Role of litigation in implementing human rights

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This paper seeks to offer a broad overview of the possibilities for human rights litigation and to make some specific comments in that context about the International Court of Justice.

Litigation in domestic courts

Pride of place must be given to the pursuit of human rights in domestic courts, in the sense that it is always desirable to have an effective local remedy to a legal wrong. The extent to which this is possible in any particular jurisdiction remains subject to many factors, including to what international instruments the State concerned is party, whether these are either directly invocable or have been incorporated into domestic law, the extent to which fundamental norms of human rights law are regarded as part of international law, and whether international law may be directly invoked either as part of the law of the land or as a hierarchically superior corpus of law.

Australia and New Zealand, which are each parties to the International Human Rights Covenants[1] as well as many other international instruments, provide interesting examples of the diverse approaches possible, with strong common law presumptions of treaty compatibility on the one hand and a particular form of interpretation on the other. The New Labour Government in the UK, having decided to incorporate the European Convention on Human Rights (the European Convention), has had occasion to receive useful input from the New Zealand judiciary and others, in deciding how best to approach the issue.[2] In the event, the UK approach is a little different from New Zealand and indeed that of Canada. The technique chosen in the *Human Rights Act 1998* (UK) (the UK Act) is for it to be unlawful for public authorities to act in a way that is incompatible with the European

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1 The two International Human Rights Covenants are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).

2 For example, see Keith K 'Bill of Rights and the Common Law: the Non-entrenched New Zealand Model' Society for Reforming Criminal Law, 10th Anniversary International Conference, London, August 1997.

Convention rights. Those rights may be invoked in any proceedings — criminal or civil — against a public authority and the court or tribunal concerned will be able to award whatever remedy is appropriate in the particular circumstances.[3]

The cherished doctrine of parliamentary sovereignty is retained in the the UK Act through the fact that the courts will *not* be able to set aside Acts of Parliament. But (and this has in fact already been the practice)[4] Acts must be interpreted to be as far as possible in accordance with the European Convention. Should this reconciliation simply not be possible, the higher courts will issue a formal declaration to the effect that the legislative provisions are incompatible with the European Convention rights. The UK Act makes available a 'fast track' procedure whereby Parliament will be able to amend rapidly the offending legislation. Interestingly, derogations are to be subject to periodic renewal by Parliament and reservations are to be subject to formal periodic review.

These legislative innovations are most welcome. There are, of course, many aspects that will be subject to particularly close scrutiny, such as the so-called 'fast track' procedure itself and the question of secondary legislation.

By contrast, the International Covenant on Civil and Political Rights (the ICCPR) still remains unincorporated in the UK. Further, the UK, unlike most of its European allies, does not recognise a right of application to the Committee of Human Rights (the Committee) under the Optional Protocol. There is still no way for detailed ICCPR case law on, for example, the right to life or the right to a fair trial, to find its way into British litigation. Moreover, there are certain rights under the ICCPR which are neither in the European Convention nor reflected in British statutory or common law; for example, the ICCPR provisions on minorities, on aliens and on family rights. The UK is thus a party to an instrument for aspects of which no recourse is available before the Committee and no remedy is available in the British courts. So there is still much to be done in 'bringing rights home'.

State immunity

Anyone litigating a human rights issue in a domestic court has first to establish jurisdiction and second, to ensure there is no immunity to that jurisdiction. Where the violation has occurred within the territory, there will, in principle, be jurisdiction.

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3 *Human Rights Act 1998* (UK).

4 For example, *Waddington v Miah* [1974] 1 WLR 683; *Attorney-General v Guardian Newspapers* (No 2) [1990] 1 AC 109; *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696.

