Rosalyn Higgins

President of the International Court of Justice

THE INTERNATIONAL COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS: PARTNERS FOR THE PROTECTION OF HUMAN RIGHTS

President Costa, members of the Bench, Minister Dati, excellencies, ladies and gentlemen,

I greatly appreciate the invitation of President Costa to speak at this ceremony marking the opening of the judicial year as well as the 50th anniversary of the European Court of Human Rights. I take it as a mark of friendship between our Courts.

I am honoured to say some words as we commemorate fifty truly remarkable years, during which you have for ever changed for the better the judicial protection of human rights.

While the International Court of Justice and the European Court of Human Rights have different roles to play, there is a great deal of common ground between The Hague and Strasbourg. The International Court of Justice possesses general subject matter jurisdiction and its docket invariably contains a diverse range of cases. It has over the years always had occasional cases touching on human rights. Although its responses have been given in the context of contentious litigation or requests for advisory opinions, and have involved States or international organisations, they have still had an impact on the perception of what an *individual* may invoke as fundamental rights protected by international law. As for the European Court of Human Rights, while always mindful of the special character of the European Convention on Human Rights, it has long recognised that "the principles underlying the Convention cannot be interpreted and applied in a vacuum"; it must also take into account any relevant rules of international law[1]. Indeed, some provisions of the Convention refer explicitly to international law (Articles 7, 15 and 35). The European Court of Human Rights regularly looks to the jurisprudence of the International Court for statements on general international law, Charter interpretation and State responsibility, and the International Court looks to the European Court's development of the law on specific human rights; and allusion may be made to this. In this way, The Hague and Strasbourg can be perceived as partners for the protection of human rights.

While the European Court of Human Rights is today most strongly associated with its handling of cases brought by individuals, Article 33 of the European Convention provides for the possibility of inter-State cases. Such cases have been heard from time to time. In the 1970s, Ireland brought a case against the United Kingdom relating to security measures in Northern Ireland. The central issue of the case was the distinction between torture and inhuman or degrading treatment, and the minimum level of severity for acts to fall within the scope of Article 3 of the Convention. At the same time, the Court took the opportunity to state its position on two broader issues of policy that have since run like a thread through its jurisprudence. First, it found that the responsibilities assigned to the Court within the framework of the Convention system extended beyond the case before it: "The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties."[2]

Second, the Court stated that in interpreting the Convention regard should be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms[3].

In 2001, in the inter-State case of Cyprus v. Turkey, the Court reiterated the special character of the Convention as "an instrument of European public order (*ordre public*) for the protection of individual human beings"[4].

In 2007 and 2008, Georgia lodged applications against the Russian Federation. The more recent of these applications has coincided with a case between the same two States before the ICJ – a situation that I will come back to.

While only a tiny percentage of the European Court of Human Rights' cases are inter-State, all contentious cases at the ICJ are of this nature. Article 34 of the Statute of the ICJ provides that only States can be parties to cases.

Despite viewing cases through the lens of inter-State relations, the ICJ, and its predecessor the Permanent Court of International Justice, have issued judgments that fundamentally concern the rights of individuals under international law. Just last week, the International Court issued a judgment in a case brought by Mexico against the United States of America concerning interpretation of its 2004 judgment in the *Avena* case. This case came before the International Court as a legal dispute between two States, but at its core were the rights of Mexican nationals on death row in the United States who had been arrested and sentenced without being informed of their rights under Article 36 of the Vienna Convention on Consular Relations, and the remedy the International Court had articulated.

1 See *Loizidou v. Turkey* (merits), 18 December 1996, § 43, *Reports of Judgments and Decisions* 1996-VI.

2 *Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25.

3 Ibid., § 239.

4 *Cyprus v. Turkey* [GC], no. 25781/94, § 78, ECHR 2001-IV.

The Permanent Court of International Justice – which operated between 1922 and 1946 – dealt with "big" rights, close conceptually to collective rights, such as the principle of non-discrimination. In the *Polish Upper Silesia* case[5], the Permanent Court showed a profound insight into what was necessary to make the protection of national minorities a reality. It held that what the minority was entitled to was equality in fact as well as in law; and that, while the claim to be a member of a national minority should be based on fact, self-identification was the only acceptable method of association. This principle has been of lasting importance in human rights law, particularly for the European Court, which has developed a rich jurisprudence relating to the rights of minorities.

In the 1935 *Minority Schools in Albania* case, the Permanent Court determined that special needs and equality in fact "are indeed closely interlocked, for there would be no true equality between a majority and a minority if the latter were deprived of its own institutions, and were consequently compelled to renounce that which constitutes the very essence of its being as a minority"[6]. Of equal importance was the finding that differentiation for objective reasons does *not* constitute discrimination.

