, similar experiences in a series of United Nations human rights mechanisms in Geneva. Many of our footsteps were set around the Lac Léman, not physically walking together but in a common spirit of having the same objective in mind: helping to make the global human rights agenda more effective and credible.

Against this background I wish to single out two areas of an institutional and thematic nature which may serve as illustrations of contributions made by Marc Bossuyt to the United Nations human rights legacy. First, his membership and leadership as an independent expert of the United Nations Sub-Commission on the Prevention of Discrimination and the Protection of Minorities (in later years re-named Sub-Commission on the Promotion and the Protection of Human Rights). It was with the active input of Marc Bossuyt that the Sub-Commission, often withstanding the odds of political tensions, initiated major developments in the UN human rights arena, frequently in close concert with

* Honorary Professor of International Law, University of Maastricht; honorary member of the International Commission of Jurists; former director of the UN Division of Human Rights; doctor *honoris causa* of Université Catholique de Louvain, Erasmus University Rotterdam, University of New York at Buffalo and Universidad de Buenos Aires.

civil society organisations and academia. A thorough examination of the various components of the UN human rights agenda is bound to reveal the pioneering role the Sub-Commission has played in the framing of normative standards, in giving new impetus to thematic issues of wide public concern and in taking on gross and consistent patterns of human rights violations. The name of Marc Bossuyt will always be associated with his role as the Sub-Commission's Special Rapporteur to whom the task was entrusted to draw up the text of the Second Protocol to the International Covenant on Civil and Political Rights, aiming at the world wide abolition of the death penalty.

A second area to demonstrate the impact of Marc Bossuyt on the priority agenda of the United Nations is his involvement in the elimination of racial discrimination. Marc is not only a former and current member of the Committee on the Elimination of Racial Discrimination (CERD – the first treaty body functioning within the UN human rights system), he also assumed the chair of one of the two plenary working groups of the World Conference against Racism held in Durban, South Africa, in 2001. In that capacity which he described as the most hectic days of his professional life, he was one of those negotiators who were instrumental against all political odds in steering a consensus text to its adoption. The Durban text deserves special mention as a tribute because, among other significant affirmations and overtures, it provided an unprecedented global framework and moral imperative for remedying and repairing historical racist and colonial wrongs. Alas, as Marc Bossuyt correctly recalls, the outcome of the Durban Conference was overshadowed in its immediate aftermath when three days after the closing of the conference the 9/11 dramatic terrorist attacks occurred against the New York Twin Towers which turned out to have a major adverse effect on the human rights situation at large.

While in the course of a lifetime of some forty years the promotion and protection of human rights moved from peripheral margins to more central areas of international law and international relations, what really counts at the end of the day is implementation at national and local levels. Marc Bossuyt is right in drawing particular attention to the role and the contribution of national judicial mechanisms, notably the courts, to uphold the rule of law. Access to an independent judiciary is undoubtedly a core component in addressing claims of human rights violations. In addition, as part of a public process of awareness building at national and international levels, the emergence, growth and recognition of other components that foster human rights accountability need to be kept in mind, among them independent national human rights institutions, ombudspersons, civil society organisations and educational institutions. All such organs of society operating *At the Crossroads of Law and Politics* are forming part of the contemporary human rights arsenal. Because of his many ventures in shedding light on a wide spectrum of challenging human rights issues Marc Bossuyt deserves much credit.

PREFACE

A PENETRATING AND SALUTARY ANALYSIS OF THE EUROPEAN SYSTEM OF HUMAN RIGHTS PROTECTION

Paul MAHONEY*

Marc Bossuyt's short book on international human rights protection is wide-ranging, covering both the United Nations system and the various existing regional systems, as well as the contribution made at national level by the domestic courts. Thus, a significant part of the book is devoted to examining the enforcement machinery set up under the European Convention on Human Rights, concentrating notably on the judicial activity of the European Court of Human Rights in Strasbourg, which is the driving force at the heart of that machinery.

There is an all too common intolerance in European human rights circles of anyone who dares to break ranks by questioning or, even worse, criticising the rulings or approach of the Strasbourg Court. Such persons are regarded almost as renegades or traitors; they are not true human rights "patriots". Sad to say, self-questioning and openness to criticism are generally lacking as qualities in many leading lights of the European human rights movement.

In his book, as in his writings throughout his distinguished career, Marc Bossuyt provides a refreshing breath of fresh air. In looking not only at the remarkable, ground-breaking achievements of the Strasbourg Court but also at its possible errors, he has not been afraid to break the taboo of human rights "patriotism".

The protection of human rights, Marc Bossuyt writes, brings us to the crossroads of law and politics. To the crossroads of law and morals, one might also add. It is no easy matter to draw the line between letting democracy work at local level in the many and diverse societies of a Convention community of 800 million people and imposing, in the cause of human rights, an ever-growing and ever-detailed corpus of Europe-wide rules elaborated by the judicial interpretation of a small group of judges in Strasbourg. Marc Bossuyt

* Judge in respect of the United Kingdom on the European Court of Human Rights (2012–2016). Any views expressed sitting are personal.

fears that on occasions, in its enthusiasm to be “the Conscience of Europe” and to continually spread wider and yet wider the net of human rights protection, the Strasbourg Court has strayed outside its treaty-given international, judicial role under the Convention. The result being over-intervention into the normal workings of democratic processes at national level and over-expansion of the Convention rights and freedoms into domains not covered by the text of the treaty. As one of the most controversial areas of the Strasbourg Court’s case-law he cites the development of positive obligations under the Convention, with the first casualty of this development being democracy. To the rallying cry that all is justified by the doctrine of the Convention being a living instrument, he replies that there must be some limits to evolutive interpretation of the Convention’s text. And his book endeavours to identify those limits.