Where it has occurred overseas, the establishment of jurisdiction in principle will depend upon the rules of the courts of the particular state. Human rights violations will often have the character of torts in domestic law. In the UK, jurisdiction may be established over an overseas tort if the tort would have been recognised as such in both countries and if service can be effected within the UK.[5] For jurisdiction to be established in New Zealand, torts including physical damage have either to be committed within New Zealand or have effect within New Zealand.[6] In the US, specific enabling legislation exists — the *Alien Tort Claims Act 1790* (US) (that allows actions by aliens)[7] and the *Torture Victims Protection Act 1991* (US) that gives a cause of action to American citizens as well.[8]

Even if jurisdiction can in principle be established for a major violation of human rights, such as torture, there is still the question of immunity if an individual is sued in his or her capacity as a State official or a current head of State or if a State is sued. Some recent judicial decisions have granted immunity in such circumstances either by reference to statutes on State immunity or to the common law.[9] The US Supreme Court held in *Argentine Republic v Amerada Hess Shipping Corp*[10] that Congress did not intend to exclude violations of international law from the US *Foreign Sovereign Immunities Act* protections. In 1996 Congress amended this legislation to give a remedy in US courts to US citizens who are the victims of torture or terrorism when such acts are perpetrated by foreign States designated as 'terrorist States' by the State Department.[11]

In 1996 the UK Court of Appeal heard the case of *Al-Adsani v Government of Kuwait*,[12] a case in which the plaintiff claimed to be kidnapped and tortured in Kuwait by certain persons, including a relative of the Emir of Kuwait. The details of the torture allegations were appalling. It was argued for the plaintiff that any immunity that a State might have must be read subject to the overriding obligation to act in

5 Supreme Court Rules (White Book) Order II (UK).

6 *Accident Compensation Act 1982* (NZ). This situation applies for those torts where a cause of action exists.

7 See *Filartiga v Pena-Irala* 630 F 2d 876 (1980).

8 See *Tadic v Karadzic* 70 F 2d 232 (1995).

9 *Saudi Arabia v Nelson* 113 SC 1471 (1993).

10 488 US 428 (1989). This position was confirmed in *Princz v FRG* 26 F 3d 1166 (1994).

11 37 *International Legal Materials* 759 (1997). An amendment to this Act has been proposed to remove immunity for States that engage in terrorism or torture even when they are not on the State Department's list. As such States may sometimes be strategic allies of the US, the prognosis for the proposed amendment is uncertain.

12 107 *International Law Reports* 536 (1996).

compliance with the basic tenets of international law, including the prohibition against torture. The Court of Appeal thought otherwise, saying that it would lead to a flood of applications by persons who might or might not be British citizens and the courts were not in a position to test those allegations, given that the foreign States would not appear. This is probably an overstatement, given the controls of jurisdiction service rules and the burden of proof.

These issues were before the House of Lords in the *Pinochet* case.[13] In that case, Senator Pinochet was charged, not with personally torturing victims or causing their disappearance, but with using the power of the State — of which he was then head — to that end. When the matter first came before the House of Lords, by a majority of 3-2 — in a judgment which attracted the widest possible international attention — their Lordships held that no immunity was available for the former Head of State for acts during the period in which he was head of State. In the view of Lord Nichols:

> It hardly needs saying that the torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of State ... International law recognises, of course, that the functions of a head of State may include activities which are wrongful, even illegal, by the law of his own State or by the laws of other States. But international law has made plain that certain types of conduct, including torture and hostage taking, are not acceptable conduct on the part of anyone.

To allow immunity for these acts would, in Lord Nicholls' view, 'make a mockery of international law'. However, this decision is now of no effect due to a claim of apparent bias by one of the Lords and so the matter is to be argued before a differently constituted panel of the House of Lords.[14]

It needs to be confirmed that torture is not an *actus jure imperii*. The now classic definition of acts that are immune on those grounds are those that *can only be performed by the State*.[15] Yet torture, regrettably, unlike nationalisation and the conclusions of treaties, can be performed by anyone.

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13 *R v Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet and R v Evans and the Commissioner of Police for the Metropolis and Others ex parte Pinochet*, unreported, House of Lords, 25 November, 1998.