In its early years the current International Court of Justice (the legal successor to the old Permanent Court of International Justice) played a major and critical role in the development of the concept of self-determination in the *South West Africa, Namibia and Western Sahara* cases. The European Court of Human Rights, for its part, has for the moment a different sense of what is meant by self-determination. It has developed the concept of self-determination in the sense of the family and the individual. Its case-law has emphasised that the principle of self-determination forms the basis of the guarantees in Article 8 of the European Convention (right to respect for private and family life)[7].

Of course, it is the European Convention on Human Rights, rather than international humanitarian law, which is at the core of your Court's work. But sometimes both Courts have been called upon to analyse the relationship between human rights law and international humanitarian law. It is rather routine for the International Court of Justice to have to deal with this issue. In the advisory opinion on the Legal *Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court found it had to consider both branches of law, treating international humanitarian law as lex specialis[8]. I have the impression in reading your interesting case-law that what you view as the parameters of the proper role of the European Court of Human Rights in relation to international humanitarian law is still work in progress. And we have noticed that in the 2008 *Korbely v. Hungary* case, in determining whether an act of which the applicant was convicted amounted to a crime against humanity as that concept was understood

5 *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ, Series A no. 7.

6 *Minority Schools in Albania*, Advisory Opinion, PCIJ, Series A/B no. 64, p. 17.

7 See *Pretty v. the United Kingdom,* no. 2346/02, ECHR 2002-III, and *Van Kück v. Germany,* no. 35968/97, ECHR 2003-VII.

8 ICJ Reports 2004, § 106.

in 1956, the European Court of Human Rights referred to the Fourth Geneva Convention, Additional Protocol I, and Additional Protocol II[9]. Some very direct analysis of international humanitarian law ensued.

Another contemporary legal issue for both Courts is the tension between the customary international law on immunity and the drive against impunity for human rights violations. In three Grand Chamber judgments in late 2001, the European Court of Human Rights held that the application of the doctrine of sovereign immunity, effectively preventing legal proceedings against foreign governments, did not violate the right to a fair trial under Article 6 of the European Convention on Human Rights[10]. The ICJ had been confronted in the 2002 *Arrest Warrant* case with the question of whether a human rights exception to immunity existed in customary international law[11]. After examining the practice of regional and national courts, the ICJ concluded that there did not yet exist any form of exception in general international law to the rule according immunity from criminal jurisdiction to incumbent Ministers for Foreign Affairs, even where they were suspected of having committed war crimes or crimes against humanity. But this is a rapidly evolving area of law that both our Courts will no doubt continue to watch carefully.

A recurring question before the International Court and the European Court of Human Rights is the territorial scope of various human rights obligations. In your Court, this question usually arises in the context of whether the obligations of the European Convention on Human Rights are applicable to a government when acting abroad. Given the *Banković, Loizidou, Issa and Ilaşcu* cases[12], more may yet be said on this issue in the future.

At the ICJ, we have seen the question come before us in two ways. First, there is the general proposition that a government is responsible for acts committed under its authority abroad. In the *Congo v. Uganda* case, for example, it held that Uganda at all times had responsibility for all actions and omissions of its own military forces in the territory of the Democratic Republic of the Congo[13]. Second, the International Court occasionally has to look at whether, by reference to a treaty, a State is under those treaty obligations when acting abroad. The answer turns upon the reading in context of the treaty, in the light of its object and purpose. In the recent *Georgia v. Russia* case[14], the parties disagreed on the territorial scope of the application of the obligations of a State Party under the Convention on the Elimination of All Forms of Racial Discrimination: Georgia claimed that the convention did not include any limitation on its territorial application, while the Russian Federation claimed that

9 *Korbely v. Hungary* [GC], no. 9174/02, to be reported in ECHR 2008. See Section II on relevant international and domestic law.

10 See *McElhinney v. Ireland* [GC], no. 31253/96, ECHR 2001-XI; *Al-Adsani v. the United Kingdom* [GC], no. 35763/97, ECHR 2001-XI; and *Fogarty v. the United Kingdom* [GC], no. 37112/97, ECHR 2001-XI. See also M. Emberland, "International Decisions", *AJIL*, vol. 96, 2002, p. 699.

11 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, ICJ Reports 2002.

12 *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, ECHR 2001-XII; *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310; *Issa and Others v. Turkey,* no. 31821/96, 16 November 2004; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004-VII.

13 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, ICJ Reports 2004, § 180.

14 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation),* Order indicating provisional measures, 15 October 2008.

the provisions of the convention could not govern a State's conduct outside its own borders. In its order of last October, the ICJ observed that there was no restriction of a general nature in the Convention on the Elimination of All Forms of Racial Discrimination relating to its territorial application and the provisions in question (Articles 2 and 5) generally appeared to apply to the actions of a State Party when it chose to act beyond its territory.