Whether or not one shares Marc Bossuyt’s reservations, or fully shares all his reservations, his analysis is the fruit of an evidently deep commitment to the notion of the international protection of human rights. His voice speaks with the combined experience of a senior national judge, a university scholar and someone engaged in national and international human rights institutions from the beginning of his professional life; it is a voice that deserves to be heard. His penetrating analysis cannot but help all concerned to arrive at a clearer-sighted vision of both the role and the limits of the international judicial protection of human rights in Europe. He describes the debate in the UN Commission on Human Rights during his tenure as a member from 1986 to 1991 as being “essentially a confrontation of ideas”. That is what this highly readable little book successfully sets out to stimulate in the section on the European system of human rights protection.

INTRODUCTION

The present book aims at assisting judges and lawyers, diplomats and other civil servants, professors and students alike, to become more familiar with the rapid developing field of the international protection of human rights. First, in order to better understand the normative framework, some fundamental questions are raised about the concept of (the different categories of) human rights and about the fundamental principle of equality and non-discrimination, including an analysis of the concept of affirmative action. Second, a short survey is given of the institutional framework (a true labyrinth) both at the universal level (UN Charter-based organs and UN treaty bodies) and at the regional level (Council of Europe, Organisation of American States and African Union).

To show the interrelatedness between the international and the national protection of human rights, attention has also been given to the contribution of national courts to human rights protection. This is in particular the case of the South African Constitutional Court with respect to social rights and the US Supreme Court with respect to the concept of affirmative action and (in the second part of this book) with respect to “self-executing” provisions of international human rights treaties. Brief references are also given to the case law of the Court of Justice of the European Union in Luxembourg, with respect to affirmative action, and (in the second part of this book) to EU Regulations and Directives in the framework of the Common European Asylum System.

In the second part of the present book some specific issues are dealt with. Some of them are procedural, such as the detailed analysis of the final day of the World Conference on Racism and the question of the internal applicability of international human rights provisions, while others are more substantive such as the issue of the death penalty and irreducible life sentences and the question of the interpretation of the European Convention on Human Rights by the European Court of Human Rights in Strasbourg with respect to both the scope of its jurisdiction and the normative provisions of the Convention to which it attributes positive obligations. Finally, attention is given to some specific legal regimes set up for refugees, minorities and victims of armed conflicts which are somewhat at the periphery of the international protection of human rights.

Besides an annex, the book contains 15 chapters, generally based on previous publications by the author. Some of them were previously presented

at colloquia in Antwerp, Brussels and Leuven (Belgium), Budapest (Hungary), Geneva (Switzerland), Mexico City (Mexico), Paramaribo (Suriname), Poitiers and Strasbourg (France) or Thessaloniki (Greece). Several of those publications were not easily accessible or were not in English. For the purposes of this book, however, they have been translated and they have all been revised and updated. The basic treaty provisions are reproduced systematically and some fundamental questions going back to their origin are raised.

Variety is a key word that characterises this book, not only in the selection of the chapters but also in the way they are dealt with. Some chapters contain a lot of academic references, others only a few, particularly the ones dealing with the institutional framework. The choice of the chapters is generally based on personal research or personal involvement with the matters dealt with. The annex (the farewell speech of the author at the University of Antwerp) will help the reader to understand why some chapters are included and how the totality of the issues dealt with presents a coherent view on the development of the international protection of human rights.

While trying to adopt a universal approach, the European system nevertheless takes a prominent role, mainly because it is the oldest and most developed system of international protection. As is also the case with other issues, that system is examined in a critical way. It is not because human rights protection pursues laudable goals that it should be immune to criticism. In dealing on a daily basis with complaints of persons claiming to be victims of human rights violations, the European Court of Strasbourg is inclined to neglect quite often the limits put on the scope of its jurisdiction and of the normative provisions it has to apply. Its desire to make constant “progress” in the protection of human rights risks replacing the concept of universal human rights with a purely regional standard. It also loses track of the proper role judges should fulfil in a society governed by the rule of law and the separation of powers.

This is but one aspect of the critical approach taken by the author. It is his feeling that judges, in particular those belonging to courts specialised in human rights, have a tendency to systematically favour interpretations benefitting to the applicants, while overlooking too easily the far-reaching implications their judgments may have for the society as a whole. Continuously tilting the balance in favour of individual applicants, without taking fully into account the difficulties democratic governments experience in coping with the challenges of our present times, divorces human rights protection too much from the pressing needs of the realities of today’s world.

Finally, the author wishes to express special thanks to the Stellenbosch Institute for Advanced Study (STIAS) in South Africa where he stayed as Research Fellow (in 2014 and 2016), to the College of Law of the National Taiwan University in Taipei where he stayed as Visiting Professor (in 2015/2016) and to

his home university, the University of Antwerp (Belgium), where he is Emeritus Professor of International Law (since 2007).

Stellenbosch, 1 March 2016

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Stellenbosch Institute for Advanced Study (STIAS)
Wallenberg Research Centre at Stellenbosch University
Stellenbosch 7600
South Africa

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“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the Pursuit of Happiness”
(United States Declaration of Independence, 4 July 1776)