14 *R v Bartle and the Commissioner of Police for the Metropolis and Others ex parte Pinochet* and *R v Evans and the Commissioner of Police for the Metropolis and Others ex parte Pinochet*, unreported, House of Lords, 17 December, 1998. The second panel of the House of Lords, by a majority of 6-1, came to the same conclusion as the first panel, though on different reasoning — unreported, House of Lords, 24 March 1999.

15 *Playa Largo v I Congresso Del Partido* [1983] 1 AC 244.

In the *Sir Ronald Davison* case in New Zealand,[16] there was general support for a 'public policy' exception in the common law of State immunity — indeed in relation to facts far less gross than major violations of human rights. This is consistent with the observation of the President of that Court that 'one can speculate that the law may gradually but steadily develop, perhaps first excepting from sovereign immunity atrocities or the use of weapons of mass destruction, perhaps ultimately going on to except acts of war not authorised by the United Nations'.[17]

Amnesties

It may also be the case that prosecution for human rights violations will not occur because a policy of amnesty has been decided upon. This in turn may have an effect on the ability of private persons to bring legal actions for those violations. The issue has been a very real one for States as they return to democracy: South America, East Germany, South Africa. The reasons for avoiding State prosecution are various: that the army, who perpetuated these unspeakable crimes, is in the wings constraining the choices of the elected government; or that reconciliation is seen as the single most important policy objective. It is the latter which has led South Africa to establish its Truth and Reconciliation Commission, which seeks to let the truth emerge and guilt be publicly acknowledged, and so avoid a criminal trial.[18]

The Committee under the ICCPR has had to address this issue. It is not that victims are entitled — in the legal sense, anyway — to demand the punishment of their tormentors. Rather, the Committee has pointed to the obligation each State undertakes, under Article 2(1) of the ICCPR, to guarantee human rights within its territories, and has suggested that trial and punishment for human rights violations are important elements in guaranteeing compliance with human rights obligations. Above all, any amnesty must be constructed in such a way that it does not effectively eliminate what is the right of the families of the victims — to know exactly what happened.[19]

European Court of Human Rights

In Europe, where things have seemed settled for so long as far as litigating human rights is concerned, a new period of uncertainty has begun. This is the result of two

16 *Controller and Auditor General v Sir Ronald Keith Davison* [1996] 2 NZLR 278.

17 *Ibid* per Cooke P at 290.

18 Report of the South African Truth and Reconciliation Commission (Juta Books, 1998).

19 Higgins R 'Time and the Law: International Perspectives on an Old Problem' (1997) 46 *International and Comparative Law Quarterly* 501.

major factors: first, the expansion of the Council of Europe system from the old democracies of Western Europe to the newer democracies of Eastern Europe. New members of the Council of Europe are required not only to accept the European Convention but also the jurisdiction of the Commission and the European Court of Human Rights (the European Court) under Articles 25 and 46 of the European Convention. What was optional for the original ratifying parties — though now in fact generally accepted — is obligatory for the States of Eastern Europe.

In turn, those new States parties are entitled to appoint judges to the European Court. The bench of the European Court has become both large and, it is widely thought, less predictable than previously. The background and legal experience of the new judges is significantly different than that of the original members.

At the same time, there has been a great preoccupation with preparations for the new structures that now obtain under the European Convention, and notably for the single Court of Human Rights in Strasbourg. These structures are created by Protocol XI of the European Convention. This was made necessary by the huge number of applications and unacceptable delays under the present structure of a separate commission and court. There is a move to *juge-rapporteurs*. A committee of three judges will decide admissibility. Cases will normally be heard in a Chamber but occasionally there will be reference to the Grand Chamber, either when a Chamber intends not to follow the Court's previous case law or when a question of principle is involved.[20]

International Covenant on Civil and Political Rights and the First Optional Protocol

These potentially universal instruments offer a wide possibility for litigants. The first essential, of course, is that the respondent State be a party to the ICCPR.[21] The second requirement is that the State concerned has accepted the Optional Protocol, whereby cases charging it with violations of the ICCPR can be brought before the Committee.[22]

For individuals who wish to target States (often their own) who are not within the Council of Europe or Inter-American judicial system, this is a significant recourse. Even with regard to States who are party to, for example, the European Convention,

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20 For a clear summary and explanation of the new procedures, see Drzemzewski A *A Single Court of Human Rights in Strasbourg* (Council of Europe H (95) 14 rev, 31 December 1995).