The *Georgia v. Russia* case is significant for another reason – it is an example of the contemporary phenomenon of the same or similar legal questions surfacing in diverse fora. This is a consequence of the dispersal of responsibility for interpreting international law – especially human rights law – among different judicial and quasi-judicial bodies. In addition to the International Court of Justice and the three major regional systems for the protection of human rights in Europe, the Americas and Africa, there are the treaty bodies responsible for monitoring implementation of the provisions of international human rights treaties dealing with the two Covenants, the elimination of racial discrimination, discrimination against women, torture, the rights of the child, and the rights of migrant workers. Moreover, in the last fifteen years, following the mass atrocities in the former Yugoslavia and Rwanda, we have seen the creation of *ad hoc* international tribunals with jurisdiction to try the individuals responsible for such crimes as well as the establishment of a permanent International Criminal Court.

The dispute between Georgia and Russia over the events of August 2008 came before the ICJ as a contentious proceeding regarding the application of the Convention on the Elimination of All Forms of Racial Discrimination. In its order, the International Court noted that the matter might also properly be brought to the attention of the Committee on the Elimination of Racial Discrimination. Around the same time, Georgia lodged an inter-State application with the European Court of Human Rights alleging violations of Articles 2 (right to life) and 3 (prohibition of inhuman and degrading treatment) of the European Convention on Human Rights and Article 1 (protection of property) of Protocol No. 1 to the Convention. The European Court ordered provisional measures calling on both parties to comply with their engagements under the Convention, particularly Articles 2 and 3. In addition, the European Court has since received thousands of applications against Georgia concerning hostilities which broke out in South Ossetia in August 2008. Meanwhile, the Prosecutor of the International Criminal Court has stated that the situation in Georgia is under analysis by his Office.

We saw this same phenomenon of reformulated claims, on essentially the same subject matter, at the time of the 1999 air strikes by NATO against the Federal Republic of Yugoslavia. Here, too, the International Court of Justice and the European Court of Human Rights were both engaged.

The plethora of judicial and quasi-judicial bodies operating in the field of human rights does pose the risk of divergent jurisprudence.

Some perceived the case of *Loizidou v. Turkey*[15] as an example of the European Court of Human Rights taking a different position from the ICJ on the question of reservations to human rights treaties. My own view is that any perceived bifurcation depends on what one believes to have been the scope of the International Court's

15 See note 3 on page 84.

Dialogue between judges 2009

judgment in the 1951 advisory opinion on *Reservations to the Genocide Convention*[16], in particular whether it precluded a court from doing anything other than noting whether a particular State had objected to a reservation. In the 2006 *Congo v. Rwanda* judgment, five judges of the ICJ (including myself) referred expressly to the *Loizidou v. Turkey* case in a joint separate opinion[17], observing that the fact that courts such as the European Court of Human Rights had pronounced upon the compatibility of specific reservations to the European Convention on Human Rights, rather than treating the question as a simple matter of bilateral sets of obligations left to the individual assessment of the States Parties to the Convention concerned, did *not* create a "schism" in international law. Rather, the judges saw the jurisprudence of the human rights courts on this question "as developing the law to meet contemporary realities"[18].

It has long been my view that the best way to avoid fragmentation of international law is for us all to keep ourselves well informed of each other's decisions, to have open channels of communication, and to build on the cordial relationships that already exist among the courts in The Hague, Strasbourg, Luxembourg, Arusha and so on. I had the pleasure of hosting an inter-court seminar on legal topics of mutual interest in December 2007 which was attended by judges from your Court, a team from the European Court of Justice led by President Skouris, along with members of the International Criminal Tribunal for the former Yugoslavia and the ICJ. President Costa and I hope that such meetings will take place on a regular basis, with different courts hosting each time. Today's judicial seminar has proved to be a further effective way of encouraging the fruitful exchange of ideas.

President Costa, members of the Bench, Minister Dati, excellencies, ladies and gentlemen,

The European Court of Human Rights is surely one of the busiest and most exemplary of international judicial bodies. It exerts a profound influence on the laws and social realities of its member States and has become the paradigm for other regional human rights courts, not to mention other international judicial bodies in general. It is a court that continually renews itself, adjusting its procedures to maximise efficiency and to address the considerable operational problems that face it. From our seat in The Hague, the judges of the International Court of Justice admire all that you have achieved, and we will continue to follow your work with the greatest interest, constantly looking for ways in which we can be partners in protecting human rights.

Thank you for this invitation and we warmly congratulate you on your 50th anniversary and all the remarkable work of your Court in this last half-century.

16 ICJ Reports 1951, p. 15.

17 *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, ICJ Reports 2006, joint separate opinion by Judges Higgins, Kooijmans, Elaraby, Owada and Simma.

18 Ibid., § 23.