21 As at 31 December 1998 141 States are parties to the ICCPR.

22 As at 31 December 1998 93 States are parties to the Optional Protocol.

experience shows that the ICCPR presents important litigation possibilities in those subject matter areas not covered in that regional treaty. For example, there is a free standing non-discrimination in the ICCPR, that is, the duty of non-discrimination in respect of all legal rights (and obligations) even if those rights are not themselves specified rights in the ICCPR. The Committee has made findings under Article 26 of the ICCPR only sparingly, being particularly aware of the fact that adverse findings in the social security and benefits area can have enormous budgetary repercussions for the States addressed. Nonetheless, an important body of case law has emerged, notably in the *Gueye* case against France, and a series of Dutch cases.[23] To the great credit of those States, albeit not without difficulty, the findings of the Committee have been accepted and the necessary legislative and financial measures have been taken to afford remedies to the particular claimants.[24]

The ICCPR also holds considerable interest for minority rights litigation. The European Convention originally had no minority rights provisions and the Council of Europe has only recently added them in the Framework Convention.[25] These provisions are formulated in ways that seem at once more limited and more broad than Article 27 of the ICCPR, notwithstanding that nearly all the Council of Europe countries are parties to the ICCPR. The European provisions are narrower in the sense that they protect only *national* minorities (and not religious or linguistic minorities) and they protect them only when a certain number of persons belonging to such minorities are resident in the same area. The European provisions are broader in that group rights — subject to these conditions — are envisaged and certain positive entitlements to own-language education are also envisaged. In any event, they are not part of the European Convention and offer no possibilities for litigation before the European Court.

There has been consideration given to a new Protocol to the European Convention that would essentially incorporate the provisions of the ICCPR. This would be very welcome news and would encourage a cross fertilisation between the jurisprudence of the Committee and of the European Court. This Protocol has yet to materialise.

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23 *Gueye v France* GAOR, 44th session, Supp 40, at 189 (1989), *Broeks v Netherlands* (1987) 2 *Selected Decisions HRC* 196, *Danning v Netherlands* (1987) 2 *Selected Decisions HRC* 205 and *Zwaan de Vries v Netherlands* (1987) 2 *Selected Decisions HRC* 209.

24 In regard to the difficulties of the Human Rights Committee itself, including the provision of legal rights of recourse, which become increasingly used, without the provision of adequate resources to handle them at appropriate speed, and the withdrawal by Jamaica, see Evatt E 'Reflecting on the role of international communications in implementing human rights' in this collection.

25 Framework for the Protection of National Minorities, European Treaty Series 157, entered into force on 1 February 1998.

Australia has encouraged a widespread understanding of the availability of recourse under the Optional Protocol for the protection of human rights. For that very reason, together with the lack of incorporation of the ICCPR in Australian law, Australia is becoming an important customer of the Committee, with over two dozen cases. Of course, this is no different from the position of the UK under the European Convention until 1998 and so it should not trouble a State that is confident in its commitment to human rights. No doubt the Committee can be relied on to distinguish the more serious applications from the others. In the meantime, the response of the authorities to the Committee's views on *Toonen* [26] have been greatly appreciated.

New Zealand, for its part, has several cases pending, including the extremely important *Apirana Mahuika* case.[27] Linked to that, of course, is the very interesting *Tangiora* case, decided in New Zealand as a matter of domestic law.[28] The finding in that case that the Committee is not, for statutory legal aid purposes, an international tribunal is understandable.

That leads me to this question: how important is it that the European Convention and the Inter-American Convention on Human Rights have monitoring bodies that are fully fledged courts, while the ICCPR has a quasi-judicial monitoring body rather than a court? The *Tangiora* case offers one set of circumstances — legal aid for judicial recourse — where the distinction may be relevant. It is also not without its importance in the field of 'follow up' to Optional Protocol cases, where it is arguments of good faith rather than of strict binding obligation which the Committee can adduce in seeking compliance with its views.

The differences between courts and quasi-judicial bodies appear also to be assuming a certain importance in the great debate on reservations to human rights treaties. Although the controversy on General Comment 24 of the Committee[29] has waxed largely in the context of State obligations under the ICCPR and thus by reference to reporting obligations, it has its relevance also in individual communications because an applicant cannot litigate what has lawfully been reserved. The International Law Commission (ILC) has engaged in the novel technique of a provisional resolution on a specific element within a larger topic (reservations to human rights treaties), before addressing the generality of the topic itself (treaty reservations).[30] It has come to

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26 *Toonen v Australia* 488/1992, views adopted 1994.

27 *Apirana Mahuika v New Zealand* 547/1993, declared admissible 1995.

28 *Wellington District Legal Services Committee v Pauline Eunice Tangiora* [1998] 1 NZLR 129.

29 General Comment No 24 (52) CCPR/C/21/rev.1/Add 6, 2 November 1994.

30 A/CN 4/L 540, 4 July 1997.

certain conclusions notwithstanding, in which it tries to treat the practice of the European and Inter-American Courts as some kind of tolerated exception to what it enunciates, even though the case law of those courts is the relevant practice. While the ILC refrains (just) from criticising the European Court and the Inter-American Court for their legal approach to the question of reservations, that *same approach* by the Committee is apparently by implication to be treated as 'wrong', because the Committee is something short of a court.

A permanent criminal court

The establishment of a permanent international criminal court now looks likely. In July 1998 the Statute of the International Criminal Court was adopted in Rome.[31] The idea has been on the international agenda since 1948, though initial work died with the hardening grip of the Cold War. The revival of the idea has come about not so much because of the ending of the Cold War (though this surely is an essential prerequisite) but for a variety of other reasons. First, in recent years the perpetration of acts of unspeakable horror have been seen. Some of these have been in the context of international conflict, some in the context of conflict whose status is contested, and some in the context of internal conflict. A universal jurisdiction exists under international law in respect of at least the first two categories of crimes and there have indeed been occasional local attempts to bring the perpetrators to justice. But either the international politics of peace-making (and reference may be made to the former Yugoslavia) or the fragility of the domestic legal order (and reference may be made to Rwanda) have made it clear that these horrors would largely go unpunished.

Second, *ad hoc* tribunals cannot go on being established *ad infinitum*. Their establishment is time-consuming and the decision to establish such a tribunal inevitably leads to charges of selective justice. At the same time, the launching of the Yugoslav and Rwanda International Tribunals have shown that many of the technical problems that were said to be insurmountable in establishing an international criminal court can be overcome. All these events, and more, have come together to reinvigorate the move for a standing international criminal tribunal.

The questions of jurisdiction *ratione personae* and *ratione materiae* were particularly difficult to reach agreement. The initial list of offences was considerably whittled down[32] and some aspects remain problematic, such as the definition of torture in

31 GEN 98/102, 19 October 1998.

32 Appropriately aggression is not an indictable offence, as the concept of aggression has virtually no meaning outside of its attribution to State conduct as against individual conduct.

Article 7(2)(e)[33] and the 'multiple commission' requirement in Article 7(2)(a).[34] There is also the general concern that too narrow a definition of offences limits the possibility of flexibility in the development of the law. In an ideal world it would suffice for a court's jurisdiction to be based on a global reference to the laws of war, treaty and custom. This concern is increased as States are expressly able 'to assist the [International Criminal] Court in the interpretation and application of Articles 6, 7 and 8'.[35] This seems to be an encroachment on the normal province of a judge and could lead to problems in the maintenance of the integrity of rule of international law across all the international tribunals.

In regard to jurisdiction *ratione temporis*, the clear provisions of Article 11 are to be welcomed. However, Article 124 is a cause for concern. It provides that a State may declare that, for a period of seven years after the entry into force of the Statute for the State concerned, it does not accept the jurisdiction of the international criminal court with respect to war crimes when a crime is alleged to have been committed by its national or on its territory. In the *Spain v Canada* case before the International Court of Justice (the International Court),[36] concerning the interpretation of a reservation to the International Court's jurisdiction by Canada, the International Court was at pains to emphasise the conceptual distinction between its jurisdiction and a State's continuing responsibility for acts that may be unlawful at international law. Yet, having a seven year period of grace from international scrutiny on war crimes, as provided under the Statute, may be taking a transition arrangement too far.

What should be the relationship of the International Criminal Court to the Security Council? The *raison d'être* of a permanent court is to avoid selectivity in prosecutions, to demonstrate a justice applicable to all, and to guarantee judicial independence from passing political pressures. But the proposals for the International Criminal Court envisage an uncomfortably close relationship with the Security Council. Article 16 of the Statute provides that:

> No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter

33 This definition could be seen to be inconsistent with the case law under the European Convention on Human Rights and the position of the Committee on the Convention against Torture.

34 This could require multiple targets or multiple attacks over time.

35 Article 9.

36 *Case concerning Fisheries Jurisdiction (Spain v Canada)*, <www.icj-cij.org>, 4 December 1998.

VII of the Charter of the United Nations, has requested the Court to that effect; that request may be reversed by the Council under the same conditions.

While a positive resolution by the Security Council is needed and it should be in the form of a request to the International Criminal Court, the door looks open for selective control over prosecutions by the Security Council which moves against the *raison d'être* of moving from *ad hoc* tribunals to a permanent court. This position runs contrary to the well-established jurisprudence of the International Court of complementarity of competence.[37]

International Court of Justice

Individuals cannot bring actions to the International Court. Those cases in which individuals claim — against their own government or against other governments — that their human rights have been violated must go to other tribunals. But it must not be forgotten that a violation of a human rights provision may be a violation of a treaty and violation of fundamental human rights is a violation of general international law.[38] The International Court can, and does, give judgments and advisory opinions with human rights as their subject matter.

The involvement of the International Court in human rights has a long history. After the redrawing of frontiers at the end of World War I, the Permanent Court of International Justice (the Permanent Court) was to provide the judicial underpinning to the great minorities treaties. In so doing it showed, in a series of important cases,[39] a profound insight into what was necessary for the protection of national minorities and its findings contained ideas that were to have a lasting importance in human rights law.

Since the end of World War II there has been both a deepening of the substantive law of human rights and a broadening of what is perceived as a human rights entitlement. The Universal Declaration of Human Rights went far beyond minorities protection. The human rights treaties that were to follow later — universal, regional and single topic — now often have their own dispute

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37 See, for example, *US Diplomatic and Consular Staff in Teheran Case* ICJ Reports 1980 and *Case concerning questions of Intepretation and Application of the Montreal Convention arising out of the Aerial Incident at Lockerbie (Lockerbie Case)* (Provisional Measures) ICJ Reports 1992.

38 *Barcelona Traction, Light and Power Co Case* ICJ Rep 1964 at para 34.

39 See, for example, *Nationality Decrees issued in Tunis and Morocco* PCIJ Rep Ser B No 4 (1923) and *Rights of Minorities in Polish Upper Silesia Case* PCIJ Series A, No 15 (1928).

settlement procedures along with a right of individual application. Nonetheless, only one inter-State case has ever reached the European Court and, although the Committee can hear inter-State cases under Article 41 of the ICCPR, none has been brought. Thus the International Court still has a significant role to play in inter-State disputes on human rights issues.

The International Court has clearly played a major and critical role in the development of the concept of self-determination. The *South West Africa, Namibia and Western Sahara* cases[40] attest to that. The International Court played its creative role at a time when there were still those who insisted that self-determination was nothing more than a political aspiration. I wish that the International Court had shown the same judicial boldness in the *East Timor* case.[41]

It is, however, still very rare for a 'fully fledged' human rights case to come to the International Court, that is to say, a case whose entire essence concerns the violation of customary or treaty law on human rights. The pending litigation in which Bosnia claims that Yugoslavia has committed genocide is one such case.[42] The International Court will be called upon to decide facts, to specify the legal content of the concept of genocide, to apply the 'intent requirement' to the dreadful events occurring on the ground, and to deal with questions of responsibility. It is not yet clear whether the parties will want to call witnesses or, if not, how they expect to handle the questions of fact.

Genocide has been a recurrent concern before the International Court, though in the *Bosnia v Yugoslavia* case it will undoubtedly be necessary to address it more directly and more thoroughly than ever before. The *Reservations* case[43] concerned a reservation to the Genocide Convention. As well as being an immensely important case for the development of the law of treaties, the Advisory Opinion was also the occasion for important pronouncements on the legal concept of genocide, with the International Court deciding that: 'the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, even without any conventional obligation'.[44] Also, in the *Corfu Channel*

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40 *South West Africa Cases* ICJ Reports 1966, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 266* ICJ Reports 1971 and *Western Sahara Case* ICJ Reports 1975.

41 ICJ Reports 1995. The author was counsel for Portugal in that case.

42 *Case concerning the Application of the Genocide Convention* ICJ Reports 1993.

43 *Reservations to the Genocide Convention Case* ICJ Reports 1951.

44 *Ibid* p 15.

case, the International Court referred to the legal importance of 'elementary considerations of humanity'.[45]

More recently, the issue of genocide came before the International Court in connection with the request by the General Assembly for an advisory opinion on the legality of nuclear weapons.[46] Some States contended that any use of nuclear weapons would necessarily amount to genocide, as national, ethnic or religious groups would be destroyed in whole or in part. The International Court preferred to treat the UN Charter (the Charter) and humanitarian law as the relevant applicable law by which to test the legality of nuclear weapons but it noted that intent was a key element in the conventional definition of genocide.[47] The case was obviously not an easy one. But the International Court made some important determinations in the field of humanitarian law. The International Court affirmed that nuclear weapons are not a category of weaponry outside of or beyond the reach of customary humanitarian law (and indeed, no State had contended that they were). Any threat or use of nuclear weapons, said the International Court had to comply with both the law of the Charter and humanitarian law.[48] The International Court was clear that there was a large body of humanitarian law, which it identified, that was applicable to nuclear weapons. A body of law which, whether in declaratory, customary or treaty form, now formed part of customary international law and was thus binding on everyone.

The International Court identified three 'cardinal principles'. The first was that 'States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets'.[49] The second was that it is prohibited 'to use weapons that cause unnecessary suffering to combatants ... that is to say, a harm greater than that unavoidable to achieve legitimate military objectives'.[50] Third, the International Court affirmed the continued existence of the so-called Martens clause, notwithstanding the doubts one State expressed in its written pleadings about its continued existence, and the arguments of other States that it said nothing of substantive importance. Stating that its 'continuing existence and applicability is not

45 ICJ Reports 1949.

46 *Legality of the Threat or Use of Nuclear Weapons Case* ICJ Reports 1996.

47 *Ibid* para 26.

48 See above, note 46, para 34. The famous clause 2(E) of the *Dispositif* may be thought to put this in doubt, which is why I was not able to vote for that particular finding.

49 See above, note 46, para 78.

50 See above, note 46, para 78.

to be doubted' the International Court found its importance to be 'as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons'.[51]

The International Court also considered Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (the Treaty), by which the parties undertake to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control. The Court found that 'the legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result'.[52] Moreover, the International Court found this had become a general obligation in international law, that could not be ignored by those who were not parties to the Treaty.

There has also been a recent development that has escaped all save the sharpest eyes. It concerns provisional (interim) measures, which the International Court can indicate when certain conditions are met. Two of the six Permanent Court cases on provisional measures concerned what today would be recognised as human rights issues.[53] In those cases human rights were protected by the provisional measures exactly because they were the rights claimed by one party under the dispute. The protection of human rights was the concomitant of the perceived need to protect the rights claimed in the dispute under litigation; it was not ancillary to them or separate from them.

The Permanent Court could not go beyond this. Because of the need for co-terminosity between the relief sought and the principle claim advanced, provisional measures could protect human rights when they were the subject matter of the dispute, but not more generally. This was indeed made clear in the *Legal Status of Eastern Greenland* case.[54] This remained the position for the International Court in its initial provisional measures cases. Though it must be pointed out that the International Court has ordered provisional measures that protect human life where the dispute in question was exactly about such rights.[55]

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51 See above, note 46, para 87.

52 See above, note 46, para 98.

53 *Case concerning the Polish Agrarian Reform and the German Minority* PCIJ Series A/B No58 and *Case of the Denunciation of the Treaty of 2 November, 1865 between China and Belgium* PCIJ Series A No 8.

54 PCIJ Reports Series A/B No 53.

55 See *US Diplomatic and Consular Staff in Tehran Case* ICJ Reports 1980 and *Case concerning the Application of the Genocide Convention* ICJ Reports 1993 (where two provisional measures were ordered).

Interesting developments occurred in the case concerning the *Frontier Dispute (Burkina Faso/Mali)*.[56] For the first time, a Chamber of the Court, rather than the International Court itself, ordered provisional measures, having confirmed its authority to do so. It made the link between the subject matter (the frontier line) and the incidents concerned not only by reference to the destruction of evidence that was material to the Chamber's eventual decision but also by reliance on new and broader factors. The Chamber said that the facts 'expose the persons and property in the disputed area, as well as the interests of both States within that area, to serious risk of irreparable damage'.[57] The risk of irreparable harm to persons and property was, in the view of the Chamber, enough for provisional measures to be ordered, even though that harm could not of itself affect where the frontier line might run or the implementation of a judgment on the frontier line.

The order concerning provisional measures in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*[58] in 1996 builds on the more radical tone struck in the *Frontier Dispute* case a decade earlier. The order clarifies the judicial thinking on this topic. Thus the International Court expressed concern about the fact that the incidents 'caused suffering, occasioned fatalities — of both military and civilian personnel — while causing others to be wounded and unaccounted for'.[59] Its order makes clear that disputes about frontiers are not just about lines on the ground but about the safety and protection of peoples who live there. After all, it was on that ground that both parties were called on to ensure that no action was taken by their armed forces which might prejudice the rights in respect of a future judgment of the International Court.

The provisional measures orders in the *Burkina Faso/Mali* and the *Cameroon/Nigeria* cases, taken together, go beyond the series of cases where the dispute in question was about human rights. These cases would seem effectively to overrule the determination by the Permanent Court in the *Eastern Greenland* case (despite the invocation of that case in the provisional measures orders in both cases) that no measures will be indicated to afford protection to persons if that goes beyond the subject matter of the dispute.

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56 ICJ Reports 1986.

57 *Ibid* para 21.

58 ICJ Reports 1996.

59 *Ibid* para 38.

Conclusion

It can be seen that the pressure to protect human rights continues in various international fora. Each one of these has its own successes and problems. But the more we understand the broad picture, the more we can learn from each part of the picture. ●